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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

**BORDER PROTECTION LEGISLATION AMENDMENT
(DETERRENCE OF ILLEGAL FOREIGN FISHING)
BILL 2005**

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon Ian Macdonald,
Minister for Fisheries, Forestry and Conservation)

CONTENTS

1. General outline.....	3
2. Financial Impact Statement.....	4
3. Notes on clauses.....	5

BORDER PROTECTION LEGISLATION AMENDMENT (DETERRENCE OF ILLEGAL FOREIGN FISHING) BILL 2005

1. GENERAL OUTLINE

- 1.1. The Bill amends the *Fisheries Management Act 1991*, the *Torres Strait Fisheries Act 1984* and the *Migration Act 1958* to ensure that breaches of illegal foreign fishing offences can be managed with significantly improved efficiency. Through the achievement of such efficiency, the Australian Government will be in a stronger position to manage foreign fishers found operating illegally in Australian waters.
- 1.2. The major outcomes of the amendments contained in the Bill will be:
 - to provide consistency between the *Torres Strait Fisheries Act 1984* and the *Fisheries Management Act 1991* in relation to illegal foreign fishing arrangements;
 - to strengthen the operating proficiency of the partnership between the Australian Fisheries Management Authority (AFMA) and the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) in the management of detained illegal foreign fishers; and
 - to provide for a seamless transition between fisheries detention and immigration detention for non-citizens suspected of committing illegal foreign fishing offences and to facilitate the rapid repatriation of detainees to their home countries.
- 1.3. Schedule 1 of the Bill provides for a number of amendments to the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984* to ensure that appropriate standards are maintained in Australia's management of people suspected of being involved in illegal foreign fishing offences. All amendments to the *Torres Strait Fisheries Act 1984* are consistent with 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 Torres Strait, and Related Matters* (the *Torres Strait Treaty*) between Australia and Papua New Guinea.
- 1.4. Part 1 of Schedule 1 of this Bill will insert a new provision into the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984* to 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. This type of provision is similar to provisions of the *Migration Act 1958* and the *Customs Act 1901*.
- 1.5. Part 2 of Schedule 1 of the Bill contains a new Schedule for both the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984*. These Schedules are almost identical and contain provisions relating to the detention of foreign fishers suspected of offences under either of these Acts. These Schedules mirror the provisions contained in the *Migration Act 1958* for dealing with the detention of unauthorised non-citizens. The powers and duties contained in Part 2 of Schedule 1 of the Bill cover a range of situations including the detention of people suspected of committing an illegal foreign fishing offence, the searching and screening of detainees and the carrying out of identification tests on detainees. This new legislative framework will provide a seamless transition between fisheries detention under either the *Fisheries Management Act 1991* or the *Torres Strait Fisheries Act 1984* and subsequent detention and repatriation under the *Migration Act 1958*.

- 1.6. Schedule 1, Part 3 of the Bill will amend the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Management Act 1991* to allow fisheries officers to search people on boats suspected of being involved in illegal foreign fishing offences for weapons and evidence of fishing offences. This amendment is a logical extension of the power to search boats suspected of being involved in illegal foreign fishing offences and will ensure the safety of fisheries officers from possible attack while investigating boats suspected of such offence as well as preventing the possibility of evidence of an offence being thrown overboard before the boat reaches Australia. This new power to search is complemented by comprehensive rules regarding the proper manner in which such a search may be conducted.
- 1.7. Part 4 of Schedule 1 of the Bill will introduce automatic forfeiture provisions into the *Torres Strait Fisheries Act 1984*, replicating those already in the *Fisheries Management Act 1991*. This will allow for the automatic forfeiture of boats and other things used in offences involving foreign boats and will provide rules for how these things may be dealt with by AFMA.
- 1.8. The amendments proposed in Part 5 of Schedule 1 of the Bill offer greater protection for officers performing their duties. The offences of assaulting, resisting or obstructing an officer or using abusive or threatening language against an officer will be amended to ensure consistency between the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984* and to cover all people exercising powers or performing functions under either Act rather than just officers.
- 1.9. Schedule 2 of the Bill amends the *Migration Act 1958* to ensure that the enforcement visa regime under the *Migration Act 1958* applies consistently to illegal foreign fishing offences under both the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984*. This consistent regime will provide maximum effectiveness for managing people suspected of committing illegal foreign fishing offences in either the Australian Fishing Zone or the Torres Strait Protected Zone.

2. FINANCIAL IMPACT STATEMENT

- 2.1. The amendments are expected to involve additional administrative costs to the Australian Government and no additional costs to the Australian fishing industry. The amendments will not result in any specified savings and there will be no loss or gain in income.
- 2.2. Amendments requiring the provision of personal identifiers of detained persons will entail minimal administrative costs (estimated at less than \$10,000 per annum in total) associated with the handling and storage of the data gathered. Positive Identification technology to collect personal identifiers is estimated to cost \$900,000 in the first year and \$100,000 per year in subsequent years. These costs will be met from within the current and future resources of the Australian Fisheries Management Authority.

3. NOTES ON CLAUSES

Clause 1: Short Title

- 3.1. Clause 1 is a formal provision specifying the short title of the Bill. The Act will be called the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005*.

Clause 2: Commencement

- 3.2. Sections 1 to 3 and anything not contained in Schedules 1 and 2 of the Bill will commence on the day on which the Bill receives the Royal Assent.
- 3.3. Part 1, 4 and 5 of Schedule 1 and Part 2 of Schedule 2 of the Bill will commence on the day after the Bill receives the Royal Assent.
- 3.4. Part 2 of Schedule 1 and Part 1 of Schedule 2 of the Bill will not take effect until the day set by Proclamation. However, if any of the provision(s) do not commence within six months of the Bill receiving the Royal Assent, they will commence on the first day after the end of that period. Division 1 of Part 3 of Schedule 1 will also commence on a day fixed by proclamation or no later than six months after the Bill receives the Royal Assent.
- 3.5. Division 2 of Part 3 of Schedule 1 of the Bill will commence immediately after the commencement of either Part 2 of Schedule 1 or Division 1 of Part 3 of Schedule 1 of the Bill, whichever is the later.

Clause 3: Schedules

- 3.6. Clause 3 states that the *Fisheries Management Act 1991*, the *Torres Strait Fisheries Act 1984* and the *Migration Act 1958* are amended or repealed as set out in the applicable items in Schedules 1 and 2 of the Bill. Any other item in a Schedule to this Bill has effect according to its terms.

Schedule 1: Fisheries Amendments

Part 1: Control of boats does not unlawfully restrain liberty of persons on the boats

FISHERIES MANAGEMENT ACT 1991

Item 1: After subsection 84(1B)

- 3.7. This item will amend the *Fisheries Management Act 1991* to ensure that an officer who has used his or her powers under the Act to detain a boat, or make a request of a master in relation to a boat, is not unlawfully restraining the liberty of any person on that boat. New subsection 84(1BA) is similar to subsection 245F(8A) of the *Migration Act 1958* and subsection 185(3AAA) of the *Customs Act 1901*.
- 3.8. It is necessary for officers to move boats suspected of involvement in illegal foreign fishing offences to Australia to enable the suspected offences to be properly investigated. This provision will ensure that officers are protected from legal action regarding this lawful exercise of their powers under the Act.
- 3.9. This means that civil or criminal proceedings may not be instituted against an officer, any person assisting an officer in the exercise of the power, AFMA or the Commonwealth in respect of a restraint caused by the exercise of that officer's powers under subsections 84(1)(g), (k), (l) or (m) of this Act.

TORRES STRAIT FISHERIES ACT 1984

Item 2: After subsection 42(2)

- 3.10. This item will amend the *Torres Strait Fisheries Act 1984* to ensure that an officer who has used his or her powers under the Act to detain a boat, or make a request of a master in relation to a boat, is not unlawfully restraining the liberty of any person on that boat. New subsection 42(2AAA) is similar to section 245F(8A) of the *Migration Act 1958* and subsection 185(3AAA) of the *Customs Act 1901*.
- 3.11. It is necessary for officers move boats suspected of involvement in illegal foreign fishing offences to Australia to enable the suspected offences to be properly investigated. This provision will ensure that officers are protected from legal action regarding this lawful exercise of their powers under the Act.
- 3.12. This means that civil or criminal proceedings may not be instituted against an officer, any person assisting an officer in the exercise of the power, AFMA or the Commonwealth in respect of a restraint caused by the exercise of that officer's powers under subsections 42(1)(d), (e), (g) or (h) of this Act.

Part 2: Provisions relating to detention of suspected illegal foreign fishers

FISHERIES MANAGEMENT ACT 1991

Item 3: Paragraphs 84(1)(ia), (ib), (ic) and (id)

- 3.13. This item repeals paragraphs 84(1)(ia), (ib), (ic) and (id) of the *Fisheries Management Act 1991*. The powers previously contained in these paragraphs (to detain suspected illegal foreign fishers, to move detained people, to search a detained person and taking measurements or photographs of a person for the purposes of identification) will now be contained in the new Schedule 1A of the *Fisheries Management Act 1991*.

Item 4: At the end of subsection 84(1)

- 3.14. This item adds a note to the end of subsection 84(1) of the *Fisheries Management Act 1991* explaining that the powers of officers in relation to the detention of suspected illegal foreign fishers are contained in the new Schedule 1A to the *Fisheries Management Act 1991*. This is necessary because it would be a reasonable expectation that that detention powers would be located along with the other powers of officers in section 84(1) of the *Fisheries Management Act 1991*.

Item 5: Sections 84A and 84B

- 3.15. This item repeals sections 84A and 84B of the *Fisheries Management Act 1991* that deal with the release of a detainee from detention and searches of detained persons. These matters will now be contained in the new Schedule 1A of the Act.

Item 6: Paragraph 87E(1)(aa)

- 3.16. This item updates a reference to the power to detain a person suspected of being an illegal foreign fisher to reflect its relocation from its present position in paragraph 84(1)(ia) to its new position in the new Schedule 1A of the *Fisheries Management Act 1991*.

Item 7: Paragraph 87E(1)(ab)

3.17. This item updates a reference to the power to move detained people to reflect its relocation from its present position in paragraph 84(1)(ib) to its new position in the new Schedule 1A of the *Fisheries Management Act 1991*.

Item 8: Paragraph 87E (1) (ab)

3.18. This item updates a reference to the power to detain a person suspected of being an illegal foreign fisher to reflect its relocation from its present position in paragraph 84(1)(ia) to its new position in the new Schedule 1A of the *Fisheries Management Act 1991*.

Item 9: Subsection 87E(5)

3.19. This item updates a reference to the power to detain a person suspected of being an illegal foreign fisher and the power to move a detained person to reflect the relocation of these powers from their present positions in paragraphs 84(1)(ia) and (ib) to their new positions in the new Schedule 1A of the *Fisheries Management Act 1991*.

Item 10: Subsection 87E(5) (note)

3.20. This item removes a reference to the section 84A which appears in a note associated with 87E(5) of the *Fisheries Management Act 1991*. Section 84A is repealed by Item 5 (above).

Item 11: Section 98A

3.21. This item repeals section 98A of the *Fisheries Management Act 1991*. The offence previously contained in this section (regarding escape from detention) will now be contained in Schedule 1A of the *Fisheries Management Act 1991*.

Item 12: After Division 5A of Part 6

3.22. This item adds a new Division to Part 6 of the *Fisheries Management Act 1991*. New Division 5B relates to the detention of suspected illegal foreign fishers. This item also inserts new section (105Q), which gives effect to new Schedule 1A of the *Fisheries Management Act 1991*.

Item 13: Before Schedule 1

3.23. This item inserts Schedule 1A into the *Fisheries Management Act 1991*. Schedule 1A contains the powers relating to the detention of suspected illegal foreign fishers.

3.24. Explanatory notes relating to each of the provisions of the new Schedule 1A to the *Fisheries Management Act 1991* are set out below.

3.25. The provisions of new Schedule 1A of the *Fisheries Management Act 1991* have been drafted to ensure maximum consistency with new Schedule 2 of the *Torres Strait Fisheries Act 1984*. This means that the explanations of the various provisions of Schedule 1A of the *Fisheries Management Act 1991* substantially replicate the explanation offered regarding the counterpart provision in Schedule 2 of the *Torres Strait Fisheries Act 1984*.

Schedule 1A: Provisions relating to detention of suspected illegal foreign fishers

Part 1: Preliminary

Section 1: Main objects of this Schedule

3.26. New section 1 outlines the three main objects of the new Schedule 1A to the *Fisheries Management Act 1991*. These three objects are to provide for the detention

of suspected illegal foreign fishers, to allow for detainees to be appropriately searched, screened and identified while protecting the welfare of the detainee and to facilitate the transition of detainees from fisheries to immigration detention by creating consistency between the *Fisheries Management Act 1991* and the *Migration Act 1958*.

Section 2: Definitions

3.27. New section 2 adds a definition of ‘authorised officer’, ‘detainee’, ‘detention’ and ‘detention officer’ for the purposes of Schedule 1A to the *Fisheries Management Act 1991*.

Section 3: Minister may appoint persons to be detention officers

3.28. New section 3 allows the Minister to appoint, by instrument, a person or members of a class or group of people to be detention officers. This will allow for the creation of a new class of officers with certain limited powers of detention under the *Fisheries Management Act 1991*. It is envisaged that employees and contractors of DIMIA and AFMA will be appointed as detention officers under the *Fisheries Management Act 1991* in the same way that employees and contractors are currently appointed as officers under the *Migration Act 1958*. Officers under the *Fisheries Management Act 1991* do not need to also be appointed as detention officers as they already have the necessary powers.

3.29. New subsection 3(2) provides that an instrument appointing officers can refer to a class of persons, such as all employees of a particular contracted company, to be officers. The instrument may also specify that a person may join the specified class of persons within a particular timeframe, as specified in the instrument.

Section 4: Detention officers subject to directions

3.30. New section 4 provides that detention officers will be subject to the directions of the Minister or AFMA in the exercise of their powers and the performance of their duties under the new Schedule 1A of the *Fisheries Management Act 1991*. In practice, day-to-day operational directions will be almost always provided to detention officers by AFMA.

Section 5: Detention officer etc. not liable to certain actions

3.31. New subsection 5(1) provides protection from liability for any kind of court proceedings for detention officers, or people assisting detention officers, for anything done in good faith in the exercise of the powers and functions contained in Schedule 1A of the *Fisheries Management Act 1991*. As noted beneath new section 5(1), this new section reflects the similar protection provided to officers, and people assisting officers, in the existing section 90 of the *Fisheries Management Act 1991*.

3.32. New subsection 5(2) clarifies that new subsection 5(1) does not affect any contractual liability of a detention officer or a person assisting a detention officer. This exclusion is to ensure that AFMA retains the potential to sue any detention officer or person assisting a detention officer for breach of contract if circumstances, which may constitute a breach of contract, ever arise.

Section 6: AFMA may authorise officers and detention officers

3.33. New section 6 provides that AFMA may authorise one or more officers and/or detention officers, by instrument, for the purposes of a specified provision of new Schedule 1A. This provision will ensure that tight control is maintained over the number and type of people who will be authorised to use certain powers contained in

the new Schedule 1A. Persons who are authorised under new section 6 are referred to in Schedule 1A as ‘authorised officers’.

Section 7: Persons who are authorised officers for the purposes of Migration Act 1958 are taken to be authorised for this Schedule

- 3.34. New section 7 provides for a scheme of automatic authorisation of detention officers who are authorised to carry out certain powers under the *Migration Act 1958*.
- 3.35. New subsection 7(1) provides that a person who is an officer or a detention officer under the *Fisheries Management Act 1991* and is an authorised officer in regards to specified sections within the *Migration Act 1958*, is to be considered authorised for the purposes of the corresponding provisions of the new Schedule 1A of the *Fisheries Management Act 1991*. The provisions of the *Migration Act 1958* and the corresponding provisions of the new Schedule 1A of the *Fisheries Management Act 1991* are contained in columns two and three of the table beneath new subsection 7(1).
- 3.36. This provision will allow officers to be dually authorised to use certain powers under both the *Fisheries Management Act 1991* and the *Migration Act 1958*. This will assist in providing a seamless transition for people in fisheries and then immigration detention.
- 3.37. This provision for automatic authorisation is subject to appropriate limitations imposed by new subsection 7(2) and (3). These new subsections provide that if officers are authorised to undertake identity tests, this power is strictly limited to the specified types of identity tests in that authorisation. Additionally, AFMA may, by instrument, specify that certain people, who would otherwise be authorised under new subsection 7(1), are not authorised to undertake certain powers.

Part 2: Detaining suspected illegal foreign fishers

Section 8: Power to detain

- 3.38. New section 8 provides officers with the power to detain people who are suspected of committing an illegal foreign fishing offence. This section substantially replicates the power contained in section 84(1)(ia) of the *Fisheries Management Act 1991* which is repealed by Item 3 of this package of amendments.
- 3.39. New subsection 8(1) gives an officer the power to detain a person for the purposes of deciding whether or not to charge them with committing an offence against section 99, 100, 100A, 101, 101A, 101B, 105E or 105F of the *Fisheries Management Act 1991*, or an offence against section 6 of the *Crimes Act 1914* relating to such an offence.
- 3.40. This power is restricted by the requirement that it can only be used to detain people where the officer has reasonable grounds to believe that the person is not an Australian citizen or resident and that the person was on a foreign boat when it was used in the commission of an offence against one of the sections outlined in new subsection 8(1).
- 3.41. New subsection 8(2) clarifies the limits of the power contained in new subsection 8(1) by ensuring that new subsection 8(1) cannot be interpreted as authorising an officer to use more force in detaining a person than is reasonably necessary.
- 3.42. New subsection 8(3) preserves the effect of section 87E of the *Fisheries Management Act 1991* which sets limits to the exercise of certain powers in relation to *Fish Stock Agreement (FSA)* boats. This exclusion is consistent with Australia’s obligations under the FSA.

Section 9: Relationship with Part IC of the Crimes Act 1914

- 3.43. New section 9 extends the protective provisions and rights that a protected suspect has under Part IC of the *Crimes Act 1914* to detainees under the *Fisheries Management Act 1991*. New section 9 substantially replicates current subsection 84A(2) of the *Fisheries Management Act 1991*, which is repealed by Item 5 of this package of amendments.

Section 10: Detention officer may detain person already detained by officer

- 3.44. New subsection 10(1) allows for detention officers to continue the detention arrangements following the initial detention of a person by an officer. A detention officer may only detain a person who has been initially detained by an officer and who is presented by an officer to the detention officer to continue the detention of that person. This power is limited by new subsection 10(2) which provides that a detention officer may not detain a person if they have reasonable grounds to believe that the detained person had, at some point, ceased to be in fisheries detention since the last time that an officer had detained them under new section 8.
- 3.45. New subsection 10(2) will apply, in practice, if a detainee escapes following initial detention. Because escape from detention is not in itself a detainable offence (see new section 14 below) a detainee, if recaptured, could not be returned to detention under the *Fisheries Management Act 1991* and therefore could not be detained by a detention officer under the *Fisheries Management Act 1991*. However, because the detainee's enforcement visa automatically expires as soon as they escape from detention, a recaptured detainee would instead be detained in immigration detention, by a duly authorised officer under the *Migration Act 1958*, as an unauthorised non-citizen.

Section 11: Detention on behalf of an officer or detention officer

- 3.46. New section 11 provides for detention to continue, in certain circumstances, in the absence of the direct presence of an officer or detention officer. In practice, this new section will allow for a detainee to be moved to a place where they can be cared for better while their offences are being investigated. For example, a detainee may be moved off a boat, if it is unseaworthy or there are poor weather conditions, to a land-based detention facility. It will also allow detainees to be taken to hospital or other places, generally on a short term basis.
- 3.47. New subsection 11(1) provides the places in which a detainee may be detained on behalf of an officer or a detention officer. As well as including places such as prisons, police stations and hospitals, the subsection provides that the Minister may approve, in writing, a particular place for people to be held for the purposes of this section.

Section 12: Power to move detainees

- 3.48. New subsection 12(1) provides officers and detention officers with the power to move detainees. This new section substantially replicates section 84(1)(ib) of the *Fisheries Management Act 1991*, which is repealed by Item 3 of this package of amendments.
- 3.49. A detainee may need to be moved to a place where they can be cared for better while their offences are being investigated. For example, a detainee may be moved off a boat, if it is unseaworthy or there are poor weather conditions, to a land-based detention facility.
- 3.50. New subsections 12(2) and (3) limit this power to ensure that no more force than is reasonably necessary is used to move a detainee and that all relevant matters

(including the administration of justice and the welfare of the detainee) are considered before a decision is taken to move a detainee.

- 3.51. New subsection 12(4) provides that new subsection 12(1) is subject to section 87E of the *Fisheries Management Act 1991* which sets limits on the exercise of certain powers in relation to *Fish Stock Agreement* (FSA) boats. This exclusion is consistent with Australia's obligations under the FSA.

Section 13: End of detention

- 3.52. New section 13 requires that a detainee be released from detention in certain circumstances. This new section substantially replicates section 84A of the *Fisheries Management Act 1991*, which is repealed by Item 5 of this package of amendments.
- 3.53. New section 13 states that a detainee must be released under whichever of the following circumstances occurs first:
- as soon as an officer knows or reasonably believes that the detainee is an Australian citizen or resident;
 - at the time a detainee is brought before a magistrate for a fisheries offence listed in subclause 8(1);
 - at the time a decision is made to charge a detainee with an offence under that subclause; or
 - at the end of 168 hours (7 days) after the detention begins.
- 3.54. This new section means that the longest a detainee can be held under the *Fisheries Management Act 1991* is 168 hours.

Section 14: Escape from detention

- 3.55. This section makes escape from detention an offence punishable on conviction by imprisonment for up to two years. This offence was previously contained in section 98A of the *Fisheries Management Act 1991*.
- 3.56. Because escape from detention is not in itself a detainable offence, a detainee, if recaptured, could not be returned to detention under the *Fisheries Management Act 1991* and therefore could not be detained by a detention officer under the *Fisheries Management Act 1991*. However, because the detainee's enforcement visa automatically expires as soon as they have escaped from detention, a recaptured detainee would instead be detained in immigration detention as an unauthorised non-citizen, by an officer duly authorised under the *Migration Act 1958*.

