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The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Border Protection Legislation
Amendment (Deterrence of Illegal
Foreign Fishing) Bill 2005**

No. , 2005

(Fisheries, Forestry and Conservation)

**A Bill for an Act to amend the law relating to
fisheries and fishers, and for related purposes**

Contents

1	Short title.....	1
2	Commencement	1
3	Schedule(s).....	3
Schedule 1—Fisheries amendments		4
Part 1—Control of boats does not unlawfully restrain liberty of persons on the boats		4
<i>Fisheries Management Act 1991</i>		4
<i>Torres Strait Fisheries Act 1984</i>		4
Part 2—Provisions relating to detention of suspected illegal foreign fishers		6
<i>Fisheries Management Act 1991</i>		6
<i>Torres Strait Fisheries Act 1984</i>		51
Part 3—Searching persons on boats suspected of illegal fishing		98
Division 1—Main amendments		98
<i>Fisheries Management Act 1991</i>		98
<i>Torres Strait Fisheries Act 1984</i>		100
Division 2—Amendment contingent on detention power		102
<i>Torres Strait Fisheries Act 1984</i>		102
Part 4—Forfeiture etc. of things involved in illegal fishing		104
Division 1—Main amendments		104
<i>Torres Strait Fisheries Act 1984</i>		104
Division 2—Related amendments		111
<i>Torres Strait Fisheries Act 1984</i>		111
Part 5—Offences against persons with powers and functions under fisheries law		113
<i>Fisheries Management Act 1991</i>		113
<i>Torres Strait Fisheries Act 1984</i>		113
Schedule 2—Enforcement visas etc.		114
Part 1—Visas etc. relating to exercise of powers under Torres Strait Fisheries Act 1984		114

<i>Migration Act 1958</i>	114
Part 2—Amendments relating to new fisheries detention provisions	116
<i>Migration Act 1958</i>	116

1 **A Bill for an Act to amend the law relating to**
2 **fisheries and fishers, and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Border Protection Legislation*
6 *Amendment (Deterrence of Illegal Foreign Fishing) Act 2005*.

7 **2 Commencement**

8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with
10 column 2 of the table. Any other statement in column 2 has effect
11 according to its terms.
12

Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	
2. Schedule 1, Part 1	The day after this Act receives the Royal Assent.	
3. Schedule 1, Part 2	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	
4. Schedule 1, Part 3, Division 1	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	
5. Schedule 1, Part 3, Division 2	The later of: (a) immediately after the commencement of Part 2 of Schedule 1 to this Act; and (b) immediately after the commencement of Division 1 of Part 3 of Schedule 1 to this Act.	
6. Schedule 1, Parts 4 and 5	The day after this Act receives the Royal Assent.	
7. Schedule 2, Part 1	The day after this Act receives the Royal Assent.	
8. Schedule 2, Part 2	At the same time as the provision(s) covered by table item 3.	

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2
3

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

1 (2) Column 3 of the table contains additional information that is not
2 part of this Act. Information in this column may be added to or
3 edited in any published version of this Act.

4 **3 Schedule(s)**

5 Each Act that is specified in a Schedule to this Act is amended or
6 repealed as set out in the applicable items in the Schedule
7 concerned, and any other item in a Schedule to this Act has effect
8 according to its terms.

1

2

Schedule 1—Fisheries amendments

3

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

4

5

Fisheries Management Act 1991

6

1 After subsection 84(1B)

7

Insert:

8

(1BA) If there is a restraint on the liberty of a person on a boat resulting from an officer's exercise of a power under paragraph (1)(g), (k), (l) or (m) (applying of its own force or because of another provision of this Act) in relation to a boat:

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(a) the restraint is not unlawful; and

(b) civil or criminal proceedings in respect of the restraint may not be instituted or continued in any court against:

(i) the officer; or

(ii) any person assisting the officer in the exercise of the power; or

(iii) AFMA; or

(iv) the Commonwealth.

This subsection is not intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

22

Torres Strait Fisheries Act 1984

23

2 After subsection 42(2)

24

Insert:

25

(2AAA) If there is a restraint on the liberty of a person on a boat resulting from an officer's exercise of a power under paragraph (1)(d), (e), (g) or (h) in relation to a boat:

26

27

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29

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(a) the restraint is not unlawful; and

(b) civil or criminal proceedings in respect of the restraint may not be instituted or continued in any court against:

(i) the officer; or

1 (ii) any person assisting the officer in the exercise of the
2 power; or

3 (iii) AFMA; or

4 (iv) the Commonwealth.