Part 3: Searching and screening detainees and screening their visitors

Section 15: Searches of detainees

- 3.57. New section 15 allows for an authorised officer to search a detainee in certain circumstances. This clause substantially replicates old paragraph 84(1)(ic) of the *Fisheries Management Act 1991*, which is repealed by Item 3. It also corresponds closely to section 252 of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.58. New subsection 15(1) provides that a detainee, and any clothes or property under the immediate control of the detainee, may be searched without a warrant for one of the purposes outlined in new subsection 15(2).
- 3.59. This power is aimed at ensuring the safety of detainees, and other people, and ensuring that authorised officers have a means of determining whether a detainee is concealing evidence of their involvement in the commission of an illegal foreign fishing offence. As such, new subsection 15(2) limits the power in subsection 15(1)

by providing that a search may only be conducted for two purposes. The authorised officer must only conduct a search for the purpose of determining whether the person has in their possession, a weapon (or other thing capable of being used to inflict bodily injury or to help the detainee escape from detention) or any evidence of the commission of an offence against section 99, 100, 100A, 101, 101A, 101B, 105E or 105F of the *Fisheries Management Act 1991* or an offence against section 6 of the *Crimes Act 1914* in relation to one of those offences.

- 3.60. New subsection 15(3) allows an authorised officer to take and keep in their possession any of the things described in new subsection 15(2) found during a search, for such time as the authorised officer thinks is necessary for the purposes of the *Fisheries Management Act 1991* or the *Migration Act 1958*.
- 3.61. New subsection 15(4) clarifies that this new section does not allow an authorised officer, or any other person conducting the search under new subsection 15(5), to remove any of a detainee's clothing or to require a detainee to remove any of their clothing, for the purposes of conducting the search.
- 3.62. New subsection 15(5) requires that a search under new subsection 15(1) be undertaken by an authorised officer of the same sex as the subject of the search. Alternatively, where it is not reasonably possible for an authorised officer of the same sex to conduct the search, the search may be conducted by any other person of the same sex as the subject who is requested by an authorised officer, and agrees, to conduct the search.
- 3.63. New subsection 15(6) provides that if a person assisting an authorised officer, under new subsection 15(5), acts in good faith and does not contravene the requirement in new subsection 15(7), they will not be liable for either criminal or civil actions or proceedings.
- 3.64. New subsection 15(7) states that an authorised person or other person assisting an authorised officer must not use more force, or subject a detainee to greater indignity, than is reasonably necessary in order to conduct the search.
- 3.65. New subsection 15(8) clarifies that a search may be conducted under this new section whether or not a screening procedure or a strip search of the detainee (under new section 16 and 17) are also conducted.
- 3.66. New section 15 provides sufficient safeguards to ensure that all searches are conducted in an appropriate manner.

Section 16: Power to conduct a screening procedure

- 3.67. New section 16 provides authorised officers with the power to conduct screening procedures on detainees in certain circumstances. This section corresponds closely to section 252AA of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.68. New subsection 16(1) allows authorised officers to conduct screening procedures without a warrant in relation to a detainee (other than those held in State or Territory prisons (see new section 22)). This power is aimed at ensuring the safety of detainees, and other people, and is limited to determining whether the detainee is concealing a weapon or any other thing capable of inflicting bodily harm or being used to escape from detention.
- 3.69. New subsections 16(2) and (3) provide safeguards restricting the power to conduct screening procedures. An officer who conducts a screening procedure is prohibited from using greater force, or subjecting the detainee to greater indignity, than is reasonably necessary in order to conduct the screening procedure. Similarly, an authorised officer must not remove any of the detainee's clothing, or to require the

detainee to remove any of their clothing for the purpose of conducting the screening procedure.

- 3.70. New subsection 16(4) clarifies that a screening procedure may be conducted under this new section whether or not a search or a strip search of the detainee (under new section 15 and 17) are also conducted.
- 3.71. New subsection 16(5) provides definitions of ‘conducting a screening procedure’ and ‘screening equipment’ for the purposes of new section 16. Screening procedures include the use of metal detectors on detainees and x-rays on a detainee’s possessions.

Section 17: Power to conduct a strip search

- 3.72. New section 17 allows for authorised officers to conduct strip searches on detainees in limited circumstances. This clause corresponds closely to section 252A of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.
- 3.73. New subsection 17(1) provides that an authorised officer may conduct a strip search on a detainee, other than those held in State or Territory prisons (see new section 22), without a warrant. A strip search must only be conducted for the purposes of determining whether the detainee has a weapon or other thing capable of being used to inflict bodily injury or to escape detention on their person or in their possession. The strip search must be conducted in accordance with the stringent rules set out in new section 18.
- 3.74. ‘Strip search’ is defined in new subsection 17(2) as a search of the detainee, of his or her clothing or of a thing in his or her possession. A strip search may include a requirement that the detainee remove some or all of their clothing and that the detainee’s body and clothing be examined. It does not include searching the detainee’s body cavities. A strip search may be as limited as requiring the removal of a jacket, or the detainee’s socks and shoes, to search for the weapon or other thing.
- 3.75. New subsection 17(3) provides that an authorised officer may only conduct a strip search if they suspect, on reasonable grounds, that the detainee has a weapon or thing capable of inflicting bodily harm or being used to escape detention, hidden on their person, or in their clothes or possession, and that it is necessary to conduct a strip search in order to recover that weapon or other thing.
- 3.76. New subsection 17(4) states that an authorised officer may form a suspicion on reasonable grounds that a strip search is necessary on the basis of a search (under new section 15) or a screening procedure (under new section 16) even if the authorised officer was not the officer who conducted the search or screening procedure. The suspicion may also be based on any other information that is available to the authorised officer.
- 3.77. In addition to this reasonable suspicion, there must be a high level authorisation for the strip search. A strip search of a detainee who is 18 years or older must be authorised by the Managing Director of AFMA, the Secretary of the Department or an SES Band 3 employee in the Department who is satisfied that there are reasonable grounds for those suspicions. A strip search of a minor between the ages of 10 and 18 years must be ordered by a magistrate after they are satisfied that there are reasonable grounds for those suspicions.
- 3.78. New subsections 17(5), (6) and (7) state the means by which approval under new subsection 17(4) must be provided. This authorisation must be recorded in writing and signed by the person giving the high level authorisation.

- 3.79. New subsection 17(8) provides that the power to authorise a strip search cannot be delegated to any other person. This ensures that strip searches will only ever be authorised as a last resort by a person of sufficient authority to make such a decision.
- 3.80. New subsections 17(9), (10) and (11) provide that a magistrate can choose not to accept the power conferred under paragraph 17(3) (c). If they do accept the power they will be exercising it in their personal capacity rather than in their capacity as a court or a member of the court while retaining all protection and immunity covering decisions made by, or as a member of, that court. This makes it clear that the exercise of the power conferred by new section 17 must be voluntary.
- 3.81. New subsection 17(12) clarifies that a strip search may be conducted under this new section whether or not a search or a screening procedure (under new sections 15 and 16) have also been carried out on the detainee.
- 3.82. New subsection 17(13) defines ‘business day’ and ‘SES Band 3 employee’ for the purposes of new section 17.

Section 18: Rules for conducting a strip search

- 3.83. New section 18 outlines comprehensive rules that must be complied with in conducting a strip search of a detainee under the new section 17. These rules are based on those contained in section 252B of the *Migration Act 1958* which, in turn, are based on those contained in 3ZI of the *Crimes Act 1914*.
- 3.84. The addition of new section 18 to the *Fisheries Management Act 1991* will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.
- 3.85. The rules contained in this new section will ensure that strip searches are conducted in a way that will protect the dignity of the detainee as much as possible while still allowing strip searches in very limited circumstances to ensure the safety of the detainee and other people.
- 3.86. New paragraph 18(1)(a) provides that a detainee must not be subjected to greater indignity than is reasonably necessary to conduct the strip search.
- 3.87. New paragraph 18(1)(b) provides that a strip search of a detainee must be conducted in a private area.
- 3.88. New paragraph 18(1)(c) provides that a strip search must only be conducted by an authorised officer of the same sex as the detainee.
- 3.89. New paragraph 18(1)(d) additionally provides that a strip search must not be conducted in the presence or view of a person who is the opposite sex to the detainee. This stipulation is subject to new subsections 18(2), (3) and (5) which provide some limited exceptions to this rule. A parent, guardian, person representing the detainee’s interest or a person nominated by the detainee to be present for the strip search does not have to be of the same sex as the detainee. Additionally, if a medical practitioner is assisting an authorised officer to conduct the strip search, they may be of the opposite sex of the detainee if a medical practitioner of the same sex is not available within a reasonable time.
- 3.90. New paragraph 18(1)(e) provides that a strip search must not be conducted in the presence or view of a person who’s presence is not necessary for the purposes of conducting the strip search. This new paragraph is also subject to new subsections 18(2), (3) and (5).
- 3.91. New paragraph 18(1)(f) prohibits a strip search of a detainee who is under 10 years of age.
- 3.92. New paragraph 18(1)(g) introduces an additional requirement where the detainee is between the ages of 10 and 18 or is incapable of managing their own affairs. In these circumstances, a strip search must be conducted in the presence of the detainee’s

parent or guardian (where that person is in detention with the detainee and is readily available) or, where the presence of a parent or guardian is not acceptable to the detainee or such a person is not readily available as specified, another person, other than the authorised officer. This other person must be capable of representing the detainee's interests and be, as far as is practicable in the circumstances, acceptable to the detainee.

- 3.93. New paragraph 18(1)(h) provides that strip search of a detainee who is at least 18 years old and capable of managing their own affairs must be conducted in the presence of another person, if nominated by the detainee where that other person is readily available and willing to attend the strip search.
- 3.94. New paragraph 18(1)(i) provides that a strip search must not involve a search of the person's body cavities. This is consistent with the definition of a strip search contained in the new subsection 17(2).
- 3.95. New paragraph 18(1)(j) provides that a strip search must not involve the removal of more items of clothing or more visual inspection than the authorised officer conducting the search believes, on reasonable grounds, to be necessary to determine whether there is a weapon, or other thing described in new subsection 17(1), hidden on the body of the detainee, in their clothing or within a thing in their possession.
- 3.96. New paragraph 18(1)(k) restricts the use of force to that which is reasonably necessary to conduct the strip search.
- 3.97. New subsection 18(4) provides that neither a detainee's refusal or failure to nominate a person to be present during the strip search under new paragraph 18(1)(h) within reasonable time, nor a detainee's inability to nominate a person who is readily available and willing to attend the strip search within a reasonable time, will prevent a strip search from being conducted.
- 3.98. New subsection 18(5) provides that a strip search may be conducted with the assistance of another person where the authorised officer conducting the strip search considers such assistance to be necessary, for the purposes of conducting the strip search. Any other person assisting the authorised officer conducting the strip search must be of the same sex as the detainee unless they are a medical practitioner and a medical practitioner of the same sex as the detainee is not available within a reasonable time.
- 3.99. New subsection 18(6) excludes liability for any action against a person who, at the request of an authorised officer, assists in conducting a strip search of a detainee where that person acts in good faith and does not contravene any part of new section 18.
- 3.100. New subsection 18(7) provides that a detainee must be provided with adequate clothing if any of his or her clothing is damaged, destroyed or retained under new section 19 as a result of the strip search. This ensures that the welfare and dignity of the detainee is considered after the search is conducted.

Section 19: Possession and retention of certain things obtained during a screening procedure or strip search

- 3.101. New section 19 provides for the retention of certain thing found during a screening procedure (under new section 16) or a strip search (under 17) of a detainee. This new section closely corresponds to section 252C of the *Migration Act 1958* and section 3ZV of the *Crimes Act 191*.
- 3.102. The addition of new section 19 to the *Fisheries Management Act 1991* will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

- 3.103. New subsection 19(1) allows an authorised officer to take possession of and retain a thing found in the course of conducting a screening procedure or a strip search if the thing might provide evidence of the commission of an offence against the *Fisheries Management Act 1991* or the thing is forfeited to the Commonwealth.
- 3.104. New subsection 19(2) states that a weapon or other thing which can be used to inflict bodily injury or help a detainee to escape from detention, described in subsections 16(1) or 17(1), is forfeited to the Commonwealth if it is found in the course of conducting a screening procedure or a strip search.
- 3.105. New subsection 19(3) prohibits an authorised officer from returning a thing forfeited to the Commonwealth to the person from which it was taken. Instead, the authorised officer must give the thing forfeited under new subsection 19(2) to a constable as soon as practicable. Under subsection 3(1) of the *Crimes Act 1914*, ‘constable’ is defined as meaning a member or special member of the Australian Federal Police, or a member of the police force or police service of a State or Territory.
- 3.106. It is noted beneath new subsection 19(3) that Subdivision C of Division 6 of Part 6 of the *Fisheries Management Act 1991* sets out the procedure for dealing with thing seized as being forfeited under section 106A. This note makes a distinction between things that are automatically forfeited under section 106A and weapons that are forfeited to the Commonwealth under new subsection 19(2).
- 3.107. New subsection 19(4) outlines certain circumstances in which an authorised officer is required to take reasonable steps to return a thing retained under new subsection 19(1) that is not forfeited to the Commonwealth. The thing should be returned to the person from whom it was taken or to the owner (if the person from whom it was taken is not entitled to possess it). These circumstances are either where it is decided that the retained thing is not to be used in evidence or when a period of 60 days from when the authorised officer took possession of the thing has passed.
- 3.108. However, new subsection 19(5) sets out circumstances in which an authorised officer is not required to return the retained thing under new subsection 19(4). These include instances where proceedings related to the evidence have been instituted before the end of the 60 day period and have not been completed, an order under new section 21 has been made permitting an authorised officer to retain the thing for a further period, or the officer is otherwise authorised to retain, destroy or dispose of the thing.

Section 20: Authorised officer may apply for a thing to be retained for a further period

- 3.109. New section 20 provides an avenue for an authorised officer to apply for an extension of the period for which they may keep a thing retained during a screening procedure or strip search under the new section 19. It corresponds closely with section 252C of the *Migration Act 1958* and 3ZW of the *Crimes Act 1914*. The addition of new section 20 to the *Fisheries Management Act 1991* will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.
- 3.110. Under new subsections 20(1) and (2), an authorised officer may apply to a magistrate for an order that a thing, retained under new subsection 19(1) and due to be returned under new subsection 19(4), may be retained for a further period. Such an application may be made in circumstances where proceedings have not yet been instituted and the 60 day period, or a period specified in an order of a magistrate under new section 21, is almost finished.
- 3.111. New subsection 21(3) requires that an authorised officer must take reasonable steps to discover and notify any persons whose interests would be affected by the retention of the thing before applying for an extension of the retention. This provision allows

evidence to be preserved for use in court proceedings in cases where a delay in court proceedings has occurred. It also provides for the interests of other parties affected by the retention of the thing to be ascertained.

Section 21: Magistrate may order that thing be retained

- 3.112. New section 21 provides the circumstances in which a magistrate may make an order allowing an authorised officer to retain, for an extended period, an item found during a screening procedure or strip search of a detainee. This section closely corresponds to section 252E of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.113. New subsection 21(1) states that a magistrate may order that the authorised officer who made an application for an extension of the retention period for a thing under new section 20 may retain the thing. A magistrate may make such an order where they are satisfied that the extension is necessary for the purposes of an investigation as to whether an offence has been committed or to enable evidence of an offence to be secured for the purposes of a prosecution.
- 3.114. New subsection 21(2) states that the order must specify the period for which the authorised officer may retain the thing.
- 3.115. New subsections 21(3), (4) and (5) provide that a magistrate can choose not to accept the power conferred under paragraph 21(1) but that if they do accept the power they will be exercising it in their personal capacity rather than in their capacity as a court or a member of the court while retaining all protection and immunity covering decisions made by, or as a member of, that court. This makes it clear that the exercise of the power conferred by new section 21 must be voluntary.

Section 22: Detainees held in State or Territory prisons or remand centres

- 3.116. New section 22 makes provision for searching detainees held in detention in a prison or remand centre of a State or Territory. This new section closely corresponds with section 252F of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.117. This new section provides that detainees held in State or Territory prisons or remand centres may be searched according to the relevant law of that State or Territory. New subsection 22(3) clarifies that new sections 16 and 17, regarding powers to conduct screening procedures and strip searches, do not apply where a detainee is held in a State or Territory prison or remand centre.

Section 23: Powers concerning entry to premises where detainee is detained

- 3.118. New section 23 provides certain powers relating to the entry of detainees' visitors to a premise where detainees are detained. This new section closely corresponds to section 252G of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.119. This power is required for the good order and security of detention centres as well as the safety of detainees, staff and other persons located there.
- 3.120. Under new subsection 23(1), an officer or detention officer may request that a person about to enter a premise where a detainee is in detention, be screened. The screening procedure may involve walking through screening equipment or passing hand-held screening equipment over or around the person or around things in the person's possession or x-raying or screening things in a person's possession.

- 3.121. New subsection 23(2) defines ‘screening equipment’ as a metal detector or similar device for detecting objects or particular substances.
- 3.122. New subsection 23(3) allows an authorised officer, in certain circumstances, to request a person, about to enter premises where a detainee is in detention, to do some or all of the things outlined in new subsection 23(4). An authorised officer may make such a request where they suspect on reasonable grounds that the person has in their possession a thing that might:
- endanger the safety of the detainees, staff or other persons on the premises; or
 - disrupt the order or security arrangements on the premises.
- This request can be made in addition to the screening procedure outlined in subsection 23(1).
- 3.123. New subsection 23(4) lists the things that an authorised officer may request a person, entering a premises where detainees are detained, to do. Such a person may be requested to:
- allow the authorised officer to inspect the things in the person’s possession;
 - remove some or all of their outer clothing (such as a jacket or coat);
 - remove items from the pockets of their clothing;
 - open a thing in their possession, or remove the thing’s contents, to allow the authorised officer to fully inspect the thing or its contents;
 - leave a thing in their possession, or some or all of its contents, in a place specified by the authorised officer where the authorised officer suspects, on reasonable grounds, that the thing or its contents are capable of concealing something that might endanger the safety of the detainees, staff or other persons on the premises or disrupt the order or security arrangements at the detention centre.
- 3.124. New subsection 23(5) provides that a person who leaves a thing in a place specified by an authorised officer (under new subsection 23(4)(e)) is entitled to its return when they leave the premises.
- 3.125. However, under new subsection 23(6), if the possession of the thing, or anything in its contents, by the person is unlawful under a Commonwealth, State or Territory law applying to the premises the thing, or its contents, it must not be returned to the person, but rather, as soon as practicable, be given to a constable. Under subsection 3(1) of the *Crimes Act 1914*, ‘constable’ is defined as meaning a member or special member of the Australian Federal Police, or a member of the police force or police service of a State or Territory. This new subsection avoids the inappropriate situation of an authorised officer having to return an item found in the possession of a person visiting a detainee, if that person’s possession of the item is illegal.
- 3.126. Under new subsection 23(7), a person who does not comply with a request under new section 23 may be refused entry to the premises where a detainee is being detained.

Part 4: Detainees’ rights to facilities for obtaining legal advice etc

Section 24: Detainee may have access to certain advice, facilities etc.

- 3.127. Under new section 24, the person responsible for the detention of a detainee must, if requested by the detainee, provide the detainee with access to reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his or her detention. This section closely corresponds to section 256 of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to

immigration detention with one set of rules applying to the detainee's entire period of detention.

Part 5: Identifying detainees

Section 25: Definitions

3.128. This section adds several definitions for the purposes of new Part 5 of Schedule 1A of the *Fisheries Management Act 1991*. These definitions closely correspond to the definitions of these terms provided in section 5 of the *Migration Act 1958* and, as such; will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

Section 26: Meaning of personal identifier

3.129. New subsection 26 provides a specific definition of a 'personal identifier' for the purposes of the new Part 5 of Schedule 1A of the *Fisheries Management Act 1991*. This section closely corresponds to section 5A of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.130. New subsection 26(1) states that 'personal identifier' means any of the following, including any of the following in digital form:

- fingerprints or handprints of a person (including those taken using paper and ink or digital live scanning technologies);
- a measurement of a person's height and weight;
- a photograph or other image of a person's face and shoulders;
- an audio or a video recording of a person (other than a video recording of an identification test under new section 37);
- an iris scan;
- a person's signature;
- any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*.

3.131. An "intimate forensic procedure" is defined by section 23WA of the *Crimes Act 1914* and is prohibited under the *Fisheries Management Act 1991*. These prohibited procedures include:

- an external examination of the genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
- the taking of a [sample](#) of blood;
- the taking of a [sample](#) of saliva, or a [sample](#) by buccal swab;
- the taking of a [sample](#) of pubic hair;
- the taking of a [sample](#) by swab or washing from the external genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
- the taking of a [sample](#) by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
- the taking of a dental impression;

- the taking of a photograph or video recording of, or an impression or cast of a wound from, the genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts.

3.132. New subsection 26(2) imposes requirements on the Minister before the Governor-General can make regulations for the purposes of adding to the list of personal identifiers under new subsection 26(1). The Minister must be satisfied that:

- obtaining the identifier would not involve the carrying out of the intimate forensic procedures contained in section 23WA of the *Crimes Act 1914* (outlined in the previous paragraph); and
- the identifier is an image of or a measurement or recording of, an external part of the body; and
- obtaining the identifier will promote one or more of the purposes referred to in new subsection 26(3).

In practice, subsection 26(2) means that any regulations proposed to be made under new section 26 will be drafted in consultation with the Attorney-General.

3.133. New subsection 26(3) contains an extensive list of purposes referred to in new subsection 26(2)(c). The effect of new subsection 26(2)(c) is that the Minister must be satisfied that obtaining a new type of personal identifier will promote one or more of the following purposes before tabling any regulations under new section 26. These purposes are:

- to assist in the identification of, and to authenticate the identity of, any non-citizen who can be required under this Act to provide a personal identifier;
- to assist in identifying, in the future, any such non-citizen;
- to enhance AFMA's ability to identify non-citizens who have a criminal history relating to fisheries;
- to combat document and identity fraud in fisheries matters;
- to complement anti-people smuggling measures;
- to inform the governments of foreign countries of the identity of non-citizens who have been detained under, or charged with offences against, this Act;
- to facilitate international cooperation to combat fishing activities that involves a breach of the laws of Australia or of a foreign country.