5 This subsection is not intended to affect the jurisdiction of the High
6 Court under section 75 of the Constitution.

1

2

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

3

4

Fisheries Management Act 1991

5

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

6

Repeal the paragraphs.

7

4 At the end of subsection 84(1)

8

Add:

9

Note: Schedule 1A gives officers powers relating to detention of suspected illegal foreign fishers.

10

11

5 Sections 84A and 84B

12

Repeal the sections.

13

6 Paragraph 87E(1)(aa)

14

Omit “paragraph 84(1)(ia)”, substitute “Schedule 1A”.

15

7 Paragraph 87E(1)(ab)

16

Omit “paragraph 84(1)(ib)”, substitute “Schedule 1A”.

17

8 Paragraph 87E(1)(ab)

18

Omit “paragraph 84(1)(ia)”, substitute “that Schedule”.

19

9 Subsection 87E(5)

20

Omit “paragraph 84(1)(ia) or (ib)”, substitute “Schedule 1A”.

21

10 Subsection 87E(5) (note)

22

Repeal the note.

23

11 Section 98A

24

Repeal the section.

25

12 After Division 5A of Part 6

26

Insert:

1 **Division 5B—Provisions relating to detention of suspected**
2 **illegal foreign fishers**

3 **105Q Provisions relating to detention of suspected illegal foreign**
4 **fishers**

5 Schedule 1A has effect.

6 **13 Before Schedule 1**

7 Insert:

8 **Schedule 1A—Provisions relating to detention**
9 **of suspected illegal foreign fishers**

10 Note: See section 105Q.

11 **Part 1—Preliminary**

12 **Division 1—Objects of this Schedule**

13 **1 Main objects of this Schedule**

- 14 (1) This Schedule has 3 main objects.
- 15 (2) The first main object is to provide for the detention (*fisheries*
16 *detention*) in Australia or a Territory of persons who:
17 (a) are reasonably suspected by an officer of having committed
18 an offence involving the use of a foreign boat; and
19 (b) are not Australian citizens or Australian residents;
20 for a limited period for the purposes of determining whether to
21 charge them with the offence.
- 22 (3) The second main object is to provide for persons in fisheries
23 detention to be searched, screened, given access to facilities for
24 obtaining legal advice, and identified.
- 25 (4) The third main object is to facilitate the transition of persons from
26 fisheries detention to immigration detention under the *Migration*
27 *Act 1958*:

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 (a) by providing for the things mentioned in subclause (3) to be
2 done in a way corresponding to the way that Act provides for
3 those things to be done to persons in immigration detention;
4 and

5 (b) by authorising the disclosure of personal information about
6 individuals who are or have been in fisheries detention to
7 persons, agencies and organisations responsible for holding
8 the individuals in immigration detention, for the purpose of
9 the immigration detention and welfare of the individuals.

10 Note: The enforcement visa of a person who is neither an Australian citizen
11 nor an Australian resident ceases to have effect under the *Migration*
12 *Act 1958* when the person ceases to be in fisheries detention, so that
13 Act requires the person to be taken into immigration detention.

14 **Division 2—Definitions**

15 **2 Definitions**

16 In this Schedule, unless the contrary intention appears:

17 *authorised officer* means an officer, or detention officer, who is
18 authorised under Division 4 for the purposes of the provision in
19 which the expression occurs.

20 *detainee* means a person detained under Part 2.

21 *detention* means detention under Part 2.

22 *detention officer* means a person appointed under clause 3 to be a
23 detention officer.

24 **Division 3—Appointment etc. of detention officers**

25 **3 Minister may appoint persons to be detention officers**

26 (1) The Minister may, by instrument, appoint one or more persons
27 (except persons who are officers) to be detention officers.

28 Note: Officers have the same powers as detention officers, as well as other
29 powers, so there is no reason for officers to be appointed as detention
30 officers.

31 (2) An instrument appointing persons to be detention officers:
32 (a) may identify the persons by reference to a class; and

- 1 (b) may provide for persons to be appointed when they become
2 members of the class at or after a time specified in the
3 instrument.

4 **4 Detention officers subject to directions**

5 A detention officer is, in the exercise of his or her powers, and the
6 performance of his or her duties, under this Schedule, subject to the
7 directions given by the Minister or AFMA.

8 **5 Detention officer etc. not liable to certain actions**

9 (1) A detention officer, or a person assisting a detention officer in the
10 exercise of powers under this Act or the regulations, is not liable to
11 an action, suit or proceeding for or in respect of anything done in
12 good faith or omitted to be done in good faith in the exercise or
13 purported exercise of any power conferred by this Act or the
14 regulations.

15 Note: Section 90 makes similar provision for officers and their assistants.

16 (2) However, subsection (1) does not affect a contractual liability of a
17 detention officer or person assisting a detention officer.

18 **Division 4—Authorisation of officers and detention officers**

19 **6 AFMA may authorise officers and detention officers**

20 (1) AFMA may, by instrument, authorise one or more officers and/or
21 detention officers for the purposes of a specified provision of this
22 Schedule.

23 (2) An instrument authorising officers and/or detention officers:

- 24 (a) may identify them by reference to a class; and
25 (b) may provide for them to be authorised when they become
26 members of the class at or after a time specified in the
27 instrument.

28 **7 Persons who are authorised officers for purposes of *Migration Act***
29 ***1958* are taken to be authorised for this Schedule**

- 30 (1) A person who:
31 (a) is an officer or detention officer; and
-

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 (b) is an authorised officer (as defined in the *Migration Act*
2 *1958*) for a provision of that Act listed in column 2 of an
3 item of the table;
4 is, while he or she meets the conditions in paragraphs (a) and (b),
5 taken to be authorised under clause 6 for the purposes of the
6 provision of this Schedule listed in column 3 of the item.
7

Corresponding provisions of the *Migration Act 1958* and this Schedule

Column 1 Item	Column 2 Provision of <i>Migration Act 1958</i>	Column 3 Provision of this Schedule
1	Subsection 252(4)	Subclause 15(3)
2	Paragraph 252(6)(a)	Paragraph 15(5)(a)
3	Subparagraph 252(6)(b)(i)	Subparagraph 15(5)(b)(i)
4	Subsection 252AA(1)	Subclause 16(1)
5	Subsection 252A(1)	Subclause 17(1)
6	Subsection 252C(1)	Subclause 19(1)
7	Subsection 252D(2)	Subclause 20(2)
8	Subsection 252G(3)	Subclause 23(3)
9	Section 261AA	Clause 28
10	Subsection 261AE(1)	Subclause 32(1)
11	Subsection 261AE(3)	Subclause 32(3)
12	Section 261AG	Clause 34
13	Section 261AJ	Clause 37
14	Subsection 261AK(1) (except paragraph (a))	Subclause 38(1) (except paragraph (a))
15	Subsection 261AK(3)	Subclause 38(3)

8 *Limits on authorisation*

9 (2) However, the person is not taken to be authorised to carry out an
10 identification test in relation to which section 5D of the *Migration*
11 *Act 1958* provides that the person is not an authorised officer (for
12 the purposes of that Act).

13 Note: This is relevant to items 9 to 15 of the table in subclause (1).

1 *Persons specified by AFMA not authorised*

- 2 (3) AFMA may, by instrument, specify that the person is not taken to
3 be authorised:
4 (a) for the purposes of the provision of this Schedule; or
5 (b) for the purposes of carrying out under this Schedule
6 identification tests of a type specified under section 5D of the
7 *Migration Act 1958* in relation to the person.
8 The instrument has effect according to its terms, despite
9 subclause (1).
- 10 (4) An instrument under subclause (3) may specify one or more
11 persons by reference to their being members of a specified class at
12 or after a time specified in the instrument.
- 13 (5) An instrument made under subclause (3) is not a legislative
14 instrument.

15 **Part 2—Detaining suspected illegal foreign fishers**

16 **Division 1—Initial detention by an officer**

17 **8 Power to detain**

- 18 (1) An officer may detain a person in Australia or a Territory for the
19 purposes of determining during the period of detention whether or
20 not to charge the person with an offence against section 99, 100,
21 100A, 101, 101A, 101B, 105E or 105F or an offence against
22 section 6 of the *Crimes Act 1914* relating to such an offence, if the
23 officer has reasonable grounds to believe that the person:
24 (a) is not an Australian citizen or an Australian resident; and
25 (b) was on a foreign boat when it was used in the commission of
26 such an offence.
- 27 (2) Subclause (1) does not authorise an officer to use more force in
28 detaining a person than is reasonably necessary.
- 29 (3) Subclause (1) has effect subject to section 87E.