Section 27: Limiting the types of identification tests that authorised officers may carry out

3.134. New section 27 allows AFMA to limit the types of identification tests that may be carried out by an authorised officer. This new section closely corresponds to section 5D of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.135. New subsection 27(1) will allow AFMA to authorise officers to carry out one or more types of identification tests without necessarily authorising them to conduct all types of identity tests. In this way, AFMA retains tight control over the type of identity tests that are being carried out on non-citizens.

3.136. New subsection 27(2) clarifies that an authorised officer is not authorised to carry out an identification test that is not a type of test specified in the instrument appointing the officer or detention officer as an authorised officer.

Section 28: Detainees must provide personal identifiers

3.137. Broadly, new section 28 requires that non-citizens in detention provide personal identifiers to authorised officers. This new section corresponds closely with section 261AA of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of

detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

- 3.138. New subsection 28(1) makes it compulsory for a non-citizen in detention to provide one or more personal identifiers to an authorised officer. This new subsection also provides that there could be prescribed circumstances in which a non-citizen does not have to provide personal identifiers to an authorised officer.
- 3.139. New subsection 28(2) states that an authorised officer must not require a non-citizen in detention to provide a personal identifier other than:
- fingerprints or handprints of the person (including those taken using paper and ink or digital live scanning technologies);
 - a measurement of the person's height and weight;
 - a photograph or other image of the person's face and shoulders;
 - the person's signature;
 - any other personal identifier of a type prescribed under new section 26(1)(g) for the purposes of this paragraph.
- 3.140. New subsection 28(3) provides that the authorised officer must act in accordance with new Division 2 of Part 5 of Schedule 1A when taking personal identifiers.
- 3.141. It is noted beneath new section 28 that new section 32 allows reasonable force to be used in carrying out an identification test in limited circumstances.

Section 29: Authorised officers must require and carry out identification tests

- 3.142. New section 29 requires that authorised officers carry out one or more identification tests on non-citizens and specifies the manner in which identification tests must be carried out. Subsections (1) and (2) correspond closely to section 261AB of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.143. New subsection 29(1) states that an authorised officer must require the non-citizen to provide at least one personal identifier by way of one or more identification tests unless prescribed circumstances under new section 28(1) exist.
- 3.144. New subsection 29(2) provides certain restrictions that must be observed in carrying out an identification test under this section.
- 3.145. New paragraph 29(2)(a) reinforces that an officer may only carry out an identification test on a non-citizen if they have been specifically authorised to carry out an identification test of that type by AFMA under new sections 26 and 27.
- 3.146. New paragraph 29(2)(b) requires that each identification test be carried out in accordance with the rules contained in new Subdivision B of Part 5. These rules provide for the conducting of identification tests and the circumstances in which force may be used.
- 3.147. New paragraph 29(2)(c) provides that identification tests must be carried in accordance with new Division 3 of Part 5, unless the authorised officer has reasonable grounds to believe that the non-citizen is not a minor or incapable person. This provision ensures that the more stringent conditions that apply to minors and incapable persons will always apply as the default position in the *Fisheries Management Act 1991*, unless there are reasons to believe that the non-citizen is not a minor or an incapable person. 'Minor' and 'incapable person' are defined for the purposes of new Part 5 in new section 25.
- 3.148. New subsection 29(3) ensures that new subsection 29(2)(a) applies to officers who have dual authorisations to do certain things under the *Fisheries Management Act 1991* and the *Migration Act 1958* (as per new section 7). Such officers are limited to performing only the types of identity tests that they have been authorised to perform

under the *Migration Act 1958*. New subsection 29(3) provides that if migration officers have limited authorisation to conduct identification tests under 5D of the *Migration Act 1958*, they will be limited to performing those types of identity tests under the *Fisheries Management Act 1991* as if a limiting authorisation had been issued by AFMA under new section 27.

Section 30: Information to be provided before carrying out identification tests

- 3.149. New section 30 provides that non-citizens must be provided with certain information before an identity test is carried out. This information is to be provided by the authorised officer who will be performing the identity tests. This new section closely corresponds with section 261AC of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.150. New subsection 30(1) provides that a non-citizen must be informed:
- that they may request that an independent person be present while the identification test is carried out and that the test be carried out by a person of the same sex as him or her; and
 - of such other matters as are specified in the regulations.
- 3.151. New subsection 30(2) further explains that the authorised officer must inform the non-citizen using a language (including sign language or braille) in which the non-citizen is able to communicate with reasonable fluency. The non-citizen can be informed through an interpreter, if necessary.
- 3.152. New subsection 30(3), provides that the authorised officer may inform a non-citizen of the matters in new subsection 30(1) by giving the non-citizen a form setting out the information contained in the regulations. However, the form must be in a language in which the non-citizen is able to communicate with reasonable fluency (including braille).
- 3.153. The kind of information that may be prescribed in the regulations includes:
- the purpose and reasons for the test;
 - the way in which the test is to be carried out, including the power to use reasonable force, if necessary;
 - the ways in which the information that is collated can be used; the circumstances in which the information obtained may be disclosed to third parties;
 - that the identification test may produce evidence against the non-citizen that might be used in a court of law;
 - that a video recording may be made of the test; and
 - the non-citizen's right to make a complaint to the Privacy Commissioner, or to make an application under the *Freedom of Information Act 1982* and how the non-citizen may go about doing so.

Section 31: General rules for carrying out identification tests

- 3.154. New section 31 contains the general rules for carrying out identification tests on a non-citizen in fisheries detention under new Part 5 of Schedule 1A. This new section closely corresponds to section 261AD of the *Migration Act 1991* which, in turn, is based on the rules contained in section 23XI of the *Crimes Act 1914*.
- 3.155. The addition of new section 31 to the *Fisheries Management Act 1991* will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.156. These rules state that an identification test:

- must be carried out in circumstances affording reasonable privacy to the non-citizen; and
- must not be carried out in the presence or view of a person who is of the opposite sex to the person if requested by the non-citizen and it is practicable to comply with the request; and
- must not be carried in the presence or view of a person whose presence is not necessary for the purposes of the identification test or is not required or permitted by any other provision of this Act; and
- must not involve the removal of more clothing than is necessary for the carrying out of the test; and
- must not involve more visual inspection than is necessary for carrying out the test; and
- must be carried out at the same time as any other identification tests that are to be carried out on the non-citizen, where it is practicable to do so.

These general rules ensure that the dignity and welfare of the non-citizen is respected, while such tests are being carried out.

Section 32: Use of force in carrying out identification tests

- 3.157. New section 32 contains the rules regarding use of reasonable force in carrying out an identification test. This new section closely corresponds to section 261AE of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.158. New section 32(1) provides that an authorised officer may use reasonable force to enable an identification test to be carried out or to prevent the loss, destruction or contamination of any personal identifier or any meaningful identifier derived from the person identifier.
- 3.159. However, new section 32(1) limits the use of this power by prohibiting the use of force on a minor or incapable person or where the personal identifier in question is a person's signature.
- 3.160. A person who has been authorised under new section 34 to help an authorised officer to use reasonable force, is subject to the same limitations as an authorised officer.
- 3.161. New subsection 32(2) sets out a number of pre-conditions that must exist before reasonable force can be exercised under new subsection 32(1). The authorised officer or person authorised to help the authorised officer must not use any force unless:
- the non-citizen required to provide the personal identifier in question has refused to allow the identification test to be carried out; and
 - all reasonable measures to carry out the identification test without the use of force have been exhausted; and
 - use of force in carrying out the identification test is authorised under new subsection 32(4).
- 3.162. New subsection 32(3) allows an authorised officer to apply to a senior authorising officer (other than themselves, if they are a senior authorising officer) as defined in new subsection 32, for an authorisation to use force in carrying out the identification test. This means that an individual application for authorisation must be made for each identification test for which an authorised officer believes that there are grounds for the use of reasonable force.
- 3.163. Under new subsection 32(4), the senior authorising officer who has received an application under new subsection 32(3) may authorise the use of force in carrying out the identification test if he or she is satisfied that:

- the non-citizen required to provide the personal identifier in question has refused to allow the identification test to be carried out; and
 - all reasonable measures to carry out the identification test without the use of force have been exhausted.
- 3.164. New subsections 32(5), (6) and (7) state the means by which a senior authorising officer may provide authorisation for the use of reasonable force in carrying out an identification test.
- 3.165. New subsection 32(8) states that a senior authorising officer cannot delegate their power of authorisation to any other person.
- 3.166. New subsection 32(8) defines ‘senior authorising officer’ to mean an officer, or detention officer, whom AFMA has authorised, or who is included in a class of officers or detention officer whom AFMA has authorised, to perform the functions of a senior authorising officer under new section 32.

Section 33: Identification tests not to be carried out in a cruel, inhuman or degrading manner etc.

- 3.167. New section 33 states that for the purposes of the *Fisheries Management Act 1991*, the carrying out of an identification test is not innately taken to be cruel, inhuman or degrading or to be a failure to treat a person with humanity and with respect for human dignity.
- 3.168. However, new section 33 also states that nothing in the *Fisheries Management Act 1991* authorises the carrying out of an identification test in a cruel, inhuman or degrading manner, or in a manner that fails to treat a person with humanity and with respect for human dignity.
- 3.169. New section 33 closely corresponds with section 261AF of the *Migration Act 1958* and reflects Articles 7 and 10(1) of the *International Covenant on Civil and Political Rights*. The addition of new section 33 to the *Fisheries Management Act 1991* will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.

Section 34: Authorised officer may get help to carry out identification tests

- 3.170. New section 34 enables an authorised officer to ask another authorised officer, officer or detention officer to help them to carry out an identification test. It also provides that an authorised officer, officer or detention officer that has been so requested, is authorised to provide that help.
- 3.171. New section 34 closely corresponds to section 261AG of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.

Section 35: Identification tests to be carried out by authorised officer of same sex as non-citizen

- 3.172. New section 35 provides that if a non-citizen requests that an identification test be carried out by an authorised officer of the same sex as the non-citizen, the identification test must be carried out by an authorised officer of that sex.
- 3.173. There is no automatic requirement that identification tests be carried out by an authorised officer of the same sex, as is the case for searches, because identification tests are not considered to be invasive.
- 3.174. This new section corresponds closely with section 261AH of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries

detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

Section 36: Independent person to be present

- 3.175. New subsection 36 provides that an independent person must be present during the carrying out of an identification test in two situations. It corresponds closely with section 261AI of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.176. Under new subsection 36(a) an independent person must be present where an identification test is carried out with the use of force (authorised under new section 32).
- 3.177. Under new subsection 36(b) an independent person must be present where an identification test is carried out if the non-citizen requests that such a person is present and an independent person is readily available at the same place as the non-citizen and is willing to attend the test within a reasonable time.
- 3.178. 'Independent person' is defined in new section 25 for the purposes of new Part 5.

Section 37: Recording of identification tests

- 3.179. New section 37 provides for authorised officers to video record the carrying out of identification tests. This new section closely corresponds to section 261AJ of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.180. New subsection 37(2) states that if the identification test is not video recorded, the authorised officer may decide that the identification test must be carried out in the presence of an independent person.
- 3.181. The non-citizen will be able to request a copy of a video recording of an identity test performed upon them though the *Freedom of Information Act 1982*.

Section 38: Retesting

- 3.182. New section 38 sets out the circumstances in which an authorised officer may require a non-citizen to undertake the same identification test more than once. This new section closely corresponds to section 261AK of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.183. New subsection 38(1) sets out the conditions that must exist before a retest is permitted. An authorised officer may retest a non-citizen where:
- the result of an earlier identification tests is unusable; or
 - an authorised officer, officer or detention officer is not satisfied as to the integrity of the personal identifier from an earlier identification test.
- 3.184. Examples of unusable identifiers include smudged fingerprints, photographs that lack definition or a failure of the technology that is being used to obtain the personal identifier.
- 3.185. New paragraphs 38(1)(c) and (d) create an additional layer of protection for the non-citizen, stating that even if an identifier is unusable or its integrity is questionable there are only two circumstances in which a re-test is permitted. The first circumstance is where an authorised officer makes the requirement that the retest be conducted while the earlier identification test is being carried out or immediately after

the earlier test is carried out. The second circumstance is where authorisation for a retest is given under new subsection 38(4).

- 3.186. New subsection 38(2) provides that where the conditions outlined in new subsection 38(1) are met and a non-citizen is required to again provide a personal identifier, the non-citizen is taken, for the purposes of Division 2 of Part 5 of Schedule 1A, not to have provided the personal identifier as a result of the earlier test being carried out.
- 3.187. New subsection 38(3) enables an authorised officer to apply for authorisation to retest a non-citizen. It specifies that depending on the number of tests performed, applications for authorisation must be made to different classes of people. Where a retest has not previously been authorised under new subsection 38(4), an application must be made to a senior authorising officer as defined in new subsection 38(11). Where an earlier retest has been authorised by a senior authorising officer under new subsection 38(4), an application for a subsequent retest must be made to the Managing Director of AFMA, the Secretary of the Department or an SES Band 3 employee in the Department.
- 3.188. New subsection 38(3) also makes it clear that authorisation for a retest cannot be given by the same officer requiring the non-citizen to provide another personal identifier under new section 38(1).
- 3.189. New subsection 38(4) provides that a senior authorising officer, the Managing Director of AFMA, the Secretary of the Department or an SES Band 3 employee of the Department may authorise a retest where:
- they are reasonably satisfied that the personal identifier that has been provided by the non-citizen as a result of an earlier identification test is unusable; or
 - they are not reasonably satisfied about the integrity of that personal identifier.
- 3.190. New paragraph 38(5), (6) and (7) state the means by which a senior authorising officer, the Managing Director of AFMA, the Secretary of the Department or a SES Band 3 employee of the Department may provide authorisation for the retest.
- 3.191. New subsection 38(8) states that the power to authorise retests cannot be delegated. This requirement ensures that a person who makes an authorisation under new section 38 has sufficient authority to do so.
- 3.192. New subsection 38(9) clarifies that an authorisation under new subsection 38(4) does not authorise the use of force in carrying out an identification test.
- 3.193. New subsection 38(10) states that where an application for authorisation to carry out a retest is denied (that is, authorisation is not given under new subsection 38(4)), the non-citizen is taken to have complied with any requirement under the *Fisheries Management Act 1991* to provide the personal identifier.
- 3.194. New subsection 38(11) provides definitions of ‘senior authorising officer’ and ‘SES Band 3 employee’ for the purposes of this clause.
- 3.195. The two tiers of authorisation required to conduct personal identification tests is designed to safeguard the rights and welfare of the detainee.

Section 39: Definitions

- 3.196. New section 39 provides definitions of ‘permitted provision’, ‘provide’, ‘related document’ and ‘video recording’ for the purposes of Subdivision C of Part 5. This new section corresponds closely to section 261AKA of the *Migration Act 1958*.

Section 40: Accessing video recordings

- 3.197. New section 40 outlines the circumstances in which accessing a video recording of an identification test is an offence. This new section closely corresponds to section 261AKB of the *Migration Act 1958*.
- 3.198. New subsection 40(1) makes it an offence for a person who is not authorised under new section 41 to access a video recording, or for a person who is authorised to access a video recording, to access a video for an unauthorised purpose. This offence carries a maximum penalty of imprisonment for two years.
- 3.199. New subsection 40(2) states that this clause will not apply if the access is through a permitted provision of the videotape. A permitted provision of a video tape is defined in new section 39 as having the meaning assigned to it in new section 42(2). This definition includes circumstances such as the provision of the videotape to the non-citizen to whom it related, the provision of the video to a court or tribunal for a purpose relating to the subject of the videotape or the provision of the videotape for the purpose of storage.
- 3.200. The note below new section 40 states that a defendant bears the evidentiary burden in relation to new subsection 40(2). That is, the defendant must provide evidence that shows, beyond a reasonable doubt, that their access of the videotape was through a permitted provision of the videotape. This requirement is consistent with subsection 13.3(3) of the *Criminal Code*.

Section 41: Authorising access to video recordings

- 3.201. New section 41 outlines the circumstances in which AFMA may authorise access to video recordings of an identification test carried out on a non-citizen. This new section corresponds closely to section 261AKC of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.202. New subsection 41(1) provides that AFMA may authorise a specified person, or any person within a specified class of people, to access all video recordings made under new section 37 or to access a specified video recording or video recordings of a specified kind. This new subsection also states that such authorisation must be given in writing.
- 3.203. New subsection 41(2) requires that, in granting an authorisation under new subsection 41(1), AFMA must specify one or more of the purposes contained in that subsection. This provides an additional safeguard to the power to authorise access to video recordings.
- 3.204. New subsection 41(3) places a further restriction on an authorisation made under new subsection 41(1) regarding a prescribed type of personal identifier. AFMA must not authorise access if the purpose of that access would involve the purposes of investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully) or prosecuting a person for such an offence.

Section 42: Providing video recordings

- 3.205. New section 42 outlines the circumstances in which providing a video recording of an identification test is an offence. This new section closely corresponds to section 261AKD of the *Migration Act 1958*.
- 3.206. Under new subsection 42(1) it is an offence to cause a video recording of an identification test to be provided to another person where such a provision is not a permitted provision of the recording. This offence carries a maximum penalty of imprisonment for two years.

- 3.207. New subsection 42(2) contains the circumstances in which a provision of a videotape of an identification test is a 'permitted provision'. These circumstances include the provision of a videotape for the purpose of administering or managing the storage of video recordings; or making the video recording available to the non-citizen to whom it relates; or for the purpose of a proceeding, before a court or a tribunal, relating to the non-citizen to whom the video recording in question relates; or for any purpose connected with determining whether a civil or criminal liability has arisen from a person carrying out or helping to carry out an identification test under the *Fisheries Management Act 1991*.
- 3.208. New subsection 42(3) further provides that a provision of the videotape is not a permitted provision if it constitutes a disclosure of a prescribed type of personal identifier and the provision is for the purposes of either investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully) or prosecuting a person for such an offence.

Section 43: Unauthorised modification of video recordings

- 3.209. New section 43 outlines the circumstances in which modifying a video recording of an identification test is an offence. This new section closely corresponds to section 261AKE of the *Migration Act 1958*.
- 3.210. New section 43 makes it an offence to cause any unauthorised modification of a video recording of an identification test, where such modification was made with intent to modify and with knowledge that such modification is unauthorised. This offence carries a maximum penalty of imprisonment for two years.
- 3.211. New section 45 further explains the parameters of unauthorised modification.

Section 44: Unauthorised impairment of video recordings

- 3.212. New section 44 outlines the circumstances in which impairing a video recording of an identification test is an offence. This new section closely corresponds to section 261AKF of the *Migration Act 1958*.
- 3.213. New section 44 makes it an offence for a person to cause any unauthorised impairment of:
- the reliability of a video recording; or
 - the security of the storage of a video recording; or
 - the operation of a system by which a video recording is stored
- where that person intends to cause the impairment and knows that the impairment is unauthorised. This offence carries a maximum penalty of imprisonment for two years.
- 3.214. New section 45 further explains the parameters of unauthorised impairment.

Section 45: Meanings of unauthorised modification and unauthorised impairment etc.

- 3.215. New section 45 explains the terms "unauthorised" and "caused" in the context of new sections 43 and 44. This section closely corresponds to section 261AKG of the *Migration Act 1958*.
- 3.216. New subsection 45(1) explains that for the purposes of Subdivision C of Division 2 of Part 5 any action described in new section 43 and 44 is unauthorised if the person is not entitled to cause that modification or impairment.

- 3.217. New subsection 45(2) states that any modification or impairment caused by the person is not unauthorised merely because that person has an ulterior purpose for causing it.
- 3.218. New subsection 45(3) states that a person causes any modification or impairment of a video recording if the person's conduct substantially contributes towards it. This means that where two or more people have jointly caused an unauthorised modification or impairment of a video recording they may all be liable under the offences outlined in new sections 43 and 44.
- 3.219. New subsection 45(4) provides that where a modification or impairment of a video recording is done by a person under a warrant issued under the law of the Commonwealth, a State or a Territory this is authorised impairment or modification.

Section 46: Destroying video recordings

- 3.220. New section 46 outlines the circumstances in which failing to destroy a video recording of an identification test within ten years is an offence. This new section closely corresponds to section 261AKH of the *Migration Act 1958*.
- 3.221. New section 46 makes it an offence for a person who has day-to-day responsibility for the system under which video recordings of identification tests are stored to fail to physically destroy the video recording, and all copies of that recording, within 10 years of it being made. The maximum penalty for this offence is two years imprisonment.
- 3.222. This provision safeguards the use of personal information and limits the period in which the information may be stored.

Section 47: Minors

- 3.223. New section 47 contains special rules to be applied in carrying out identification tests on minors. Minors are defined for the purposes of Part 5 of Schedule 1A by new section 25 as persons who are less than 18 years old. This section closely corresponds to subsections 261AL(1), (5) and (6) of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.224. New subsection 47(1) restricts the types of personal identifiers that can be required from non-citizen minors who are less than 15 years old. The only personal identifiers that may be required from a person who is less than 15 years old are measurements of their height and weight or a photograph, or other image, of their face and shoulders.
- 3.225. The age limit on the requirement to provide personal identifiers was set at 15 years so as to be consistent with international comparisons and the *Migration Act 1958*.
- 3.226. New subsections 47(2) and (3) set out the requirement for a parent, guardian or independent person to be present while an identification test is carried out on any non-citizen minor, not just those who are less than 15 years old.
- 3.227. New subsection 47(3) further requires that where the guardian of the child is the Minister administering the *Immigration (Guardianship of Children) Act 1946*, the identification test must be carried out in the presence of an independent person other than that Minister.

Section 48: Incapable persons

- 3.228. New section 48 contains special rules to be applied in carrying out identification tests on incapable persons. Incapable persons are defined for the purposes of Part 5 Schedule 1A by new section 25 as a person who is incapable of understanding the general nature and effect of, and purposes of, a requirement to provide a personal

identifier. This new section corresponds closely to subsections 261AM(1) and (4) of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

- 3.229. New subsection 48(1) restricts the type of identifiers that can be required from incapable persons under the *Fisheries Management Act 1991*. The only personal identifiers that may be required from an incapable person are measurements of their height and weight or a photograph, or other image, of the non-citizen's face and shoulders.
- 3.230. New subsection 47(2) states that an identification test on an incapable person must be carried out in the presence of either a parent or guardian of the incapable person or an independent person.