30 Note: Section 87E sets limits on the exercise of certain powers in relation to
31 FSA boats.

1 **9 Relationship with Part IC of the *Crimes Act 1914***

- 2 (1) Part IC of the *Crimes Act 1914* applies in relation to the detainee
3 while detained under this Part as if:
4 (a) he or she were a protected suspect for a Commonwealth
5 offence for the purposes of that Part; and
6 (b) an officer were an investigating official for the purposes of
7 that Part.
- 8 (2) Subclause (1) does not affect the operation of Division 2 of Part IC
9 of the *Crimes Act 1914* as it applies of its own force in relation to a
10 person who is lawfully arrested.

11 **Division 2—Continued detention by a detention officer**

12 **10 Detention officer may detain person already detained by officer**

- 13 (1) For the purposes of facilitating an officer determining whether or
14 not to charge a person with an offence against section 99, 100,
15 100A, 101, 101A, 101B, 105E or 105F or an offence against
16 section 6 of the *Crimes Act 1914* relating to such an offence, a
17 detention officer may detain the person in Australia or a Territory
18 if the detention officer has reasonable grounds to believe that the
19 person:
20 (a) has been detained by an officer under Division 1; and
21 (b) has been presented, while detained by that officer, to a
22 detention officer for detention by a detention officer.
- 23 (2) However, the detention officer may not detain the person if the
24 detention officer has reasonable grounds to believe that the person
25 has ceased to be in detention since the last time the person was
26 detained by an officer under Division 1.
- 27 (3) Subclause (1) does not authorise a detention officer to use more
28 force in detaining a person than is reasonably necessary.

1 **Division 3—Detention on behalf of an officer or detention**
2 **officer**

3 **11 Detention on behalf of an officer or detention officer**

- 4 (1) A person is taken to be detained by an officer or detention officer
5 under this Part while the person is held, on behalf of the officer or
6 detention officer, in any of the following:
7 (a) a prison or remand centre of the Commonwealth, a State or a
8 Territory;
9 (b) a police station or watch house;
10 (c) a hospital or other place where the person is receiving
11 medical treatment;
12 (d) another place approved by the Minister in writing;
13 (e) a boat.
- 14 (2) This clause has effect even while the officer or detention officer is
15 not present where the person is held on behalf of the officer or
16 detention officer.
- 17 (3) An approval of a place by the Minister is not a legislative
18 instrument.

19 **Division 4—Moving detainees**

20 **12 Power to move detainees**

- 21 (1) An officer or a detention officer may:
22 (a) take a detainee in Australia to another place in Australia or to
23 a place in an external Territory; and
24 (b) take a detainee in an external Territory to another place in the
25 Territory or to a place in Australia or another Territory.
- 26 (2) Subclause (1) does not authorise an officer or detention officer to
27 use more force than is reasonably necessary to take the detainee to
28 the place.
- 29 (3) In exercising the power under subclause (1), the officer or
30 detention officer must have regard to all matters that he or she
31 considers relevant, including:
32 (a) the administration of justice; and

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 (b) the welfare of the detainee.

2 (4) So far as it relates to an officer, subclause (1) has effect subject to
3 section 87E.

4 Note: Section 87E sets limits on the exercise of certain powers in relation to
5 FSA boats.

6 **Division 5—End of detention**

7 **13 End of detention**

8 A detainee must be released from detention:

- 9 (a) as soon as an officer or detention officer knows or reasonably
10 believes that the detainee is an Australian citizen or an
11 Australian resident; or
12 (b) at the time the detainee is brought before a magistrate
13 following a decision to charge the detainee with an offence
14 referred to in subclause 8(1); or
15 (c) at the time a decision is made not to charge the detainee with
16 an offence referred to in that subclause; or
17 (d) at the end of 168 hours after the detention began;
18 whichever occurs first.

19 **Division 6—Offence of escaping from detention**

20 **14 Escape from detention**

- 21 (1) A person commits an offence if:
22 (a) the person is in detention; and
23 (b) the person escapes from that detention.
24 (2) The offence is punishable on conviction by imprisonment for up to
25 2 years.

1 **Part 3—Searching and screening detainees and**
2 **screening their visitors**

3 **Division 1—Searches of detainees**

4 **15 Searches of detainees**

- 5 (1) For the purposes set out in subclause (2), a detainee, and the
6 detainee's clothing and any property under the immediate control
7 of the detainee, may, without warrant, be searched.
- 8 (2) The purposes for which a detainee, and the detainee's clothing and
9 any property under the immediate control of the detainee, may be
10 searched under this clause are as follows:
- 11 (a) to find out whether there is hidden on the detainee's person,
12 in the clothing or in the property, a weapon or other thing
13 capable of being used to inflict bodily injury or to help the
14 detainee to escape from detention;
- 15 (b) to find out whether there is hidden on the detainee's person,
16 in the clothing or in the property, a document or other thing
17 that is, or may be, evidence of:
- 18 (i) an offence against section 99, 100, 100A, 101, 101A,
19 101B, 105E or 105F; or
- 20 (ii) an offence against section 6 of the *Crimes Act 1914*
21 relating to an offence described in subparagraph (i).
- 22 (3) If, in the course of a search under this clause, a weapon or other
23 thing referred to in paragraph (2)(a), or a document or other thing
24 referred to in paragraph (2)(b), is found, an authorised officer:
- 25 (a) may take possession of the weapon, document or other thing;
26 and
- 27 (b) may retain the weapon, document or other thing for such
28 time as he or she thinks necessary for the purposes of this Act
29 or the *Migration Act 1958*.
- 30 (4) This clause does not authorise an authorised officer, or another
31 person conducting a search pursuant to subclause (5), to remove
32 any of the detainee's clothing, or to require a detainee to remove
33 any of his or her clothing.

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (5) A search under this clause of a detainee, and the detainee's
2 clothing, must be conducted by:
3 (a) an authorised officer of the same sex as the detainee; or
4 (b) in a case where an authorised officer of the same sex as the
5 detainee is not available to conduct the search—any other
6 person who is of the same sex and:
7 (i) is requested by an authorised officer; and
8 (ii) agrees;
9 to conduct the search.
- 10 (6) An action or proceeding, whether civil or criminal, does not lie
11 against a person who, at the request of an authorised officer,
12 conducts a search under this clause if the person acts in good faith
13 and does not contravene subclause (7).
- 14 (7) An authorised officer or other person who conducts a search under
15 this clause must not use more force, or subject a detainee to greater
16 indignity, than is reasonably necessary in order to conduct the
17 search.
- 18 (8) To avoid doubt, a search of a detainee may be conducted under this
19 clause irrespective of whether a screening procedure is conducted
20 in relation to the detainee under clause 16 or a strip search of the
21 detainee is conducted under clause 17.

22 Note: This clause corresponds closely to section 252 of the *Migration Act*
23 *1958*.

24 **Division 2—Screening of detainees**

25 **16 Power to conduct a screening procedure**

- 26 (1) A screening procedure in relation to a detainee, other than a
27 detainee to whom clause 22 applies, may be conducted by an
28 authorised officer, without warrant, to find out whether there is
29 hidden on the detainee, in his or her clothing or in a thing in his or
30 her possession a weapon, or other thing, capable of being used:
31 (a) to inflict bodily injury; or
32 (b) to help the detainee, or any other detainee, to escape from
33 detention.
- 34 (2) An authorised officer who conducts a screening procedure under
35 this clause must not use greater force, or subject the detainee to
-

- 1 greater indignity, than is reasonably necessary in order to conduct
2 the screening procedure.
- 3 (3) This clause does not authorise an authorised officer to remove any
4 of the detainee's clothing, or to require a detainee to remove any of
5 his or her clothing.
- 6 (4) To avoid doubt, a screening procedure may be conducted in
7 relation to a detainee under this clause irrespective of whether a
8 search of the detainee is conducted under clause 15 or 17.
- 9 (5) In this clause:
- 10 *conducting a screening procedure*, in relation to a detainee,
11 means:
- 12 (a) causing the detainee to walk, or to be moved, through
13 screening equipment; or
14 (b) passing hand-held screening equipment over or around the
15 detainee or around things in the detainee's possession; or
16 (c) passing things in the detainee's possession through screening
17 equipment or examining such things by X-ray.
- 18 *screening equipment* means a metal detector or similar device for
19 detecting objects or particular substances.
- 20 Note: This clause corresponds closely to section 252AA of the *Migration*
21 *Act 1958*.

22 **Division 3—Strip searches of detainees**

23 **17 Power to conduct a strip search**

- 24 (1) A strip search of a detainee, other than a detainee to whom
25 clause 22 applies, may be conducted by an authorised officer,
26 without warrant, to find out whether there is hidden on the
27 detainee, in his or her clothing or in a thing in his or her possession
28 a weapon, or other thing, capable of being used:
- 29 (a) to inflict bodily injury; or
30 (b) to help the detainee, or any other detainee, to escape from
31 detention.
- 32 Note: Clause 18 sets out rules for conducting a strip search under this clause.