Section 49: Definitions

- 3.231. New section 49 provides definitions of 'disclose', 'identifying information', 'permitted disclosure', 'unauthorised impairment' and 'unauthorised modification' for the purposes of Division 4 of Part 5 of Schedule 1A. This section closely corresponds to section 336A of the *Migration Act 1958*.

Section 50: Application

- 3.232. New section 50 makes it clear that section 15.4 of the *Criminal Code* (which relates to extended geographical jurisdiction) applies to all offences against Division 4 of Part 5 of Schedule 1A. This new section corresponds closely with section 336B of the *Migration Act 1958*.
- 3.233. The application of section 15.4 of the *Criminal Code* means that the offences under Division 4 of Part 5 of Schedule 1A can be committed regardless of whether or not the conduct (or the result of the conduct) constituting the alleged offence occurred in Australia. This provision is necessary as some of the offences could potentially relate to the disclosure of information to a foreign country and this provision puts beyond doubt that the disclosure of the information will constitute an offence regardless of whether the disclosure was made or received in a foreign location.

Section 51: Accessing identifying information

- 3.234. New section 51 outlines the circumstances in which accessing identifying information is an offence. This new section corresponds closely with section 336C of the *Migration Act 1958*.
- 3.235. New subsection 51(1) makes it an offence for a person to access identifying information where that person has not been authorised to access the identifying information for the purpose for which the person accessed it. The maximum penalty for this offence is two years imprisonment.
- 3.236. New subsection 51(2) provides that the offence contained in new section 30(1) does not apply if a person accesses identifying information through a permitted disclosure. The term 'permitted disclosure' is defined in new subsections 53(2) and (3) of Division 4 of Part 5 of Schedule 1A.
- 3.237. The note at the end of new subsection 51(2) states that a defendant bears the evidentiary burden in relation to new subsection 51(2). That is, the defendant must provide evidence that shows, beyond a reasonable doubt, that their access of the videotape was through a permitted provision of the videotape. This requirement is consistent with subsection 13.3(3) of the *Criminal Code*.

Section 52: Authorising access to identifying information

3.238. New section 52 outlines the circumstances in which AFMA may authorise access to identifying information about a non-citizen. This new section corresponds closely to section 336D of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.239. New subsection 52(1) provides that AFMA may authorise a specified person, or any person within a specified class of people, to access identifying information of the kind specified in the authorisation. This new subsection also states that such authorisation must be given in writing.

3.240. New subsection 52(2) requires that, in granting an authorisation under new subsection 52(1), AFMA must specify one or more purposes for which access is authorised. These purposes are:

- One or more of the purposes set out in new subsection 26(3), which includes purposes such as assisting in the identification of non-citizens and enhancing AFMA's ability to identify non-citizens who have a criminal history relating to fisheries;
- Disclosing identifying information in accordance with Division 4 of Part 5 of Schedule 1A;
- Administering or managing the storage of identifying information;
- Making identifying information available to the person to whom it relates;
- Modifying identifying information to enable it to be matched with other identifying information;
- Modifying identifying information in order to correct errors or ensure compliance with appropriate standards;
- Making decisions under the *Fisheries Management Act 1991*;
- Complying with laws of the Commonwealth or the States or Territories; or
- Disclosing personal information under clause 59 (about disclosure of information about a person who has been in detention for the purposes of the immigration detention or removal of the person).

3.241. New subsection 52(3) places a further restriction on an authorisation made under new subsection 52(1). Where the identifying information in question relates to a personal identifier of a prescribed type, an authorising purpose under new subsection 52(2) must not include or involve the purposes of investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully) or prosecuting a person for such an offence.

Section 53: Disclosing identifying information

3.242. New section 53 outlines the circumstances in which disclosing identifying information is an offence. This new section corresponds closely with section 336E of the *Migration Act 1958*.

3.243. New subsection 53(1) makes it an offence for a person to engage in conduct that causes the disclosure of identifying information unless that disclosure is a permitted disclosure. The maximum penalty for this offence is two years imprisonment.

3.244. New subsection 53(2) defines 'permitted disclosure' to include a disclosure for the purpose of data matching, managing the storage of identifying information, making the identifying information available to the non-citizen to whom it relates and disclosures permitted under new sections 54 and 59.

3.245. New subsection 53(3) places a further restriction on an authorisation made under new subsection 53(1) regarding a prescribed type of personal identifier. Such a disclosure is not permitted for the purposes of either investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully) or prosecuting a person for such an offence.

Section 54: Authorising disclosure of identifying information to foreign countries etc.

3.246. New section 54 states the circumstances in which AFMA may authorise the disclosure of identifying information to foreign countries and organisations. This new section closely corresponds to subsections 336F(1) and (2) of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.247. New subsection 54(1) allows AFMA to authorise a specified officer or detention officer, or any officer or detention officer included in a specified class of officers or detention officers, or an Agency prescribed in the regulations, to disclose certain identifying information to one or more foreign countries (or their respective police services, law enforcement bodies, border control bodies or a prescribed body), specified international organisations or specified organisations of foreign countries, that are responsible for fisheries matters or prescribed bodies of the Commonwealth or of a State or Territory.

3.248. New section 54 allows AFMA to authorise an agency to disclose information to foreign governments and organisations. The Department of Foreign Affairs and Trade (DFAT) is an agency that will be prescribed in regulations to transmit such information to the governments of foreign countries using diplomatic channels. However, this section will not allow DFAT (or any other agency prescribed in the regulations) to control of the information for their own purposes.

3.249. New subsection 54(2) provides that AFMA must specify the purpose(s) for which the disclosure is authorised as set out in subsection 26(3).

Section 55: Unauthorised modification of identifying information

3.250. New section 55 outlines the circumstances in which modifying identifying information is an offence. This new section closely corresponds to section 336G of the *Migration Act 1958*.

3.251. New section 55 makes it an offence to cause any unauthorised modification of identifying information, where that person intends to cause the modification and knows that the modification is unauthorised. This offence carries a maximum penalty of imprisonment for two years.

3.252. New section 57 further explains the parameters of unauthorised modification.

Section 56: Unauthorised impairment of identifying information

3.253. New section 56 outlines the circumstances in which impairing identifying information is an offence. This new section closely corresponds to section 336H of the *Migration Act 1958*.

3.254. New section 56 makes it an offence for a person to cause any unauthorised impairment of:

- the reliability of identifying information; or
- the security of the storage of identifying information; or
- the operation of a system by which identifying information is stored

where that person intends to cause the impairment and knows that the impairment is unauthorised. This offence carries a maximum penalty of imprisonment for two years.

3.255. New section 57 further explains the parameters of unauthorised impairment.

Section 57: Meanings of unauthorised modification and unauthorised impairment etc.

3.256. New section 57 explains the terms “unauthorised” and “caused” in the context of new sections 55 and 56. This section closely corresponds to section 336J of the *Migration Act 1958*.

3.257. New subsection 57(1) explains that for the purposes of Division 4 of Part 5 any action described in new section 55 and 56 is unauthorised if the person is not entitled to cause that modification or impairment.

3.258. New subsection 57(2) states that any such modification or impairment caused by the person is not unauthorised merely because that person has an ulterior purpose for causing it.

3.259. New subsection 57(3) states that a person *causes* any modification or impairment of identifying information if the person’s conduct substantially contributes towards it. This means that where two or more people have jointly caused an unauthorised modification or impairment of identifying information they may all be liable under the offences outlines in new sections 55 and 56.

3.260. New subsection 57(4) provides that where such modification or impairment is done by a person under a warrant issued under the law of the Commonwealth, a State or a Territory, this is authorised.

Section 58: Identifying information may be indefinitely retained

3.261. New section 58 simply provides that identifying information may be indefinitely retained. This section corresponds closely with paragraph 336L(1)(a) of the *Migration Act 1958* because under Schedule 1A of the *Fisheries Management Act 1991* any identifying information will always be about someone who is, or has been, in detention. As such, this new section will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.

Part 6: Disclosure of detainees’ personal information

Section 59: Disclosure of detainees’ personal information

3.262. New section 59 outlines the circumstances and purposes for which an agency or organisation that has been responsible for the detention of an individual may disclose personal information about the detainee.

3.263. New subsection 59(1) contains the types of agencies and organisations to which personal information pertaining to a detainee may be disclosed by an agency which is, or has been, responsible for the detention of that detainee. The agencies and organisations to whom a disclosure of personal information about a detainee may be made, are agencies or organisations that are, or will be, responsible for:

- taking the individual into immigration detention; or
- keeping the individual in immigration detention; or
- causing the individual to be kept in immigration detention; or
- the removal of the individual.

3.264. A disclosure of personal information may only be made to an organisation or agency of:

- the immigration detention of the individual; and

- the removal of the individual; and
- the welfare of the individual while in immigration detention or being removed.

3.265. This places a stringent restriction on the purposes by which personal information may be shared. Information about detainees will only be disclosed to an agency or organisation which has a legislative reason to know such information (in accordance with new section 59). This will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention. The types of information that may be disclosed would include medical, behavioural and identity information.

3.266. New subsection 59(3) defines 'agency', 'immigration detention', 'organisation', 'personal information' and 'removal' for the purposes of new section 59.

Item 14: Transitional – persons detained just before commencement

3.267. Item 14 states that if a person has been detained just before the commencement of the new Schedule 1A of the *Fisheries Management Act 1991*, new Schedule 1A will apply to that person as if they had been detained by the officer under that Schedule. This provides certainty for officers and detainees during the transition period when Schedule 1A comes into force.

TORRES STRAIT FISHERIES ACT 1984

Item 15: Subsection 3(1)

3.268. Item 15 inserts a definition of 'Australian resident' into section 3(1) of the *Torres Strait Fisheries Act 1984*. This definition replicates the definition of 'Australian resident' already included in section 4(1) of the *Fisheries Management Act 1991*.

Item 16: At the end of subsection 42(1)

3.269. This item adds a note referring to new Schedule 2 to the end of subsection 42(1) of the *Torres Strait Fisheries Act 1984* to the same effect as the amendment made to the *Fisheries Management Act 1991* by Item 4. Schedule 2 relates to the detention of illegal foreign fishers.

Item 17: After subsection 42(6)

3.270. This item adds a provision mirroring section 90 of the *Fisheries Management Act 1991* to section 42 of the *Torres Strait Fisheries Act 1984*. New subsection 42(6AA) will protect officers, and people assisting officers, from liability when exercising powers under the *Torres Strait Fisheries Act 1984* for all things done in good faith. This provides the same protection as section 90 of the *Fisheries Management Act 1991*.

3.271. This amendment is one of a package of amendments aimed at creating maximum consistency between the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984*.

Item 18: At the end of Part VI

3.272. This Item adds a Division heading and a new section 54A referring to the provisions relating to the detention of suspected illegal foreign fishers which will be contained in the new Schedule 2 of the *Torres Strait Fisheries Act 1984*. The purpose of this new section is to give effect to new Schedule 2.

Item 19: Schedule (heading)

3.273. This item relabels the heading of the existing Schedule to the *Torres Strait Fisheries Act 1984* as ‘Schedule 1’ to provide for the addition of new Schedule 2 to the Act.

Item 20: At the end of the Act

3.274. This item inserts new Schedule 2 at the end of the *Torres Strait Fisheries Act 1984*. Schedule 2 will contain powers relating to the detention of suspected illegal foreign fishers.

3.275. The provisions of new Schedule 2 of the *Torres Strait Fisheries Act 1984* have been drafted to ensure maximum consistency with new Schedule 1A of the *Fisheries Management Act 1991*. This means that the explanations of the various provisions of Schedule 2 of the *Torres Strait Fisheries Act 1984* substantially replicate the explanation offered regarding the counterpart provision in Schedule 1A of the *Fisheries Management Act 1991*.

Part 1: Preliminary

Section 1: Main objects of this Schedule

3.276. New section 1 outlines the three main objects of the new Schedule 2 to the *Torres Strait Fisheries Act 1984*. These three objects are to provide for the detention of suspected illegal foreign fishers, to allow for detainees to be appropriately searched, screened and identified while protecting the welfare of the detainee and to facilitate the transition of detainees from fisheries to immigration detention by creating consistency between the *Torres Strait Fisheries Act 1984* and the *Migration Act 1958*.

Section 2: Definitions

3.277. New section 2 adds a definition of ‘authorised officer’, ‘detainee’, ‘detention’ and ‘detention officer’ for the purposes of Schedule 2 to the *Torres Strait Fisheries Act 1984*.

Section 3: Minister may appoint persons to be detention officers

3.278. New section 3 allows the Minister to appoint, by instrument, a person or members of a class or group of people to be detention officers. This will allow for the creation of a new class of officers with certain limited powers of detention under the *Torres Strait Fisheries Act 1984*. It is envisaged that employees and contractors of DIMIA and AFMA will be appointed as detention officers under the *Torres Strait Fisheries Act 1984* in the same way that employees and contractors are currently appointed as officers under the *Migration Act 1958*. Officers under the *Torres Strait Fisheries Act 1984* do not need to also be appointed as detention officers as they already have the necessary powers.

3.279. New subsection 3(2) provides that an instrument appointing officers can refer to a class of persons, such as all employees of a particular contracted company, to be officers. The instrument may also specify that a person may join the specified class of persons within a particular timeframe, as specified in the instrument.

Section 4: Detention officers subject to directions

3.280. New section 4 provides that detention officers are subject to the directions of the Minister or AFMA in the exercise of their powers, and the performance of their duties, under Schedule 2 of the *Torres Strait Fisheries Act 1984*. In practice, day-to-day operational directions will almost always be provided to detention officers by AFMA.

Section 5: Detention officer etc. not liable to certain actions

3.281. New subsection 5(1) provides protection from liability for any kind of court proceedings for detention officers, or people assisting detention officers, for anything done in good faith in the exercise of the powers and functions contained in Schedule 2 of the *Torres Strait Fisheries Act 1984*. As noted beneath new section 5(1), this new section reflects the similar protection provided to officers, and people assisting officers, in the new subsection 42(6AA) of the *Torres Strait Fisheries Act 1984* (see Item 17 above).

3.282. New subsection 5(2) clarifies that new subsection 5(1) does not affect any contractual liability of a detention officer or a person assisting a detention officer. This exclusion is to ensure that AFMA retains the potential to sue any detention officer or person assisting a detention officer for breach of contract if circumstances, which may constitute a breach of contract, ever arise.

Section 6: AFMA may authorise officers and detention officers

3.283. New section 6 provides that AFMA may authorise one or more officers and/or detention officers, by instrument, for the purposes of a specified provision of new Schedule 1A. This provision will ensure that tight control is maintained over the number and type of people who will be authorised to use certain powers contained in the new Schedule 2. Persons who are authorised under new section 6 are referred to in Schedule 1A as ‘authorised officers’.

Section 7: Persons who are authorised officers for the purposes of Migration Act 1958 are taken to be authorised for this Schedule

3.284. New section 7 provides for a scheme of automatic authorisation of detention officers who are authorised to carry out certain powers under the *Migration Act 1958*.

3.285. New subsection 7(1) states that a person who is an officer or a detention officer under the *Torres Strait Fisheries Act 1984* and is an authorised officer in regards to specified sections within the *Migration Act 1958*, is to be considered authorised for the purposes of the corresponding provisions of the new Schedule 2 of the *Torres Strait Fisheries Act 1984*. The provisions of the *Migration Act 1958* and the corresponding provisions of the new Schedule 2 of the *Torres Strait Fisheries Act 1984* are contained in columns two and three of the table beneath new subsection 7(1).

3.286. This provision will allow officers to be dually authorised to use certain powers under both the *Torres Strait Fisheries Act 1984* and the *Migration Act 1958*. This will assist in providing a seamless transition for people in fisheries and then immigration detention.

3.287. This provision for automatic authorisation is subject to appropriate limitations imposed by new subsection 7(2) and (3). These new subsections provide that if officers are authorised to undertake identity tests, this power is strictly limited to the specified types of identity tests in that authorisation. Additionally, AFMA may, by

instrument, specify that certain people, who would otherwise be authorised under new subsection 7(1), are not authorised to undertake certain powers.

Part 2: Detaining suspected illegal foreign fishers

Section 8: Power to detain

- 3.288. New section 8 provides officers with the power to detain people who are suspected of committing an illegal foreign fishing offence. This section substantially replicates the power contained in section 84(1)(ia) of the *Fisheries Management Act 1991* which is repealed by Item 3 of this package of amendments and is being added to the *Torres Strait Fisheries Act 1984* to ensure maximum consistency between the *Torres Strait Fisheries Act 1984*, the *Fisheries Management Act 1991* and the *Migration Act 1958*.
- 3.289. New subsection 8(1) gives an officer the power to detain a person, in certain circumstances, for the purposes of deciding whether or not to charge them with committing an offence against section 45, 48, 49 or 51 of the *Torres Strait Fisheries Act 1984*, or an offence against section 6 of the *Crimes Act 1914* relating to such an offence.
- 3.290. This power is restricted by the requirement that it can only be used to detain people where the officer has reasonable grounds to believe that the person is not an Australian citizen or resident and that the person was on a foreign boat, or a Papua New Guinea boat, when it was used in the commission of an offence against one of the sections outlined in new subsection 8(1).
- 3.291. New subsection 8(2) clarifies the limits of the power contained in new subsection 8(1) by ensuring that new subsection 8(1) cannot be interpreted as authorising an officer to use more force in detaining a person than is reasonably necessary.

Section 9: Relationship with Part IC of the Crimes Act 1914

- 3.292. New section 9 extends the protective provisions and rights that a protected suspect has under Part IC of the *Crimes Act 1914* to detainees under the *Torres Strait Fisheries Act 1984*. New section 9 substantially replicates current subsection 84A(2) of the *Fisheries Management Act 1991*, which is repealed by Item 5 of this package of amendments and is being added to the *Torres Strait Fisheries Act 1984* to ensure maximum consistency between the *Torres Strait Fisheries Act 1984*, the *Fisheries Management Act 1991* and the *Migration Act 1958*.

Section 10: Detention officer may detain person already detained by officer

- 3.293. New subsection 10(1) allows for detention officers to continue the detention arrangements following the initial detention of a person by an officer. A detention officer may only detain a person who has been initially detained by an officer and who is presented by an officer to the detention officer to continue the detention of that person. This power is limited by new subsection 10(2) which provides that a detention officer may not detain a person if they have reasonable grounds to believe that the detained person had, at some point, ceased to be in fisheries detention since the last time that an officer had detained them under new section 8.
- 3.294. New subsection 10(2) will apply, in practice, if a detainee escapes following initial detention. Because escape from detention is not in itself a detainable offence (see new section 14 below) a detainee, if recaptured, could not be returned to detention under the *Torres Strait Fisheries Act 1984* and therefore could not be detained by a detention officer under the *Torres Strait Fisheries Act 1984*. However, because the

detainee's enforcement visa automatically expires as soon as they escape from detention, a recaptured detainee would instead be detained in immigration detention, by a duly authorised officer under the *Migration Act 1958*, as an unauthorised non-citizen.

Section 11: Detention on behalf of an officer or detention officer

- 3.295. New section 11 provides for detention to continue, in certain circumstances, in the absence of the direct presence of an officer or detention officer. In practice, this new section will allow for a detainee to be moved to a place where they can be cared for better while their offences are being investigated. For example, a detainee may be moved off a boat, if it is unseaworthy or there are poor weather conditions, to a land-based detention facility. It will also allow detainees to be taken to hospital or other places, generally on a short term basis.
- 3.296. New subsection 11(1) provides the places in which a detainee may be detained on behalf of an officer or a detention officer. As well as including places such as prisons, police stations and hospitals, the subsection provides that the Minister may approve, in writing, a particular place for people to be held for the purposes of this section.

Section 12: Power to move detainees

- 3.297. New section 12(1) provides officers and detention officers with the power to move detainees. This section substantially replicates current section 84(1)(ib) of the *Fisheries Management Act 1991*, which is repealed in Item 3 of this package of amendments and is being added to the *Torres Strait Fisheries Act 1984* to ensure maximum consistency between the *Torres Strait Fisheries Act 1984*, the *Fisheries Management Act 1991* and the *Migration Act 1958*.
- 3.298. A detainee may need to be moved to a place where they can be cared for better while their offences are being investigated. For example, a detainee may be moved off a boat, if it is unseaworthy or there are poor weather conditions, to a land-based detention facility.
- 3.299. New subsections 12(2) and (3) limit this power to ensure that no more force than is reasonably necessary is used to move a detainee and that all relevant matters (including the administration of justice and the welfare of the detainee) are considered before a decision is taken to move a detainee.

Section 13: End of detention

- 3.300. New section 13 outlines the circumstances in which a detainee must be released from detention. New subsection 13(1) substantially replicates the old section 84A of the *Fisheries Management Act 1991*, which is repealed by Item 5 of this package of amendments. This new section is being added to the *Torres Strait Fisheries Act 1984* to ensure maximum consistency between the *Torres Strait Fisheries Act 1984*, the *Fisheries Management Act 1991* and the *Migration Act 1958*. New subsection 13(2), (3) and (4) have been drafted to accommodate Australia's obligations under the *Torres Strait Treaty*.
- 3.301. New section 13 is split into three sections outlining the different rules for dealing with the end of detention for different types of people.
- 3.302. New subsection 13(1) outlines the rules for the end of detention for a detainee, who is suspected of being an illegal fisher from a foreign boat.
- 3.303. New subsection 13(1) states that a detainee who was detained under new subsection 8(1), because the officer had reasonable grounds to believe they were engaged in illegal activities on a foreign boat, must be released under whichever of the following circumstances occurs first:

- as soon as an officer knows, or reasonably believes, that the detainee is an Australian citizen or resident;
 - at the time a detainee is brought before a magistrate for a fisheries offence against section 45, 48, 49 or 51 of the *Torres Strait Fisheries Act 1984*;
 - at the time a decision is made to charge a detainee with an offence; or
 - at the end of 168 hours (7 days) after the detention begins.
- 3.304. New section 13(1) does not apply to Papua New Guinean citizens or residents or any other foreign nationals found on Papua New Guinean boats. Subsection 13(1) provides that foreign nationals (other than Papua New Guinean citizens or residents) on foreign boats (other than Papua New Guinean boats) cannot be held in fisheries detention under the *Torres Strait Fisheries Act 1984* for longer than 168 hours.
- 3.305. New subsection 13(2) outlines the rules for end of detention for any detainee from a Papua New Guinean boat.
- 3.306. New subsection 13(2) states that a detainee who was detained under new subsection 8(1) because the officer had reasonable grounds to believe they were on a Papua New Guinean boat must be released under whichever of the following circumstances occurs first:
- as soon as an officer knows or reasonably believes that the detainee is an Australian citizen or resident;
 - as soon as an officer believes that the detainee did not commit an offence described in new subsection 8(1);
 - as soon as an officer finishes investigating whether the detainee committed an offence; or
 - at the end of 72 hours (3 days) after the detention begins.
- 3.307. New subsection 13(2) provides a slightly different detention regime for Papua New Guinean nationals and residents, and any other foreign nationals found on Papua New Guinean boats. This regime is in accordance with the *Torres Strait Treaty*. The *Torres Strait Treaty* obliges Australia to return Papua New Guinean citizens, residents and any other foreign nationals found on Papua New Guinean boats, to Papua New Guinea for prosecution of offences under Papua New Guinean laws.
- 3.308. New subsection 13(3) outlines the rules for end of detention for a Papua New Guinean national or resident who is found illegally fishing on a foreign boat.
- 3.309. New subsection 13(3) states that where an officer or detention officer knows or reasonably believes that the detainee is either a citizen of Papua New Guinea or a person who is usually resident in Papua New Guinea they will be treated in the manner described in 13(2). Therefore, they cannot be held for longer than 72 hours.
- 3.310. New subsection 13(4) provides for circumstances where people are detained on a foreign boat, which was found illegally fishing, and it was later discovered that one or more of the persons detained were Papua New Guinean nationals or people normally resident in Papua New Guinea.
- 3.311. If a Papua New Guinean national or resident in such circumstances has been already detained for more than 72 hours, the effect of the provision is to validate the period in which they have been detained (if there was any doubt in this regard) and to require their immediate release from fisheries detention. If the Papua New Guinean national or resident had been detained for less than 72 hours, they will be subject to the conditions prescribed in new subsection 13(2) and must only be held for a maximum of 72 hours. If there is any doubt, the subsection also provides that the period for which they had been detained was valid.

Section 14: Escape from detention

- 3.312. This section makes escape from detention an offence punishable on conviction by imprisonment for up to two years. This section substantially replicates current section 98A of the *Fisheries Management Act 1991*, which is repealed in Item 11 of this package of amendments and is being added to the *Torres Strait Fisheries Act 1984* to ensure maximum consistency between *Torres Strait Fisheries Act 1984*, the *Fisheries Management Act 1991* and the *Migration Act 1958*.
- 3.313. Because escape from detention is not in itself a detainable offence, a detainee, if recaptured, could not be returned to detention under the *Torres Strait Fisheries Act 1984* and therefore could not be detained by a detention officer under the *Torres Strait Fisheries Act 1984*. However, because the detainee's enforcement visa automatically expires as soon as they have escaped from detention, a recaptured detainee would instead be detained in immigration detention as an unauthorised non-citizen, by an officer duly authorised under the *Migration Act 1958*.

Part 3: Searching and screening detainees and screening their visitors

Section 15: Searches of detainees

- 3.314. New section 15 allows for an authorised officer to search a detainee in certain circumstances. This clause substantially replicates old paragraph 84(1)(ic) of the *Fisheries Management Act 1991*, which is repealed by Item 3. It also corresponds closely to section 252 of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.315. New subsection 15(1) provides that a detainee, and any clothes or property under the immediate control of the detainee, may be searched without a warrant for one of the purposes outlined in new subsection 15(2).
- 3.316. This power is aimed at ensuring the safety of detainees, and other people, and ensuring that authorised officers have a means of determining whether a detainee is concealing evidence of their involvement in the commission of an illegal foreign fishing offence. As such, new subsection 15(2) limits the power in subsection 15(1) by providing that a search may only be conducted for two purposes. The authorised officer must only conduct a search for the purpose of determining whether the person has in their possession, a weapon (or other thing capable of being used to inflict bodily injury or to help the detainee escape from detention) or any evidence of the commission of an offence against section 45, 48, 49 or 51 of the *Torres Strait Fisheries Act 1984* or an offence against section 6 of the *Crimes Act 1914* in relation to one of those offences.
- 3.317. New subsection 15(3) allows an authorised officer to take and keep in their possession any of the things described in new subsection 15(2) found during a search, for such time as the authorised officer thinks is necessary for the purposes of the *Torres Strait Fisheries Act 1984* or the *Migration Act 1958*.
- 3.318. New subsection 15(4) clarifies that this new section does not allow an authorised officer, or any other person conducting the search under new subsection 15(5), to remove any of a detainee's clothing or to require a detainee to remove any of their clothing, for the purposes of conducting the search.
- 3.319. New subsection 15(5) requires that a search under new subsection 15(1) be undertaken by an authorised officer of the same sex as the subject of the search. Alternatively, where it is not reasonably possible for an authorised officer of the same sex to conduct the search, the search may be conducted by any other person of the same sex as the subject who is requested by an authorised officer, and agrees, to conduct the search.

- 3.320. New subsection 15(6) provides that if a person assisting an authorised officer, under new subsection 15(5), acts in good faith and does not contravene the requirement in new subsection 15(7), they will not be liable for either criminal or civil actions or proceedings.
- 3.321. New subsection 15(7) states that an authorised person or other person assisting an authorised officer must not use more force, or subject a detainee to greater indignity, than is reasonably necessary in order to conduct the search.
- 3.322. New subsection 15(8) clarifies that a search may be conducted under this new section whether or not a screening procedure or a strip search of the detainee (under new section 16 and 17) are also conducted.
- 3.323. New section 15 provides sufficient safeguards to ensure that all searches are conducted in an appropriate manner.

Section 16: Power to conduct a screening procedure

- 3.324. New section 16 provides authorised officers with the power to conduct screening procedures on detainees in certain circumstances. This section corresponds closely to section 252AA of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.325. New subsection 16(1) allows authorised officers to conduct screening procedures without a warrant in relation to a detainee (other than those held in State or Territory prisons (see new section 22)). This power is aimed at ensuring the safety of detainees, and other people, and is limited to determining whether the detainee is concealing a weapon or any other thing capable of inflicting bodily harm or being used to escape from detention.
- 3.326. New subsections 16(2) and (3) provide safeguards restricting the power to conduct screening procedures. An officer who conducts a screening procedure is prohibited from using greater force, or subjecting the detainee to greater indignity, than is reasonably necessary in order to conduct the screening procedure. Similarly, an authorised officer must not remove any of the detainee's clothing, or to require the detainee to remove any of their clothing for the purpose of conducting the screening procedure.
- 3.327. New subsection 16(4) clarifies that a screening procedure may be conducted under this new section whether or not a search or a strip search of the detainee (under new section 15 and 17) are also conducted.
- 3.328. New subsection 16(5) provides definitions of 'conducting a screening procedure' and 'screening equipment' for the purposes of new section 16. Screening procedures include the use of metal detectors on detainees and x-rays on a detainee's possessions.

Section 17: Power to conduct a strip search

- 3.329. New section 17 allows for authorised officers to conduct strip searches on detainees in limited circumstances. This clause corresponds closely to section 252A of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.330. New subsection 17(1) provides that an authorised officer may conduct a strip search on a detainee, other than those held in State or Territory prisons (see new section 22), without a warrant. A strip search must only be conducted for the purposes of determining whether the detainee has a weapon or other thing capable of being used to inflict bodily injury or to escape detention on their person or in their possession.

The strip search must be conducted in accordance with the stringent rules set out in new section 18.

- 3.331. 'Strip search' is defined in new subsection 17(2) as a search of the detainee, of his or her clothing or of a thing in his or her possession. A strip search may include a requirement that the detainee remove some or all of their clothing and that the detainee's body and clothing be examined. It does not include searching the detainee's body cavities. A strip search may be as limited as requiring the removal of a jacket, or the detainee's socks and shoes, to search for the weapon or other thing.
- 3.332. New subsection 17(3) provides that an authorised officer may only conduct a strip search if they suspect, on reasonable grounds, that the detainee has a weapon or thing capable of inflicting bodily harm or being used to escape detention, hidden on their person, or in their clothes or possession, and that it is necessary to conduct a strip search in order to recover that weapon or other thing.
- 3.333. New subsection 17(4) states that an authorised officer may form a suspicion on reasonable grounds that a strip search is necessary on the basis of a search (under new section 15) or a screening procedure (under new section 16) even if the authorised officer was not the officer who conducted the search or screening procedure. The suspicion may also be based on any other information that is available to the authorised officer.
- 3.334. In addition to this reasonable suspicion, there must be a high level authorisation for a strip search. A strip search of a detainee who is 18 years or older must be authorised by the Managing Director of AFMA, the Secretary of the Department or an SES Band 3 employee in the Department who is satisfied that there are reasonable grounds for those suspicions. A strip search of a minor between the ages of 10 and 18 years must be ordered by a magistrate after they are satisfied that there are reasonable grounds for those suspicions.
- 3.335. New subsections 17(5), (6) and (7) state the means by which approval under new subsection 17(4) must be provided. This authorisation must be recorded in writing and signed by the person giving the high level authorisation.
- 3.336. New subsection 17(8) provides that the power to authorise a strip search cannot be delegated to any other person. This ensures that strip searches will only ever be authorised as a last resort by a person of sufficient authority to make such a decision.
- 3.337. New subsections 17(9), (10) and (11) provide that a magistrate can choose not to accept the power conferred under paragraph 17(3) (c). If they do accept the power, they will be exercising it in their personal capacity rather than in their capacity as a court or a member of the court while retaining all protection and immunity covering decisions made by, or as a member of, that court. This makes it clear that the exercise of the power conferred by new section 17 must be voluntary.
- 3.338. New subsection 17(12) clarifies that a strip search may be conducted under this new section whether or not a search or a screening procedure (under new sections 15 and 16) have also been carried out on the detainee.
- 3.339. New subsection 17(13) defines 'business day' and 'SES Band 3 employee' for the purposes of new section 17.

Section 18: Rules for conducting a strip search

- 3.340. The new section 18 outlines comprehensive rules for conducting a strip search of a detainee under the new section 17. These rules are based on those contained in section 252B of the *Migration Act 1958* which, in turn, are based on those contained in 3ZI of the *Crimes Act 1914*.

- 3.341. The addition of new section 18 to the *Torres Strait Fisheries Act 1984* will facilitate the seamless transfer of detainees from fisheries detention to immigration with one set of rules applying to the detainee's entire period of detention.
- 3.342. The rules contained in this new section will ensure that strip searches are conducted in a way that will protect the dignity of the detainee as much as possible while still allowing strip searches in very limited circumstances to ensure the safety of the detainee and other people.
- 3.343. New paragraph 18(1)(a) provides that a detainee must not be subjected to greater indignity than is reasonably necessary to conduct the strip search.
- 3.344. New paragraph 18(1)(b) provides that a strip search of a detainee must be conducted in a private area.
- 3.345. New paragraph 18(1)(c) provides that a strip search must only be conducted by an authorised officer of the same sex as the detainee.
- 3.346. New paragraph 18(1)(d) additionally provides that a strip search must not be conducted in the presence or view of a person who is the opposite sex to the detainee. This stipulation is subject to new subsections 18(2), (3) and (5) which provide some limited exceptions to this rule. A parent, guardian, person representing the detainee's interest or a person nominated by the detainee to be present for the strip search does not have to be of the same sex as the detainee. Additionally, if a medical practitioner is assisting an authorised officer to conduct the strip search, they may be of the opposite sex of the detainee if a medical practitioner of the same sex is not available within a reasonable time.
- 3.347. New paragraph 18(1)(e) provides that a strip search must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of conducting the strip search. This new paragraph is also subject to new subsections 18(2), (3) and (5).
- 3.348. New paragraph 18(1)(f) prohibits a strip search of a detainee who is under 10 years of age.
- 3.349. New paragraph 18(1)(g) introduces an additional requirement where the detainee is between the ages of 10 and 18 or is incapable of managing their own affairs. In these circumstances, a strip search must be conducted in the presence of the detainee's parent or guardian (where that person is in detention with the detainee and is readily available) or, where the presence of a parent or guardian is not acceptable to the detainee or such a person is not readily available as specified, another person, other than the authorised officer. This other person must be capable of representing the detainee's interests and be, as far as is practicable in the circumstances, acceptable to the detainee.
- 3.350. New paragraph 18(1)(h) provides that strip search of a detainee who is at least 18 years old and capable of managing their own affairs must be conducted in the presence of another person, if nominated by the detainee where that other person is readily available and willing to attend the strip search.
- 3.351. New paragraph 18(1)(i) provides that a strip search must not involve a search of the person's body cavities. This is consistent with the definition of a strip search contained in the new subsection 17(2).
- 3.352. New paragraph 18(1)(j) provides that a strip search must not involve the removal of more items of clothing or more visual inspection than the authorised officer conducting the search believes, on reasonable grounds, to be necessary to determine whether there is a weapon, or other thing described in new subsection 17(1,) hidden on the detainee, in their clothing or in a thing in their possession.
- 3.353. New paragraph 18(1)(k) restricts the use of force to that which is reasonably necessary to conduct the strip search.

- 3.354. New subsection 18(4) provides that neither a detainee's refusal or failure to nominate a person to be present during the strip search under new paragraph 18(1)(h) within reasonable time, nor a detainee's inability to nominate a person under that new paragraph who is readily available and willing to attend the strip search within a reasonable time will prevent a strip search from being conducted.
- 3.355. New subsection 18(5) provides that a strip search may be conducted with the assistance of another person where the authorised officer conducting the strip search considers such assistance to be necessary, for the purposes of conducting the strip search. Any other person assisting the authorised officer conducting the strip search must be of the same sex as the detainee unless they are a medical practitioner and a medical practitioner of the same sex as the detainee is not available within a reasonable time.
- 3.356. New subsection 18(6) excludes liability for any action against a person who, at the request of an authorised officer, assists in conducting a strip search of a detainee where that person acts in good faith and does not contravene any part of new section 18.
- 3.357. New subsection 18(7) provides that a detainee must be provided with adequate clothing if any of his or her clothing is damaged, destroyed or retained under new section 19 as a result of the strip search. This ensures that the welfare and dignity of the detainee is considered after the search is conducted.

Section 19: Possession and retention of certain things obtained during a screening procedure or strip search

- 3.358. New section 19 provides for the retention of certain thing found during a screening procedure (under new section 16) or a strip search (under 17) of a detainee. This new section closely corresponds to section 252C of the *Migration Act 1958* and section 3ZV of the *Crimes Act 1918*.
- 3.359. The addition of new section 19 to the *Torres Strait Fisheries Act 1984* will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.360. New subsection 19(1) allows an authorised officer to take possession of and retain a thing found in the course of conducting a screening procedure or a strip search if the thing might provide evidence of the commission of an offence against the *Torres Strait Fisheries Act 1984* or the thing is forfeited to the Commonwealth.
- 3.361. New subsection 19(2) states that a weapon or other thing which can be used to inflict bodily injury or help a detainee to escape from detention, described in subsections 16(1) or 17(1), is forfeited to the Commonwealth if it is found in the course of conducting a screening procedure or a strip search.
- 3.362. New subsection 19(3) prohibits an authorised officer from returning a thing forfeited to the Commonwealth. Instead, the authorised officer must give the thing forfeited under new subsection 19(2) to a constable as soon as practicable. Under subsection 3(1) of the *Crimes Act 1914*, 'constable' is defined as meaning a member or special member of the Australian Federal Police, or a member of the police force or police service of a State or Territory.
- 3.363. It is noted beneath new subsection 19(3) that Subdivision C of Division 6 of Part 6 of the *Torres Strait Fisheries Act 1984* sets out the procedure for dealing with thing seized as being forfeited under section 106A. This note makes a distinction between things that are automatically forfeited under section 106A and weapons that are forfeited to the Commonwealth under new subsection 19(2).
- 3.364. New subsection 19(4) outlines certain circumstances in which an authorised officer is required to take reasonable steps to return a thing retained under new subsection

19(1) that is not forfeited to the Commonwealth. The thing should be returned to the person from whom it was taken, or to the owner (if that person is not entitled to possess it). These circumstances are either where it is decided that the retained thing is not to be used in evidence or when a period of 60 days from when the authorised officer took possession of the thing has passed.

3.365. However, new subsection 19(5) sets out circumstances in which an authorised officer is not required to return the retained thing under new subsection 19(4). These include instances where proceedings related to the evidence have been instituted before the end of the 60 day period and have not been completed, an order under new section 21 has been made permitting an authorised officer to retain the thing for a further period, or the officer is otherwise authorised to retain, destroy or dispose of the thing.

Section 20: Authorised officer may apply for a thing to be retained for a further period

3.366. New section 20 provides an avenue for an authorised officer to apply for an extension of the period for which they may keep a thing retained during a screening procedure or strip search under the new section 19. It corresponds closely with section 252C of the *Migration Act 1958* and 3ZW of the *Crimes Act 1914*. The addition of new section 20 to the *Torres Strait Fisheries Act 1984* will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.367. Under new subsections 20(1) and (2), an authorised officer may apply to a magistrate for an order that a thing, retained under new subsection 19(1) and due to be returned under new subsection 19(4), may be retained for a further period. Such an application may be made in circumstances where proceedings have not yet been instituted and the 60 day period, or a period specified in an order of a magistrate under new section 21, is almost finished.

3.368. New subsection 21(3) requires that an authorised officer must take reasonable steps to discover and notify any persons whose interests would be affected by the retention of the thing before applying for an extension of the retention. This provision allows evidence to be preserved for use in court proceedings in cases where a delay in court proceedings has occurred. It also provides for the interests of other parties affected by the retention of the thing to be ascertained.

Section 21: Magistrate may order that thing be retained

3.369. New section 21 provides the circumstances in which a magistrate may make an order allowing an authorised officer to retain, for an extended period, an item found during a screening procedure or strip search of a detainee. This section closely corresponds to section 252E of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.370. New subsection 21(1) states that a magistrate may order that the authorised officer who made an application for an extension of the retention period for a thing under new section 20 may retain the thing. A magistrate may make such an order where they are satisfied that the extension is necessary for the purposes of an investigation as to whether an offence has been committed or to enable evidence of an offence to be secured for the purposes of a prosecution.

3.371. New subsection 21(2) states that the order must specify the period for which the authorised officer may retain the thing.

3.372. New subsections 21(3), (4) and (5) provide that a magistrate can choose not to accept the power conferred under paragraph 21(1) but that if they do accept the

power they will be exercising it in their personal capacity rather than in their capacity as a court or a member of the court while retaining all protection and immunity covering decisions made by, or as a member of, that court. This makes it clear that the exercise of the power conferred by new section 21 must be voluntary.

Section 22: Detainees held in State or Territory prisons or remand centres

3.373. New section 22 makes provision for searching detainees held in detention in a prison or remand centre of a State or Territory. This new section closely corresponds with section 252F of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.374. This new section provides that detainees held in State or Territory prisons or remand centres may be searched according to the relevant law of that State or Territory. New subsection 22(3) clarifies that new sections 16 and 17, regarding powers to conduct screening procedures and strip searches, do not apply where a detainee is held in a State or Territory prison or remand centre.

Section 23: Powers concerning entry to premises where detainee is detained

3.375. New section 23 provides certain powers relating to the entry of detainees' visitors to a premise where detainees are detained. This new section closely corresponds to section 252G of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.376. This power is required for the good order and security of detention centres as well as the safety of detainees, staff and other persons located there.

3.377. Under new subsection 23(1), an officer or detention officer may request that a person, about to enter a premise where a detainee is in detention, be screened. The screening procedure may involve walking through screening equipment or passing hand-held screening equipment over or around the person or around things in the person's possession or x-raying or screening things in a person's possession.

3.378. New subsection 23(2) defines 'screening equipment' as a metal detector or similar device for detecting objects or particular substances.

3.379. New subsection 23(3) allows an authorised officer, in certain circumstances, to request a person, about to enter premises where a detainee is in detention, to do some or all of the things outlined in new subsection 23(4). An authorised officer may make such a request where they suspect on reasonable grounds that the person has in their possession a thing that might:

- endanger the safety of the detainees, staff or other persons on the premises;
- or
- disrupt the order or security arrangements on the premises.

This request can be made in addition to the screening procedure outlined in subsection 23(1).

3.380. New subsection 23(4) lists the things that an authorised officer may request a person, entering a premises where detainees are detained, to do. Such a person may be requested to:

- allow the authorised officer to inspect the things in the person's possession;
- remove some or all of their outer clothing (such as a jacket or coat);
- remove items from the pockets of their clothing;
- open a thing in their possession, or remove the thing's contents, to allow the authorised officer to fully inspect the thing or its contents;

- leave a thing in their possession, or some or all of its contents, in a place specified by the authorised officer where the authorised officer suspects, on reasonable grounds, that the thing or its contents are capable of concealing something that might endanger the safety of the detainees, staff or other persons on the premises or disrupt the order or security arrangements at the detention centre.
- 3.381. New subsection 23(5) provides that a person who leaves a thing in a place specified by an authorised officer (under new subsection 23(4)(e)) is entitled to its return when they leave the premises.
- 3.382. However, under new subsection 23(6), if the possession of the thing, or anything in its contents, by the person is unlawful under a Commonwealth, State or Territory law applying to the premises the thing, or its contents, it must not be returned to the person, but rather, as soon as practicable, be given to a constable. Under subsection 3(1) of the *Crimes Act 1914*, ‘constable’ is defined as meaning a member or special member of the Australian Federal Police, or a member of the police force or police service of a State or Territory. This new subsection avoids the inappropriate situation of an authorised officer having to return an item found in the possession of a person visiting a detainee, if that person’s possession of the item is illegal.
- 3.383. Under new subsection 23(7), a person who does not comply with a request under new section 23 may be refused entry to the premises where a detainee is being detained.
- 3.384. New subsection 23(8) defines ‘premises’ to include a place, a vessel and an aircraft for the purposes of new section 23.

Part 4: Detainees’ rights to facilities for obtaining legal advice etc

Section 24: Detainee may have access to certain advice, facilities etc.

Under new section 24, the person responsible for the detention of a detainee must, if requested by the detainee, provide the detainee with access to reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his or her detention. This section closely corresponds to section 256 of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.

Part 5: Identifying detainees

Section 25: Definitions

3.385. This section adds several definitions for the purposes of new Part 5 of Schedule 2 of the *Torres Strait Fisheries Act 1984*. These definitions closely correspond to the definitions of these terms provided in section 5 of the *Migration Act 1958* and, as such; will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.

Section 26: Meaning of personal identifier

3.386. New subsection 26 provides a specific definition of a ‘personal identifier’ for the purposes of the new Part 5 of Schedule 2 of the *Torres Strait Fisheries Act 1984*. This section closely corresponds to section 5A of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to

immigration detention with one set of rules applying to the detainee's entire period of detention.

- 3.387. New subsection 26(1) states that 'personal identifier' means any of the following, including any of the following in digital form:
- fingerprints or handprints of a person (including those taken using paper and ink or digital live scanning technologies);
 - a measurement of a person's height and weight;
 - a photograph or other image of a person's face and shoulders;
 - an audio or a video recording of a person (other than a video recording of an identification test under new section 37);
 - an iris scan;
 - a person's signature;
 - any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*.
- 3.388. An "intimate forensic procedure" is defined by section 23WA of the *Crimes Act 1914* and is prohibited under the *Torres Strait Fisheries Act 1984*. These prohibited procedures include:
- an external examination of the genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
 - the taking of a [sample](#) of blood;
 - the taking of a [sample](#) of saliva, or a [sample](#) by buccal swab;
 - the taking of a [sample](#) of pubic hair;
 - the taking of a [sample](#) by swab or washing from the external genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
 - the taking of a [sample](#) by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
 - the taking of a dental impression;
 - the taking of a photograph or video recording of, or an impression or cast of a wound from, the genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts.
- 3.389. New subsection 26(2) imposes requirements on the Minister before the Governor-General can make regulations for the purposes of adding to the list of personal identifiers under new subsection 26(1). The Minister must be satisfied that:
- obtaining the identifier would not involve the carrying out of the intimate forensic procedures contained in section 23WA of the *Crimes Act 1914* (outlined in the previous paragraph); and
 - the identifier is an image of or a measurement or recording of, an external part of the body; and
 - obtaining the identifier will promote one or more of the purposes referred to in new subsection 26(3).

In practice, subsection 26(2) means that any regulations proposed to be made under new section 26 will be drafted in consultation with the Attorney-General.

- 3.390. New subsection 26(3) contains an extensive list of purposes referred to in new subsection 26(2)(c). The effect of new subsection 26(2)(c) is that the Minister must be satisfied that obtaining a new type of personal identifier will promote one or more of the following purposes before tabling any regulations under new section 26. These purposes are:

- to assist in the identification of, and to authenticate the identity of, any non-citizen who can be required under this Act to provide a personal identifier;
- to assist in identifying, in the future, any such non-citizen;
- to enhance AFMA's ability to identify non-citizens who have a criminal history relating to fisheries;
- to combat document and identity fraud in fisheries matters;
- to complement anti-people smuggling measures;
- to inform the governments of foreign countries of the identity of non-citizens who have been detained under, or charged with offences against, this Act;
- to facilitate international cooperation to combat fishing activities that involves a breach of the laws of Australia or of a foreign country.

Section 27: Limiting the types of identification tests that authorised officers may carry out

3.391. New section 27 allows AFMA to limit the types of identification tests that may be carried out by an authorised officer. This new section closely corresponds to section 5D of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.392. New subsection 27(1) will allow AFMA to authorise officers to carry out one or more types of identification tests without necessarily authorising them to conduct all types of identity tests. In this way, AFMA retains tight control over the type of identity tests that are being carried out on non-citizens.

3.393. New subsection 27(2) clarifies that an authorised officer is not authorised to carry out an identification test that is not a type of test specified in the instrument appointing the officer or detention officer as an authorised officer.

Section 28: Detainees must provide personal identifiers

3.394. Broadly, new section 28 requires that non-citizens in detention provide personal identifiers to authorised officers. This new section corresponds closely with section 262A of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.395. New subsection 28(1) makes it compulsory for a non-citizen in detention to provide one or more personal identifiers to an authorised officer. This new subsection also provides that there could be prescribed circumstances in which a non-citizen does not have to provide personal identifiers to an authorised officer.

3.396. New subsection 28(2) states that an authorised officer must not require a non-citizen in detention to provide a personal identifier other than:

- fingerprints or handprints of the person (including those taken using paper and ink or digital live scanning technologies);
- a measurement of the person's height and weight;
- a photograph or other image of the person's face and shoulders;
- the person's signature;
- any other personal identifier of a type prescribed under new section 26(1)(g) for the purposes of this paragraph.

3.397. New subsection 28(3) provides that the authorised officer must act in accordance with new Division 2 of Part 5 of Schedule 2 when taking personal identifiers.

3.398. It is noted beneath new section 28 that new section 32 allows reasonable force to be used in carrying out an identification test in limited circumstances.

Section 29: Authorised officers must require and carry out identification tests

- 3.399. New section 29 requires that authorised officers carry out one or more identification tests on non-citizens and specifies the manner in which identification tests must be carried out. Subsections (1) and (2) correspond closely to section 262B of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.400. New subsection 29(1) states that an authorised officer must require the non-citizen to provide at least one personal identifier by way of one or more identification tests unless prescribed circumstances under new section 28(1) exist.
- 3.401. New subsection 29(2) provides certain restrictions that must be observed in carrying out an identification test under this section.
- 3.402. New paragraph 29(2)(a) reinforces that an officer may only carry out an identification test on a non-citizen if they have been specifically authorised to carry out an identification test of that type by AFMA under new sections 2 and 27.
- 3.403. New paragraph 29(2)(b) requires that each identification test be carried out in accordance with the rules contained in new Subdivision B of Part 5. These rules provide for the conducting of identification tests and the circumstances in which force may be used.
- 3.404. New paragraph 29(2)(c) provides that identification tests must be carried in accordance with new Division 3 of Part 5, unless the authorised officer has reasonable grounds to believe that the non-citizen is not a minor or incapable person. This provision ensures that the more stringent conditions that apply to minors and incapable persons will always apply as the default position in the *Torres Strait Fisheries Act 1984*; unless there are reasons to believe that the non-citizen is not a minor or an incapable person. 'Minor' and 'incapable person' are defined for the purposes of new Part 5 in new section 25.
- 3.405. New subsection 29(3) ensures that new subsection 29(2)(a) applies to officers who have dual authorisations to do certain things under the *Torres Strait Fisheries Act 1984* and the *Migration Act 1958* (as per new section 7). Such officers are limited to performing only the types of identity tests that they have been authorised to perform under the *Migration Act 1958*. New subsection 29(3) provides that if migration officers have limited authorisation to conduct identification tests under 5D of the *Migration Act 1958*, they will be limited to performing those types of identity tests under the *Torres Strait Fisheries Act 1984* as if a limiting authorisation had been issued by AFMA under new section 27.

Section 30: Information to be provided before carrying out identification tests

- 3.406. New section 30 provides that non-citizens must be provided with certain information before an identity test is carried out. This information is to be provided by the authorised officer who will be performing the identity tests. This new section closely corresponds with section 262C of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.407. New subsection 30(1) provides that a non-citizen must be informed:
- that they may request that an independent person be present while the identification test is carried out and that the test be carried out by a person of the same sex as him or her; and
 - of such other matters as are specified in the regulations.
- 3.408. New subsection 30(2) further explains that the authorised officer must inform the non-citizen using a language (including sign language or braille) in which the non-

citizen is able to communicate with reasonable fluency. The non-citizen can be informed through an interpreter, if necessary.

3.409. New subsection 30(3), provides that the authorised officer may inform a non-citizen of the matters in new subsection 30(1) by giving the non-citizen a form setting out the information contained in the regulations. However, the form must be in a language in which the non-citizen is able to communicate with reasonable fluency (including braille).

3.410. The kind of information that may be prescribed in the regulations includes:

- the purpose and reasons for the test;
- the way in which the test is to be carried out, including the power to use reasonable force, if necessary;
- the ways in which the information that is collated can be used; the circumstances in which the information obtained may be disclosed to third parties;
- that the identification test may produce evidence against the non-citizen that might be used in a court of law;
- that a video recording may be made of the test; and
- the non-citizen's right to make a complaint to the Privacy Commissioner, or to make an application under the *Freedom of Information Act 1982* and how the non-citizen may go about doing so.

Section 31: General rules for carrying out identification tests

3.411. New section 31 contains the general rules for carrying out identification tests on a non-citizen in fisheries detention under new Part 5 of Schedule 2. This new section closely corresponds to section 262D of the *Migration Act 1958* which, in turn, is based on the rules contained in section 23XI of the *Crimes Act 1914*.

3.412. The addition of new section 31 to the *Torres Strait Fisheries Act 1984* will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.413. These rules state that an identification test:

- must be carried out in circumstances affording reasonable privacy to the non-citizen; and
- must not be carried out in the presence or view of a person who is of the opposite sex to the person if requested by the non-citizen and it is practicable to comply with the request; and
- must not be carried in the presence or view of a person whose presence is not necessary for the purposes of the identification test or is not required or permitted by any other provision of this Act; and
- must not involve the removal of more clothing than is necessary for the carrying out of the test; and
- must not involve more visual inspection than is necessary for carrying out the test; and
- must be carried out at the same time as any other identification tests that are to be carried out on the non-citizen, where it is practicable to do so.

These general rules ensure that the dignity and welfare of the non-citizen is respected, while such tests are being carried out.

Section 32: Use of force in carrying out identification tests

3.414. New section 32 contains the rules regarding use of reasonable force in carrying out an identification test. This new section closely corresponds to section 262E of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from

fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

- 3.415. New section 32(1) provides that an authorised officer may use reasonable force to enable an identification test to be carried out or to prevent the loss, destruction or contamination of any personal identifier or any meaningful identifier derived from the person identifier.
- 3.416. However, new section 32(1) limits the use of this power by prohibiting the use of force on a minor or incapable person or where the personal identifier in question is a person's signature.
- 3.417. A person who has been authorised under new section 34 to help an authorised officer to use reasonable force, is subject to the same limitations as an authorised officer.
- 3.418. New subsection 32(2) sets out a number of pre-conditions that must exist before reasonable force can be exercised under new subsection 32(1). The authorised officer or person authorised to help the authorised officer must not use any force unless:
- the non-citizen required to provide the personal identifier in question has refused to allow the identification test to be carried out; and
 - all reasonable measures to carry out the identification test without the use of force have been exhausted; and
 - use of force in carrying out the identification test is authorised under new subsection 32(4).
- 3.419. New subsection 32(3) allows an authorised officer intending to use reasonable force in carrying out an identification test to apply to a senior authorising officer (other than themselves, if they are a senior authorising officer) as defined in new subsection 32, for an authorisation to use force in carrying out the identification test. This means that an individual application for authorisation must be made for each identification test for which an authorised officer believes that there are grounds for the use of reasonable force.
- 3.420. Under new subsection 32(4), the senior authorising officer who has received an application under new subsection 32(3) may authorise the use of force in carrying out the identification test if he or she is satisfied that:
- the non-citizen required to provide the personal identifier in question has refused to allow the identification test to be carried out; and
 - all reasonable measures to carry out the identification test without the use of force have been exhausted.
- 3.421. New subsections 32(5), (6) and (7) state the means by which a senior authorising officer may provide authorisation for the use of reasonable force in carrying out an identification test.
- 3.422. New subsection 32(8) states that a senior authorising officer cannot delegate their power of authorisation to any other person.
- 3.423. New subsection 32(8) defines 'senior authorising officer' to mean an officer, or detention officer, whom AFMA has authorised, or who is included in a class of officers or detention officer whom AFMA has authorised, to perform the functions of a senior authorising officer under new section 32.

Section 33: Identification tests not to be carried out in a cruel, inhuman or degrading manner etc.

- 3.424. New section 33 states that for the purposes of the *Torres Strait Fisheries Act 1984*, the carrying out of an identification test is not innately taken to be cruel, inhuman or degrading or to be a failure to treat a person with humanity and with respect for human dignity.

3.425. However, new section 33 also states that nothing in the *Torres Strait Fisheries Act 1984* authorises the carrying out of an identification test in a cruel, inhuman or degrading manner, or in a manner that fails to treat a person with humanity and with respect for human dignity.

3.426. New section 33 closely corresponds with section 262F of the *Migration Act 1958* and reflects Articles 7 and 10(1) of the *International Covenant on Civil and Political Rights*. The addition of new section 33 to the *Torres Strait Fisheries Act 1984* will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

Section 34: Authorised officer may get help to carry out identification tests

3.427. New section 34 enables an authorised officer to ask another authorised officer, officer or detention officer to help them to carry out an identification test. It also provides that an authorised officer, officer or detention officer that has been so requested, is authorised to provide that help.

3.428. New section 34 closely corresponds to section 262AG of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

Section 35: Identification tests to be carried out by authorised officer of same sex as non citizen

3.429. New section 35 provides that if a non-citizen requests that an identification test be carried out by an authorised officer of the same sex as the non-citizen, the identification test must be carried out by an authorised officer of that sex.

3.430. There is no automatic requirement that identification tests be carried out by an authorised officer of the same sex, as is the case for searches, because identification tests are not considered to be invasive.

3.431. This new section corresponds closely with section 262H of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

Section 36: Independent person to be present

3.432. New subsection 36 provides that an independent person must be present during the carrying out of an identification test in two situations. It corresponds closely with section 262IAI of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

3.433. Under new subsection 36(a) an independent person must be present where an identification test is carried out with the use of force (authorised under new section 32).

3.434. Under new subsection 36(b) an independent person must be present where an identification test is carried out if the non-citizen requests that such a person is present and an independent person is readily available at the same place as the non-citizen and is willing to attend the test within a reasonable time.

3.435. 'Independent person' is defined in new section 25 for the purposes of new Part 5.

Section 37: Recording of identification tests

3.436. New section 37 provides for authorised officers to video record the carrying out of identification tests. This new section closely corresponds to section 262J of the

Migration Act 1958 and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

- 3.437. New subsection 37(2) states that if the identification test is not video recorded, the authorised officer may decide that the identification test must be carried out in the presence of an independent person.
- 3.438. The non-citizen will be able to request a copy of a video recording of an identity test performed upon them though the *Freedom of Information Act 1982*.

Section 38: Retesting

- 3.439. New section 38 sets out the circumstances in which an authorised officer may require a non-citizen to undertake the same identification test more than once. This new section closely corresponds to section 262K of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.440. New subsection 38(1) sets out the conditions that must exist before a retest is permitted. An authorised officer may retest a non-citizen where:
- the result of an earlier identification tests is unusable; or
 - an authorised officer, officer or detention officer is not satisfied as to the integrity of the personal identifier from an earlier identification test.
- 3.441. Examples of unusable identifiers include smudged fingerprints, photographs that lack definition or a failure of the technology that is being used to obtain the personal identifier.
- 3.442. New paragraphs 38(1)(c) and (d) create an additional layer of protection for the non-citizen, stating that even if an identifier is unusable or its integrity is questionable there are only two circumstances in which a re-test is permitted. The first circumstance is where an authorised officer makes the requirement that the retest be conducted while the earlier identification test is being carried out or immediately after the earlier test is carried out. The second circumstance is where authorisation for a retest is given under new subsection 38(4).
- 3.443. New subsection 38(2) provides that where the conditions outlined in new subsection 38(1) are met and a non-citizen is required to again provide a personal identifier, the non-citizen is taken, for the purposes of Division 2 of Part 5 of Schedule 2, not to have provided the personal identifier as a result of the earlier test being carried out.
- 3.444. New subsection 38(3) enables an authorised officer to apply for authorisation to retest a non-citizen. It specifies that, depending on the number of tests performed, applications for authorisation must be made to different classes of people. Where a retest has not previously been authorised under new subsection 38(4), an application must be made to a senior authorising officer as defined in new subsection 38(11). Where an earlier retest has been authorised by a senior authorising officer under new subsection 38(4), an application for a subsequent retest must be made to the Managing Director of AFMA, the Secretary of the Department or an SES Band 3 employee in the Department.
- 3.445. New subsection 38(3) also makes it clear that authorisation for a retest cannot be given by the same officer requiring the non-citizen to provide another personal identifier under new section 38(1).
- 3.446. New subsection 38(4) provides that a senior authorising officer, the Managing Director of AFMA, the Secretary of the Department or an SES Band 3 employee of the Department may authorise a retest where:

- they are reasonably satisfied that the personal identifier that has been provided by the non-citizen as a result of an earlier identification test is unusable; or
 - they are not reasonably satisfied about the integrity of that personal identifier.
- 3.447. New paragraph 38(5), (6) and (7) state the means by which a senior authorising officer, the Managing Director of AFMA, the Secretary of the Department or a SES Band 3 employee of the Department may provide authorisation for the retest.
- 3.448. New subsection 38(8) states that the power to authorise retests cannot be delegated. This requirement ensures that a person who makes an authorisation under new section 38 has sufficient authority to do so.
- 3.449. New subsection 38(9) clarifies that an authorisation under new subsection 38(4) does not authorise the use of force in carrying out an identification test.
- 3.450. New subsection 38(10) states that where an application for authorisation to carry out a retest is denied (that is, authorisation is not given under new subsection 38(4)), the non-citizen is taken to have complied with any requirement under the *Torres Strait Fisheries Act 1984* to provide the personal identifier.
- 3.451. New subsection 38(11) provides definitions of ‘senior authorising officer’ and ‘SES Band 3 employee’ for the purposes of this clause.
- 3.452. The two tiers of authorisation required to conduct personal identification tests is designed to safeguard the rights and welfare of the detainee.

Section 39: Definitions

- 3.453. New section 39 provides definitions of ‘permitted provision’, ‘provide’, ‘related document’ and ‘video recording’ for the purposes of Subdivision C of Part 5. This new section corresponds closely to section 262KA of the *Migration Act 1958*.

Section 40: Accessing video recordings

- 3.454. New section 40 outlines the circumstances in which accessing a video recording of an identification test is an offence. This new section closely corresponds to section 262KB of the *Migration Act 1958*.
- 3.455. New subsection 40(1) makes it an offence for a person who is not authorised under new section 41 to access a video recording, or for a person who is authorised to access a video recording, to access a video for an unauthorised purpose. This offence carries a maximum penalty of imprisonment for two years.
- 3.456. New subsection 40(2) states that this clause will not apply if the access is through a permitted provision of the videotape. A permitted provision of a video tape is defined in new section 39 as having the meaning assigned to it in new section 42(2). This definition includes circumstances such as the provision of the videotape to the non-citizen to whom it related, the provision of the video to a court or tribunal for a purpose relating to the subject of the videotape or the provision of the videotape for the purpose of storage.
- 3.457. The note below new section 40 states that a defendant bears the evidentiary burden in relation to new subsection 40(2). That is, the defendant must provide evidence that shows, beyond a reasonable doubt, that their access of the videotape was through a permitted provision of the videotape. This requirement is consistent with subsection 13.3(3) of the *Criminal Code*.

Section 41: Authorising access to video recordings

- 3.458. New section 41 outlines the circumstances in which AFMA may authorise access to video recordings of an identification test carried out on a non-citizen. This new

section corresponds closely to section 262KC of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

- 3.459. New subsection 41(1) provides that AFMA may authorise a specified person, or any person within a specified class of people, to access all video recordings made under new section 37 or to access a specified video recording or video recordings of a specified kind. This new subsection also states that such authorisation must be given in writing.
- 3.460. New subsection 41(2) requires that, in granting an authorisation under new subsection 41(1), AFMA must specify one or more of the purposes contained in that subsection. This provides an additional safeguard to the power to authorise access to video recordings.
- 3.461. New subsection 41(3) places a further restriction on an authorisation made under new subsection 41(1) regarding a prescribed type of personal identifier. AFMA must not authorise access if the purpose of that access would involve the purposes of investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully) or prosecuting a person for such an offence.

Section 42: Providing video recordings

- 3.462. New section 42 outlines the circumstances in which providing a video recording of an identification test is an offence. This new section closely corresponds to section 262KD of the *Migration Act 1958*.
- 3.463. Under new subsection 42(1) it is an offence to cause a video recording of an identification test to be provided to another person where such a provision is not a permitted provision of the recording. This offence carries a maximum penalty of imprisonment for two years.
- 3.464. New subsection 42(2) contains the circumstances in which a provision of a videotape of an identification test is a 'permitted provision'. These circumstances include the provision of a videotape for the purpose of administering or managing the storage of video recordings; or making the video recording available to the non-citizen to whom it relates; or for the purpose of a proceeding, before a court or a tribunal, relating to the non-citizen to whom the video recording in question relates; or for any purpose connected with determining whether a civil or criminal liability has arisen from a person carrying out or helping to carry out an identification test under the *Torres Strait Fisheries Act 1984*.
- 3.465. New subsection 42(3) further provides that a provision of the videotape is not a permitted provision if it constitutes a disclosure of a prescribed type of personal identifier and the provision is for the purposes of either investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully) or prosecuting a person for such an offence.

Section 43: Unauthorised modifications of video recordings

- 3.466. New section 43 outlines the circumstances in which modifying a video recording of an identification test is an offence. This new section closely corresponds to section 262KE of the *Migration Act 1958*.
- 3.467. New section 43 makes it an offence to cause any unauthorised modification of a video recording of an identification test, where such modification was made with

intent to modify and with knowledge that such modification is unauthorised. This offence carries a maximum penalty of imprisonment for two years.

3.468. New section 45 further explains the parameters of unauthorised modification.

Section 44: Unauthorised impairment of video recordings

3.469. New section 44 outlines the circumstances in which impairing a video recording of an identification test is an offence. This new section closely corresponds to section 262KF of the *Migration Act 1958*.

3.470. New section 44 makes it an offence for a person to cause any unauthorised impairment of:

- the reliability of a video recording; or
- the security of the storage of a video recording; or
- the operation of a system by which a video recording is stored

where that person intends to cause the impairment and knows that the impairment is unauthorised. This offence carries a maximum penalty of imprisonment for two years.

3.471. New section 45 further explains the parameters of unauthorised impairment.

Section 45: Meanings of unauthorised modification and unauthorised impairment etc.

3.472. New section 45 explains the terms “unauthorised” and “caused” in the context of new sections 43 and 44. This section closely corresponds to section 262KG of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.

3.473. New subsection 45(1) explains that for the purposes of Subdivision C of Division 2 of Part 5 any action described in new section 43 and 44 is unauthorised if the person is not entitled to cause that modification or impairment.

3.474. New subsection 45(2) states that any modification or impairment caused by the person is not unauthorised merely because that person has an ulterior purpose for causing it.

3.475. New subsection 45(3) states that a person causes any modification or impairment of a video recording if the person’s conduct substantially contributes towards it. This means that where two or more people have jointly caused an unauthorised modification or impairment of a video recording they may all be liable under the offences outlined in new sections 43 and 44.

3.476. New subsection 45(4) provides that where a modification or impairment of a video recording is done by a person under a warrant issued under the law of the Commonwealth, a State or a Territory this is authorised impairment or modification.

Section 46: Destroying video recordings

3.477. New section 46 outlines the circumstances in which failing to destroy a video recording of an identification test within ten years is an offence. This new section closely corresponds to section 262KH of the *Migration Act 1958*.

3.478. New section 46 makes it an offence for a person who has day-to-day responsibility for the system under which video recordings of identification tests are stored to fail to physically destroy the video recording, and all copies of that recording, within 10 years of it being made. The maximum penalty for this offence is two years imprisonment. This provision safeguards the use of personal information and limits the period in which the information may be stored.

Section 47: Minors

- 3.479. New section 47 contains special rules to be applied in carrying out identification tests on minors. Minors are defined for the purposes of Part 5 of Schedule 2 by new section 25 as persons who are less than 18 years old. This section closely corresponds to subsections 262L(1), (5) and (6) of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.480. New subsection 47(1) restricts the types of personal identifiers that can be required from non-citizen minors who are less than 15 years old. The only personal identifiers that may be required from a person who is less than 15 years old are measurements of their height and weight or a photograph, or other image, of their face and shoulders.
- 3.481. The age limit on the requirement to provide personal identifiers was set at 15 years so as to be consistent with international comparisons and the *Migration Act 1958*.
- 3.482. New subsections 47(2) and (3) set out the requirement for a parent, guardian or independent person to be present while an identification test is carried out on any non-citizen minor, not just those who are less than 15 years old.
- 3.483. New subsection 47(3) further requires that where the guardian of the child is the Minister administering the *Immigration (Guardianship of Children) Act 1946*, the identification test must be carried out in the presence of an independent person other than that Minister.

Section 48: Incapable persons

- 3.484. New section 48 contains special rules to be applied in carrying out identification tests on incapable persons. Incapable persons are defined for the purposes of Part 5 Schedule 2 by new section 25 as a person who is incapable of understanding the general nature and effect of, and purposes of, a requirement to provide a personal identifier. This new section corresponds closely to subsections 262M(1) and (4) of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.
- 3.485. New subsection 48(1) restricts the type of identifiers that can be required from incapable persons under the *Torres Strait Fisheries Act 1984*. The only personal identifiers that may be required from an incapable person are measurements of their height and weight or a photograph, or other image, of the non-citizen's face and shoulders.
- 3.486. New subsection 47(2) states that an identification test on an incapable person must be carried out in the presence of either a parent or guardian of the incapable person or an independent person.

Section 49: Definitions

- 3.487. New section 49 provides definitions of 'disclose', 'identifying information', 'permitted disclosure', 'unauthorised impairment' and 'unauthorised modification' for the purposes of Division 4 of Part 5 of Schedule 2. This section closely corresponds to section 336A of the *Migration Act 1958*.

Section 50: Application

- 3.488. New section 50 makes it clear that section 15.4 of the *Criminal Code* (which relates to extended geographical jurisdiction) applies to all offences against Division 4 of Part 5 of Schedule 1A. This new section corresponds closely with section 336B of the *Migration Act 1958*.

3.489. The application of section 15.4 of the *Criminal Code* means that the offences under Division 4 of Part 5 of Schedule 1A can be committed regardless of whether or not the conduct (or the result of the conduct) constituting the alleged offence occurred in Australia. This provision is necessary as some of the offences could potentially relate to the disclosure of information to a foreign country and this provision puts beyond doubt that the disclosure of the information will constitute an offence regardless of whether the disclosure was made or received in a foreign location.

Section 51: Accessing identifying information

- 3.490. New section 51 outlines the circumstances in which accessing identifying information is an offence. This new section corresponds closely with section 336C of the *Migration Act 1958*.
- 3.491. New subsection 51(1) makes it an offence for a person to access identifying information where that person has not been authorised to access the identifying information for the purpose for which the person accessed it. The maximum penalty for this offence is two years imprisonment.
- 3.492. New subsection 51(2) provides that the offence contained in new section 30(1) does not apply if a person accesses identifying information through a permitted disclosure. The term ‘permitted disclosure’ is defined in new subsections 53(2) and (3) of Division 4 of Part 5 of Schedule 2.
- 3.493. The note at the end of new subsection 51(2) states that a defendant bears the evidentiary burden in relation to new subsection 51(2). That is, the defendant must provide evidence that shows, beyond a reasonable doubt, that their access of the videotape was through a permitted provision of the videotape. This requirement is consistent with subsection 13.3(3) of the *Criminal Code*.

Section 52: Authorising access to identifying information

- 3.494. New section 52 outlines the circumstances in which AFMA may authorise access to identifying information about a non-citizen. This new section corresponds closely to section 336D of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.
- 3.495. New subsection 52(1) provides that AFMA may authorise a specified person, or any person within a specified class of people, to access identifying information of the kind specified in the authorisation. This new subsection also states that such authorisation must be given in writing.
- 3.496. New subsection 52(2) requires that, in granting an authorisation under new subsection 52(1), AFMA must specify one or more purposes for which access is authorised. These purposes are:
- One or more of the purposes set out in new subsection 26(3), which includes purposes such as assisting in the identification of non-citizens and enhancing AFMA’s ability to identify non-citizens who have a criminal history relating to fisheries;
 - Disclosing identifying information in accordance with Division 4 of Part 5 of Schedule 2;
 - Administering or managing the storage of identifying information;
 - Making identifying information available to the person to whom it relates;
 - Modifying identifying information to enable it to be matched with other identifying information;
 - Modifying identifying information in order to correct errors or ensure compliance with appropriate standards;

- Making decisions under the *Torres Strait Fisheries Act 1984*;
- Complying with laws of the Commonwealth or the States or Territories; or
- Disclosing personal information under clause 59 (about disclosure of information about a person who has been in detention for the purposes of the immigration detention or removal of the person).

3.497. New subsection 52(3) places a further restriction on an authorisation made under new subsection 52(1). Where the identifying information in question relates to a personal identifier of a prescribed type, an authorising purpose under new subsection 52(2) must not include or involve the purposes of investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully) or prosecuting a person for such an offence.

Section 53: Disclosing identifying information

3.498. New section 53 outlines the circumstances in which disclosing identifying information is an offence. This new section corresponds closely with section 336E of the *Migration Act 1958*.

3.499. New subsection 53(1) makes it an offence for a person to engage in conduct that causes the disclosure of identifying information unless that disclosure is a permitted disclosure. The maximum penalty for this offence is two years imprisonment.

3.500. New subsection 53(2) defines ‘permitted disclosure’ to include a disclosure for the purpose of data matching, managing the storage of identifying information, making the identifying information available to the non-citizen to whom it relates and disclosures permitted under new sections 54 and 59.

3.501. New subsection 53(3) places a further restriction on an authorisation made under new subsection 53(1) regarding a prescribed type of personal identifier. Such a disclosure is not permitted for the purposes of either investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully) or prosecuting a person for such an offence.

Section 54: Authorising disclosure of identifying information to foreign countries etc.

3.502. New section 54 states the circumstances in which AFMA may authorise the disclosure of identifying information to foreign countries and organisations. This new section closely corresponds to subsections 336F(1) and (2) of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee’s entire period of detention.

3.503. New subsection 54(1) allows AFMA to authorise a specified officer or detention officer, or any officer or detention officer included in a specified class of officers or detention officers, or an Agency prescribed in the regulations, to disclose certain identifying information to one or more foreign countries (or their respective police services, law enforcement bodies, border control bodies or a prescribed body), specified international organisations or specified organisations of foreign countries, that are responsible for fisheries matters or prescribed bodies of the Commonwealth or of a State or Territory.

3.504. New section 54 allows AFMA to authorise an agency to disclose information to foreign governments and organisations. The Department of Foreign Affairs and Trade (DFAT) is an agency that will be prescribed in regulations to transmit such information to the governments of foreign countries using diplomatic channels.

However, this section will not allow DFAT (or any other agency prescribed in the regulations) to control of the information for their own purposes.

3.505. New subsection 54(2) provides that AFMA must specify the purpose(s) for which the disclosure is authorised as set out in subsection 26(3).

Section 55: Unauthorised modification of identifying information

3.506. New section 55 outlines the circumstances in which modifying identifying information is an offence. This new section closely corresponds to section 336G of the *Migration Act 1958*.

3.507. New section 55 makes it an offence to cause any unauthorised modification of identifying information, where that person intends to cause the modification and knows that the modification is unauthorised. This offence carries a maximum penalty of imprisonment for two years.

3.508. New section 57 further explains the parameters of unauthorised modification.

Section 56: Unauthorised impairment of identifying information

3.509. New section 56 outlines the circumstances in which impairing identifying information is an offence. This new section closely corresponds to section 336H of the *Migration Act 1958*.

3.510. New section 56 makes it an offence for a person to cause any unauthorised impairment of:

- the reliability of identifying information; or
- the security of the storage of identifying information; or
- the operation of a system by which identifying information is stored

where that person intends to cause the impairment and knows that the impairment is unauthorised. This offence carries a maximum penalty of imprisonment for two years.

3.511. New section 57 further explains the parameters of unauthorised impairment.

Section 57: Meanings of unauthorised modification and unauthorised impairment etc.

3.512. New section 57 explains the terms “unauthorised” and “caused” in the context of new sections 55 and 56. This section closely corresponds to section 336J of the *Migration Act 1958*.

3.513. New subsection 57(1) explains that for the purposes of Division 4 of Part 5 any action described in new section 55 and 56 is unauthorised if the person is not entitled to cause that modification or impairment.

3.514. New subsection 57(2) states that any such modification or impairment caused by the person is not unauthorised merely because that person has an ulterior purpose for causing it.

3.515. New subsection 57(3) states that a person *causes* any modification or impairment of identifying information if the person’s conduct substantially contributes towards it. This means that where two or more people have jointly caused an unauthorised modification or impairment of identifying information they may all be liable under the offences outlined in new sections 55 and 56.

3.516. New subsection 57(4) provides that where such modification or impairment is done by a person under a warrant issued under the law of the Commonwealth, a State or a Territory, this is authorised.

Section 58: Identifying information may be indefinitely retained

3.517. New section 58 simply provides that identifying information may be indefinitely retained. This section corresponds closely with paragraph 336L(1)(a) of the

Migration Act 1958 because under Schedule 2 of the *Torres Strait Fisheries Act 1984* any identifying information will always be about someone who is, or has been, in detention. As such, this new section will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

Part 6: Disclosure of detainees' personal information

Section 59: Disclosure of detainees' personal information

- 3.518. New section 59 outlines the circumstances and purposes for which an agency or organisation that has been responsible for the detention of an individual may disclose personal information about the detainee.
- 3.519. New subsection 59(1) contains the types of agencies and organisations to which personal information pertaining to a detainee may be disclosed by an agency which is, or has been, responsible for the detention of that detainee. The agencies and organisations to whom a disclosure of personal information about a detainee may be made, are agencies or organisations that are, or will be, responsible for:
- taking the individual into immigration detention; or
 - keeping the individual in immigration detention; or
 - causing the individual to be kept in immigration detention; or
 - the removal of the individual.
- 3.520. A disclosure of personal information may only be made to an organisation or agency of:
- the immigration detention of the individual; and
 - the removal of the individual; and
 - the welfare of the individual while in immigration detention or being removed.
- 3.521. This places a stringent restriction on the purposes by which personal information may be shared. Information about detainees will only be disclosed to an agency or organisation which has a legislative reason to know such information (in accordance with new section 59). This will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention. The types of information that may be disclosed would include medical, behavioural and identity information.
- 3.522. New subsection 59(3) defines 'agency', 'immigration detention', 'organisation', 'personal information' and 'removal' for the purposes of new section 59.

Part 3: Searching persons on boats suspected of illegal fishing

Division 1: Main amendments

FISHERIES MANAGEMENT ACT 1991

Item 21: After paragraph 84(1)(a)

- 3.523. This item amends section 84 of the *Fisheries Management Act 1991* to confer an additional search power on officers. New paragraph 84(1)(aaa) will enable officers to search people on boats suspected of fishing illegally, or supporting a boat that is suspected of fishing illegally, in the Australian Fishing Zone for the purpose of determining whether any dangerous objects or evidence of an offence against

subsection 95(2) or section 99, 100, 100A, 101, 101A or 101B of the Act are being held or concealed by the person.

- 3.524. Currently, officers have the power to search boats and seize evidence but the power to search *people* does not apply until after they have been detained (once the boat has reached Australia). This new power will ensure that objects that could present a danger or constitute evidence of an offence can be secured by officers immediately, removing the possibility of attack or loss of evidence due to a time delay before a search can be conducted.
- 3.525. New paragraph 84(1)(aaa) of the *Fisheries Management Act 1991* will be subject to new section 84AA (see Item 23 below) which contains appropriate limitations on the manner in which searches may be carried out under new paragraph 84(1)(aaa). New section 84AA substantially replicates the conditions that already exist in relation to searching detainees without a warrant, found in existing section 84B of the *Fisheries Management Act 1991*.

Item 22: Paragraph 84(1)(c)

- 3.526. This item extends the power to examine things found during a search conferred on officers in subsection 84(1)(c) of the *Fisheries Management Act 1991* to cover items found under new paragraph 84(1)(aaa) (Item 21 above).

Item 23: After section 84

- 3.527. This item places appropriate limitations on the new power to conduct searches that will be added at section 84(1)(aaa) of the *Fisheries Management Act 1991* (Item 21, above). New section 84AA substantially replicates the conditions that already exist in relation to searching detainees without a warrant, found in existing section 84B of the *Fisheries Management Act 1991*.
- 3.528. New subsection 84AA(1) requires that a search conducted under new paragraph 84(1)(aaa) of *Fisheries Management Act 1991* must only be conducted by an officer of the same sex as the subject of the search (the subject).
- 3.529. However, new subsection 84AA(2) provides that where an officer of the same sex is not available to conduct the search, the search may be conducted by another person who is the same sex as the subject if that other person agrees, at the request of an officer, to conduct the search.
- 3.530. New subsection 84AA(3) clarifies that nothing in this section or new paragraph 84(1)(aaa) authorises the officer, or other person conducting the search, to remove, or require the subject to remove, any of the subject's clothing. Additionally, no officer, or other person conducting the search, may use more force, or subject the subject to greater indignity, than is reasonably necessary to conduct the search.
- 3.531. New subsection 84AA(4) provides that where an officer finds a weapon (or thing capable of being used to inflict bodily harm) or evidence of detainable offences (subsection 95(2) or sections 99, 100, 100A, 101, 101A or 101B of the *Fisheries Management Act 1991*) while conducting a search, the officer may take possession of that thing and keep the thing for as long as that officer thinks is necessary for the purposes of the *Fisheries Management Act 1991*. This will allow officers to keep items to be used as evidence of an offence or to prevent the item being used to cause harm to another person while the subject is in the company of officers or in detention in Australia.
- 3.532. New subsection 84AA(5) requires that where a person other than an officer finds an item under new paragraph 84(1)(aaa), that person must take possession of the item and give it to an officer who may keep it for as long as they think is necessary for the purposes of the *Fisheries Management Act 1991*.

- 3.533. New subsection 84AA(6) provides that the item found during a search may be retained for as long as is necessary for the purposes of the *Fisheries Management Act 1991* or the *Migration Act 1958*, if the subject is eventually detained under the *Fisheries Management Act 1991*.
- 3.534. The note beneath new subsection 84B(6) explains that the time that an item may be kept can be extended because once a subject is detained under the *Fisheries Management Act 1991* that person will generally also be detained under the *Migration Act 1958* following the expiry of their enforcement visa. The reasons for retaining a weapon, for example, remain the same despite changing from fisheries to immigration detention.

Item 24: Subsection 87A(1)

- 3.535. This item amends subsection 87A(1), which relates to the powers of officers in relation to a *Fish Stocks Agreement* (FSA) boat (a boat of the nationality of a foreign country that is party to the FSA) on the high seas to include the new search powers contained in new paragraph 84(1)(aaa) (Item 21 above). The power to conduct a search does not extend to the searching for evidence. This power is consistent with the FSA.

Item 25: Subsection 87B(1) (after table item 2)

- 3.536. This item amends section 87B to include a new item in the table within that section. This addition to the table will clarify the application of powers of officers in relation to a *Fish Stocks Agreement* (FSA) boat by directing that the reference in the new section 84(1) (aaa) (Item 21 above) to section 99, 100, 100A, 101 or 101A be applied as if it was a reference to an offence against section 105E or 105F of the *Fisheries Management Act 1991*. Sections 105E or 105F are offences relating to the intentional breach of a regional management measure or arrangement.
- 3.537. This amendment also provides that a reference to a foreign boat used as the support boat in an offence against section 101B should be omitted in applying the power contained in new paragraph 84(1)(aaa) to FSA boats on the high seas.
- 3.538. This amendment will enable the amendment to subsection 87A(1), outlined in Item 24 above, to take effect. That is, officers will have the power to search a person on an FSA boat on the high seas without warrant where they reasonably suspect that the FSA boat has been used in an offence against sections 105E or 105F of the *Fisheries Management Act 1991*.

Item 26: After subsection 87H(2)

- 3.539. This item amends section 87H of the *Fisheries Management Act 1991* to extend the powers of officers in relation to boats on the high seas without a nationality.
- 3.540. New subsection 87H(2A) will allow officers to search people, without a warrant, on boats on the high seas without a nationality for weapons or anything capable of being used to injure another person.
- 3.541. New subsection 84H(2B) provides that the limitations and rules for retaining items under the new section 84AA (Item 23) will also apply to new subsection 87H(2A).
- 3.542. This new power to search people on boats on the high seas without a nationality will ensure the safety of fisheries officers from any possibility of attack while they are exercising their existing power under subsection 87H(1) to board and inspect boats on the high seas where the officer has reasonable grounds to believe that the boat has no nationality.

Item 27: At the end of paragraph 42(1)(a)

3.543. This item allows Item 28 (below) to be added to section 42(1) of the *Torres Strait Fisheries Act 1984* and clarifies, along with Items 29, 31 and 32 (below), that the use of one of the powers contained in section 42(1) does not preclude the use of one or more of the other powers contained in that section.

Item 28: After paragraph 42(1)(a)

- 3.544. This item amends section 42 of the *Torres Strait Fisheries Act 1984* to confer a search power on officers. This new section replicates new paragraph 84(1)(aaa) of the *Fisheries Management Act 1991* (Item 21 above).
- 3.545. New paragraph 42(1)(aa) will enable officers to search people on boats suspected of fishing illegally, in the Torres Strait Protected Zone for the purpose of determining whether any dangerous objects or evidence of an offence against subsection 45(1)(a) or section 48, 49 or 51 of the *Torres Strait Fisheries Act 1984* are being held or concealed by the person.
- 3.546. This new power will ensure that objects that could present a danger or constitute evidence of an offence can be secured by officers, removing the possibility of attack or loss of evidence due to a time delay before a search could be conducted.
- 3.547. New paragraph 42(1)(aa) of the *Torres Strait Fisheries Act 1984* will be subject to new section 42A (see Item 33 below) which contains appropriate limitations on the manner in which searches may be carried out under new paragraph 42(1)(aa). This new section exactly replicates new subsection 84AA(1) of the *Fisheries Management Act 1991* (Item 23 above).

Item 29: At the end of paragraphs 42(1)(b) and (ba)

3.548. This item clarifies, along with Items 27 (above), 31 and 32 (below), that the use of one of the powers contained in section 42(1) of the *Torres Strait Fisheries Act 1984* does not preclude the use of one or more of the other powers contained in that section.

Item 30: Paragraph 42(1)(c)

3.549. This item extends the power to examine things found during a search conferred on officers in subsection 42(1)(c) of the *Torres Strait Fisheries Act 1984* to cover new paragraph 42(1)(aa) (Item 28 above). This amendment mirrors the amendment made to the *Fisheries Management Act 1991* by Item 22 above.

Item 31: At the end of paragraphs 42(1)(d) and (e)

3.550. This item clarifies, along with Item 27, 29 (above) and 32 (below), that the use of one of the powers contained in section 42(1) of the *Torres Strait Fisheries Act 1984* does not preclude the use of one or more of the other powers contained in that section.

Item 32: After section 42

3.551. This item clarifies, along with Items 27, 29 and 32 (above), that the use of one of the powers contained in section 42(1) of the *Torres Strait Fisheries Act 1984* does not preclude the use of one or more of the other powers contained in that section.

Item 33: Searches under paragraph 42(1)(aa)

3.552. This item adds new section 42A to the *Torres Strait Fisheries Act 1984* which places appropriate limitations on the new power to conduct searches that will be

added by new paragraph 42(1)(aa) of the *Torres Strait Fisheries Act 1984* (Item 28, above). This new section closely replicates new subsections 84AA(1), (2), (3), (4) and (5) of the *Fisheries Management Act 1991* (Item 23 above).

Division 2: Amendment contingent on detention power

TORRES STRAIT FISHERIES ACT 1984

Item 34: At the end of section 42A

3.553. This item will add another subsection to new section 42A which is contingent on the addition of detention powers to the *Torres Strait Fisheries Act 1984* also contained in this package of amendments. This new section closely replicates new subsection 84AA(6) of the *Fisheries Management Act 1991* (Item 23 above).

Part 4: Forfeiture etc. of things involved in illegal fishing

Division 1: Main amendments

TORRES STRAIT FISHERIES ACT 1984

Item 35: After paragraph 42(1)(e)

3.554. This item adds new paragraph 42(1)(ea) to the *Torres Strait Fisheries Act 1984*. This new paragraph empowers officers to seize boats, equipment and fish where those items have been automatically forfeited to the Commonwealth under new section 52A of the *Torres Strait Fisheries Act 1984* (Item 36 below) or the officer has reasonable grounds to believe that the items have been forfeited under that section.

Item 36: After section 52

3.555. This item adds an automatic forfeiture scheme to the *Torres Strait Fisheries Act 1984*, similar the scheme already contained in sections 106A to 106H of the *Fisheries Management Act 1991*. This addition will provide for greater consistency in Australia's approach to the management of boats and other things (things) used in fisheries offences. At present, boats, equipment and catch seized under the *Torres Strait Fisheries Act 1984* can only be forfeited by a court. Automatic forfeiture will provide an additional deterrent to illegal fishing activity.

Subdivision B: Automatic forfeiture of things used in certain offences

Section 52A: Forfeiture of things used in certain offences

3.556. New section 52A provides for the automatic forfeiture of boats used in offences against subsection 45(2) or sections 48, 49 or 51 of the *Torres Strait Fisheries Act 1984*. Automatic forfeiture will also apply to equipment and fish that were either on a boat at the time of an offence against those provisions or used or involved in the commission of the offence. This provision is located in new Subdivision B of Part VI of the *Torres Strait Fisheries Act 1984*.

Subdivision C: Dealing with things seized as automatically forfeited

3.557. New Subdivision C of Division 3 of Part VI of the *Torres Strait Fisheries Act 1984* (new sections 52B, 52C, 52D, 52E, 52F, 52G and 52H) contains the rules for dealing

with things seized under new section 52A as being automatically forfeited to the Commonwealth.

Section 52B: Application of this Subdivision

3.558. New section 52B states that the purpose of new Subdivision C is to set out rules applying to things seized under the new power contained in new paragraph 42(1)(ea), because it was forfeited under new section 52A or the officer had reasonable grounds to believe that it had been forfeited under new section 52A. New section 52B substantially replicates the existing section 106B of the *Fisheries Management Act 1991*.

Section 52C: Notice of seizure

3.559. New section 52C provides the rules for giving notice of the seizure of a thing which is automatically forfeited to the Commonwealth. New section 52C substantially replicates existing section 106C of the *Fisheries Management Act 1991*.

3.560. New subsection 52C(1) states that a written notice of the seizure must be given to the person who was, or who the officer has reasonable grounds to believe was, the master of the boat immediately prior to its seizure. New subsection 52C(2) provides that the notice of seizure must identify the thing that has been seized as being automatically forfeited to the Commonwealth and state that it has been seized. The notice must also state that the thing will be condemned as forfeited unless the owner of the thing or the person who had possession, custody or control of the thing immediately before it was seized makes a written claim to the Managing Director of AFMA, within 30 days. Condemnation of the thing occurs under sections 52E and 52G of the Act

Section 52D: Dealing with the thing before it is condemned

3.561. New section 52D provides the rules for dealing with a thing before it has been condemned under new section 52E or 52G. New section 52D substantially replicates the existing section 106D of the *Fisheries Management Act 1991*.

3.562. Under new subsection 52D(1), AFMA may destroy a boat that has been seized as forfeited to the Commonwealth in certain circumstances. These circumstances are where the boat is unseaworthy or poses a serious risk to safety, public health, quarantine, other property or the environment. A boat may also be destroyed or disposed of where the expenses of custody and maintenance of the boat in the period between the time of its seizure and the time of its condemnation are likely to be greater than its value.

3.563. New subsection 52D(2) provides that where AFMA causes the boat to be disposed, this may be made subject to certain conditions.

3.564. New subsection 52D(3) contains a table which list the other provisions of the *Torres Strait Fisheries Act 1984* that are relevant to dealing with things, other than boats, before they have been condemned. Paragraph 42(1)(q) grants an officer the power to sell any fish seized under the *Torres Strait Fisheries Act 1984* and new section 52I which provides for the release of things to the owner of the thing on certain conditions.

Section 52E: Thing condemned if not claimed in time

3.565. New subsection 52E(1) provides that a thing is condemned as forfeited to the Commonwealth if a written claim for the thing is not received by the Managing Director from the owner, or person who had possession of the thing immediately prior to seizure, within 30 days of a notice being issued under new section 52C. This new

section substantially replicates the existing section 106E of the *Fisheries Management Act 1991*.

- 3.566. New subsection 52E(2) clarifies that an owner of a thing, or person who had possession of the thing immediately prior to seizure, may claim the thing even if it is disposed of or destroyed either before or after the claim is made.

Section 52F: Dealing with claim for thing

- 3.567. New section 52F outlines the procedure for dealing with a thing after it has been claimed. New section 52F substantially replicates the existing section 106F of the *Fisheries Management Act 1991*.
- 3.568. New paragraph 52F(1)(a) provides that where a thing is claimed, an officer may retain possession of the thing without initiating any proceedings for the condemnation of the thing.
- 3.569. New paragraph 52F(1)(b) states that the Managing Director of AFMA may choose to provide the claimant a written notice stating that the thing will be condemned if the claimant does not institute proceedings against the Commonwealth within two months. The proceedings that may be instituted to avoid condemnation of the thing are either:
- to recover the thing; or
 - for a declaration that the thing is not forfeited.
- 3.570. The second note below new subsection 52F(1) clarifies that if the Managing Director of AFMA does give the notice referred to in new paragraph 52F(1)(b) and the claimant does institute proceedings, whether the claimant will recover the thing or not will depend on the Court's decision in those proceedings.
- 3.571. New subsection 52F(2) states for the purposes of section 29 of the *Acts Interpretation Act 1901* the notice in new paragraph 52F(1)(b) may be given to the claimant by posting it to the last address of the claimant that is known to the Managing Director of AFMA. In practice, the last known address of the claimant is likely to be the address that was provided in the notice of claim (as required by new paragraph 52E(1)(c)).
- 3.572. New subsection 52F(3) states that the Managing Director of AFMA is not limited in the ways that notice can be given to the claimant.
- 3.573. The note associated with new subsection 52F(3) states that section 28A and 29 of the *Acts Interpretation Act 1901* contain the relevant procedures for providing a notice under new paragraph 52F(1)(b).
- 3.574. New subsection 52F(4) is provided to ensure that there is no doubt that notice may be given under new paragraph 52F(1)(b) even if the thing has already been released under new section 52I.

Section 52G: Condemnation of thing if it claimed

- 3.575. New section 52G provides the procedures that follow the provision of a notice by the Managing Director of AFMA under the new section 52F. New section 52G substantially replicates the existing section 106G of the *Fisheries Management Act 1991*.
- 3.576. New subsection 52G(1) states that new section 52G applies where the Managing Director of AFMA has given a claimant a notice under new section 52F about the possibility of instituting proceedings to recover the thing or for a declaration that the thing is not forfeited.
- 3.577. New subsection 52G(2) provides that if the claimant to whom the notice under new section 52F was provided does not institute proceedings within 2 months (of that notice being provided), the thing is condemned as forfeited to the Commonwealth.

- 3.578. New subsection 52G(3) provides that where proceedings are instituted by the claimant within 2 months, the thing will be condemned as forfeited to the Commonwealth at the end of those proceedings unless those proceedings result in:
- an order for the claimant to recover the thing; or
 - an order for the Commonwealth to pay the claimant the proceeds of the sale of the thing if it has been sold before the end of the proceedings; or
 - an order for the Commonwealth to pay the claimant the market value of the thing at the time it was disposed of (except by sale) or destroyed, if it has been disposed of (except by sale) or destroyed before the end of the proceedings; or
 - a declaration that the thing is not forfeited.
- 3.579. New subsection 52G(4) clarifies for the purposes of new section 52G(3) that the end of proceedings, if the proceedings go to judgment, is:
- at the end of the period for lodging an appeal against the judgement, if no appeal is lodged within that period; or
 - when an appeal lapses or is finally determined, if an appeal is lodged against the judgment within that period.
- 3.580. New subsection 52G(5) clarifies that proceedings relating to the claimed thing may be instituted or continued even if the claimed thing is disposed of or destroyed.
- 3.581. New subsection 52G(6) requires that, in certain circumstances, a court must order the Commonwealth to pay a person an amount equal to:
- the proceeds of the sale of the thing, if it has been sold before the end of the proceedings; or
 - the market value of the thing at the time it was disposed of (except by sale) or destroyed, where it has been disposed of (except by sale) or destroyed before the end of the proceedings.
- 3.582. The circumstances in which a court is required to make such an order is where the claimed thing has been disposed of or destroyed and the court decides that it would have ordered that the thing be delivered to the claimant apart from the fact that the thing had been disposed of or destroyed.

Section 52H: Dealing with thing after it is condemned

- 3.583. New section 52H provides that if a thing is condemned as forfeited to the Commonwealth, the thing must be dealt with or disposed of in accordance with the directions of the Minister. New section 52H exactly replicates the existing section 106H of the *Fisheries Management Act 1991*.

Division 4: Dealing with property that has been seized etc.

- 3.584. New Division 4 of Part VI of the *Torres Strait Fisheries Act 1984* (new sections 52I and 52J) contains procedures for dealing with property that has been seized, bonding of property to owners and the status of the *Admiralty Act 1988*.
- 3.585. A new heading has been added for Division 4 which will make the different sections of the *Torres Strait Fisheries Act 1984* easier to interpret and is consistent with the format of the *Fisheries Management Act 1991*.

Section 52I: Release of property that has been seized etc.

- 3.586. New section 52I deals with the release of property that has been seized and substantially replicates the existing section 88 of the *Fisheries Management Act 1991*.
- 3.587. New section 52I will allow AFMA to release things forfeited under the *Torres Strait Fisheries Act 1984*, on whatever conditions they believe appropriate, in the same manner that property is currently released under the *Fisheries Management Act 1991*.

This will allow Australia to effectively comply with its international obligations, under the *United Nations Convention on the Law of the Sea*, to provide an opportunity for owners of seized vessels to pay a bond to have their property returned to them.

- 3.588. This power can only be exercised before the property has been either condemned or ordered by a court to be restored to its owner.
- 3.589. New paragraphs 52I(1)(a) and (b) provide that the property can be released to either the owner or master of a boat (where the property in question is a boat) or to the owner of the property or the person from whom the property was removed.
- 3.590. New paragraphs 52I(1)(c) and (d) include examples of the types of conditions that AFMA may place on the release of property. These examples relate to the value of the property if it is forfeited or the payment of any fines that may be imposed under the *Torres Strait Fisheries Act 1984*.
- 3.591. New subsection 52I(2) provides that in some circumstances, the conditions on which the property may be released may include payment of the costs of the prosecution, where there is a possibility that a court could order that such a payment be made in relation to an offence relating to the property. This can only be done if it is property referred to in new subsection 52I(1) and is also property referred to in section 52, which deals with court ordered forfeiture of property related to illegal foreign fishing offences.
- 3.592. New subsection 52I(3) clarifies that fish is included in a reference to property in new section 52I and that property is taken to be in the control of an officer where the possessor of the property is subject to the direction of an officer, whether or not an officer is directly in possession of the property.

Section 52J: Seizure or forfeiture has effect despite admiralty proceedings

- 3.593. New section 52J specifies that the seizure, detention or forfeiture of a boat under the *Torres Strait Fisheries Act 1984* overrides certain actions taken under the *Admiralty Act 1988*. New section 52J substantially replicates section 108A of the *Fisheries Management Act 1991*.
- 3.594. This new section will ensure that Australian investigations and judicial actions are not frustrated by third parties such as foreign mortgagees. As well as providing consistency with the *Fisheries Management Act 1991*, this protection is also important given the possibility of larger foreign boats fishing illegally in the Torres Strait in the future.
- 3.595. New subsection 52J(1) states that the seizure, detention or forfeiture of a boat under the *Torres Strait Fisheries Act 1984* will have effect despite the arrest of a boat under the *Admiralty Act 1988* or the making of an order for the sale of the boat or the actual sale of the boat due to court proceedings brought under the *Admiralty Act 1988*.
- 3.596. New subsection 52J(2) clarifies that new subsection 52J(1) has effect regardless of the relative timing of any these actions.

Division 2 – Related Amendments

TORRES STRAIT FISHERIES ACT 1984

Item 37: Before section 42

- 3.597. A new heading has been added for Division 1 which will make the different sections of the *Torres Strait Fisheries Act 1984* easier to interpret and is consistent with the format of the *Fisheries Management Act 1991*.

Item 38: Before section 44

3.598. A new heading has been added for Division 2 which will make the different sections of the *Torres Strait Fisheries Act 1984* easier to interpret and is consistent with the format of the *Fisheries Management Act 1991*.

Item 39: Before section 52

3.599. A new heading has been added for Division 3 which will make the different sections of the *Torres Strait Fisheries Act 1984* easier to interpret and is consistent with the format of the *Fisheries Management Act 1991*.

Item 40: Before section 53

3.600. A new heading has been added for Division 5 which will make the different sections of the *Torres Strait Fisheries Act 1984* easier to interpret and is consistent with the format of the *Fisheries Management Act 1991*.

Item 41: Before section 54

3.601. A new heading has been added for Division 6 which will make the different sections of the *Torres Strait Fisheries Act 1984* easier to interpret and is consistent with the format of the *Fisheries Management Act 1991*.

Part 5: Offences against persons with powers and functions under fisheries law

FISHERIES MANAGEMENT ACT 1991

Item 42: Paragraph 108(1)(e)

3.602. This item broadens the offence contained in section 108(1)(e) to include using abusive or threatening language to any person exercising a power or performing a function under the *Fisheries Management Act 1991*. This amendment has been included to ensure the safety of every person who is exercising or performing any power, function or duty under the *Fisheries Management Act 1991*, such as AFMA officials, detention officers and others who may not be “officers” under the *Fisheries Management Act 1991*.

Item 43: Paragraph 108(1)(f)

3.603. This item broadens the offence contained in section 108(1)(f) to include assaulting, resisting or obstructing any person exercising a power or performing a duty under the *Fisheries Management Act 1991*. This amendment has been included to ensure the safety of every person who is exercising or performing any power, function or duty under the *Fisheries Management Act 1991*, such as AFMA officials, detention officers and others who may not be “officers” under the *Fisheries Management Act 1991*.

TORRES STRAIT FISHERIES ACT 1984

Item 44: At the end of paragraph 43(1)(e)

3.604. This item broadens the offence contained in section 43(1)(e) to include using abusive or threatening language to any person exercising a power or performing a function under the of the *Torres Strait Fisheries Act 1984*. This amendment exactly replicates the amendment made to section 108(1)(e) of the *Fisheries Management Act 1991* (Item 42 above).

Item 45: After paragraph 43(1)(e)

3.605. This item adds the offence of assaulting, resisting or obstructing an officer or a person who is exercising or performing any power, function or duty of an officer to the *Torres Strait Fisheries Act 1984*. New paragraph 43(1)(f) exactly replicates section 108(1)(f) of the *Fisheries Management Act 1991* (as amended by Item 43 above) and is essential both to ensuring the safety of every person who is exercising or performing any power or function under the *Torres Strait Fisheries Act 1984* and providing consistency with the *Fisheries Management Act 1991*.

Schedule 2: Enforcement visas etc.

Part 1: Visas etc. relating to exercise of powers under Torres Strait Fisheries Act 1984

MIGRATION ACT 1958

Item 1: Subsection 5(1) (definition of fisheries detention offence)

3.606. This item replaces the current definition of “fisheries detention offence” in the *Migration Act 1958* with a new definition which includes offences against section 45, 48, 49 or 51 of the *Torres Strait Fisheries Act 1984* and section 6 of the *Crimes Act 1914* (as it relates to the other offences listed in the definition) as well as sections 99, 100, 100A, 101, 101A, 101B, 105E or 105F of the *Fisheries Management Act 1991* which are included in the existing section.

3.607. This amendment is part of a package of amendments that will ensure that exemptions from certain visa requirements contained in the *Migration Act 1958* refer to people held under certain offences in the *Torres Strait Fisheries Act 1984*. Once a person is detained under these offences, an enforcement visa will be granted to the non-citizen by operation of law.

Item 2: Subsection 5(1) (definition of fisheries officer)

3.608. This item replaces the current definition of “fisheries officer” in the *Migration Act 1958* to include an officer appointed under the *Torres Strait Fisheries Act 1984* as well as officers as defined in the *Fisheries Management Act 1991*.

3.609. This amendment is part of a package of amendments that will ensure that exemptions from certain visa requirements contained in the *Migration Act 1958* refer to relevant circumstances in the *Torres Strait Fisheries Act 1984* as well as the *Fisheries Management Act 1991*.

Item 3: Subparagraph 43(3)(b)(i)

3.610. This item extends the exemption from the requirement to enter Australia through a port or by way of a pre-cleared flight under paragraph 43(3)(b) of the *Migration Act 1958*. Subparagraph 43(3)(b)(i) will now include a reference to people brought into Australia on a boat that has been required to enter Australia by a fisheries officer under section 42(1)(g) of the *Torres Strait Fisheries Act 1984* as well as people brought to Australia under a similar requirement authorised by either paragraph 84(1)(k)(ii) or 84(1)(l) of the *Fisheries Management Act 1991*.

3.611. This amendment is part of a package of amendments that will ensure that exemptions from certain visa requirements contained in the *Migration Act 1958* refer to relevant circumstances in the *Torres Strait Fisheries Act 1984* as well as the *Fisheries Management Act 1991*.

Item 4: Subparagraph 43(3)(b)(ii)

- 3.612. This item also extends the exemption from the requirement to enter Australia through a port or by way of a pre-cleared flight mentioned in the previous paragraph by amending subparagraph 43(3)(b)(ii) of the *Migration Act 1958*. This subsection will now include people brought into Australia on a boat that has been required to enter Australia by a fisheries officer under paragraphs 42(1)(h) of the *Torres Strait Fisheries Act 1984* as well as under paragraph 84(1)(m) of the *Fisheries Management Act 1991*.
- 3.613. This amendment is part of a package of amendments that will ensure that exemptions from certain visa requirements contained in the *Migration Act 1958* refer to relevant circumstances in the *Torres Strait Fisheries Act 1984* as well as the *Fisheries Management Act 1991*.

Item 5: Paragraph 164B(1)(a)

- 3.614. This item extends the circumstances in which an enforcement visa will be granted to a non-citizen on a foreign boat outside Australia's migration zone, outlined in paragraph 164B(1) of the *Migration Act 1958* to include offences under the *Torres Strait Fisheries Act 1984* as well as the *Fisheries Management Act 1991*.
- 3.615. The amendment to paragraph 164B(1)(a) will allow an enforcement visa to be granted in circumstances where a fisheries officer has reasonable grounds to believe that the boat has been, currently is, or will be involved in the commission of a fisheries detention offence and a fisheries officer has made a requirement of the boat's master under paragraph 42(1)(g) of the *Torres Strait Fisheries Act 1984* or subparagraph 84(1)(k)(ii) or paragraph 84(1)(l) of the *Fisheries Management Act 1991*.
- 3.616. This amendment is part of a package of amendments that will ensure that the enforcement visa regime contained in Division 4A of the *Migration Act 1958* can be applied to illegal foreign fishing offences under the *Torres Strait Fisheries Act 1984* as well as to offences under the *Fisheries Management Act 1991*.

Item 6: Paragraph 164B(1)(b)

- 3.617. This item also extends the circumstances in which an enforcement visa will be granted to a non-citizen on a foreign boat outside Australia's migration zone, as outlined in paragraph 164B(1) of the *Migration Act 1958*.
- 3.618. The amendment to paragraph 164B(1)(b) will allow an enforcement visa to be granted in circumstances where a fisheries officer exercises his or her power under paragraph 42(1)(h) of the *Torres Strait Fisheries Act 1984* or paragraph 84(1)(m) of the *Fisheries Management Act 1991* in relation to the boat due to its suspected involvement in an illegal activity.
- 3.619. This amendment is part of a package of amendments that will ensure that the 'enforcement visa regime' contained in Division 4A of the *Migration Act 1958* can be applied to illegal foreign fishing offences under the *Torres Strait Fisheries Act 1984* as well as to offences under the *Fisheries Management Act 1991*.

Item 7: Subsection 164B(1)(note 2)

- 3.620. This item explains that under paragraph 42(1)(g) of the *Torres Strait Fisheries Act 1984*, a fisheries officer may require the master of a boat to bring or take the boat into the migration zone. Under paragraph 42(1)(h) of the Act, a fisheries officer may bring a boat into the migration zone.

Item 8: Subsections 164B(3) and (4)

- 3.621. This item adds to subsections 164B(3) and (4). This is so that enforcement visas can be granted where prescribed actions are taken by fisheries officers in prescribed circumstances in relation to non-citizens and/or boats under the *Torres Strait Fisheries Act 1984* as well as the *Fisheries Management Act 1991*.
- 3.622. This amendment is part of a package of amendments that will ensure that the enforcement visa regime contained in Division 4A of the *Migration Act 1958* can be applied to illegal foreign fishing offences under the *Torres Strait Fisheries Act 1984* as well as to offences under the *Fisheries Management Act 1991*.

Item 9: Saving of enforcement visas

- 3.623. This item ensures that any enforcement visas issued before the commencement of the amendments outlined in Part 1 of Schedule 2 will remain valid following commencement of those provisions.

Part 2: Amendments relating to new fisheries detention provisions

MIGRATION ACT 1958

Item 10: Section 164A (definition of fisheries detention)

- 3.624. This item replaces the current definition of “fisheries detention” in the *Migration Act 1958* to reflect the new definitions to be included in new section 2 of Schedule 2 of the *Torres Strait Fisheries Act 1984* and new section 2 of Schedule 1A of the *Fisheries Management Act 1991*.
- 3.625. This amendment is part of a package of amendments that will ensure that the enforcement visa regime contained in Division 4A of the *Migration Act 1958* can be applied to illegal foreign fishing offences under the *Torres Strait Fisheries Act 1984* as well as to offences under the *Fisheries Management Act 1991*.

Item 11: Subsection 164B(2)

- 3.626. This amendment replaces a reference to officers’ powers under the *Fisheries Management Act 1991* with an updated reference to the relevant Schedules of the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984* regarding the detention of illegal fishers.
- 3.627. This amendment is part of a package of amendments that will ensure that the enforcement visa regime contained in Division 4A of the *Migration Act 1958* can be applied to illegal foreign fishing offences under the *Torres Strait Fisheries Act 1984* as well as to offences under the *Fisheries Management Act 1991*.

Item 12: Saving of enforcement visas

- 3.628. This item ensures that any enforcement visas issued before the commencement of the amendments outlined in Part 2 of Schedule 2 will remain valid following commencement of those provisions.