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (2) A *strip search* of a detainee means a search of the detainee, of his
2 or her clothing or of a thing in his or her possession. It may
3 include:
- 4 (a) requiring the detainee to remove some or all of his or her
5 clothing; and
- 6 (b) an examination of that clothing and of the detainee's body
7 (but not of the detainee's body cavities).
- 8 (3) A strip search of a detainee may be conducted by an authorised
9 officer only if:
- 10 (a) an officer or detention officer suspects on reasonable grounds
11 that there is hidden on the detainee, in his or her clothing or
12 in a thing in his or her possession a weapon or other thing
13 described in subclause (1); and
- 14 (b) the officer, or detention officer, referred to in paragraph (a)
15 suspects on reasonable grounds that it is necessary to conduct
16 a strip search of the detainee to recover that weapon or other
17 thing; and
- 18 (c) the strip search is authorised as follows:
- 19 (i) if the detainee is at least 18—the Managing Director of
20 AFMA, the Secretary of the Department, or an SES
21 Band 3 employee in the Department (who is not the
22 officer referred to in paragraphs (a) and (b) nor the
23 authorised officer conducting the strip search),
24 authorises the strip search because he or she is satisfied
25 that there are reasonable grounds for those suspicions;
- 26 (ii) if the detainee is at least 10 but under 18—a magistrate
27 orders the strip search because he or she is satisfied that
28 there are reasonable grounds for those suspicions.
- 29 (4) An officer or detention officer may form a suspicion on reasonable
30 grounds for the purposes of paragraph (3)(a) on the basis of:
- 31 (a) a search conducted under clause 15 (whether by that officer
32 or detention officer or by another officer or detention
33 officer); or
- 34 (b) a screening procedure conducted under clause 16 (whether by
35 that officer or detention officer or by another officer or
36 detention officer); or
- 37 (c) any other information that is available to the officer or
38 detention officer.

- 1 (5) An authorisation of a strip search given for the purposes of
2 paragraph (3)(c):
3 (a) may be given by telephone, fax or other electronic means;
4 and
5 (b) must be recorded in writing, and signed by the person giving
6 the authorisation, within one business day after it is given.
- 7 (6) A record made under paragraph (5)(b) is not a legislative
8 instrument.
- 9 (7) A failure to comply with paragraph (5)(b) does not affect the
10 validity of a strip search conducted on the basis of that
11 authorisation.
- 12 (8) The power to authorise a strip search under paragraph (3)(c) cannot
13 be delegated to any other person.
- 14 (9) A power conferred on a magistrate by this clause is conferred on
15 the magistrate in a personal capacity and not as a court or a
16 member of a court.
- 17 (10) The magistrate need not accept the power conferred.
- 18 (11) A magistrate exercising a power under this clause has the same
19 protection and immunity as if he or she were exercising that power
20 as, or as a member of, the court of which the magistrate is a
21 member.
- 22 (12) To avoid doubt, a strip search of a detainee may be conducted
23 under this clause irrespective of whether a search of the detainee is
24 conducted under clause 15 or a screening procedure is conducted in
25 relation to the detainee under clause 16.
- 26 (13) In this clause:
- 27 ***business day*** means a day that is not a Saturday, Sunday or public
28 holiday in the place where the authorisation is given.
- 29 ***SES Band 3 employee*** means an SES employee with a
30 classification of Senior Executive Band 3, and includes an SES
31 employee who has been temporarily assigned duties that have been
32 allocated a classification of Senior Executive Band 3.
- 33 Note: This clause corresponds closely to section 252A of the *Migration Act*
34 1958.
-

1 **18 Rules for conducting a strip search**

2 (1) A strip search of a detainee under clause 17:

3 (a) must not subject the detainee to greater indignity than is
4 reasonably necessary to conduct the strip search; and

5 (b) must be conducted in a private area; and

6 (c) must be conducted by an authorised officer of the same sex
7 as the detainee; and

8 (d) subject to subclauses (2), (3) and (5), must not be conducted
9 in the presence or view of a person who is of the opposite sex
10 to the detainee; and

11 (e) subject to subclauses (2), (3) and (5), must not be conducted
12 in the presence or view of a person whose presence is not
13 necessary for the purposes of the strip search; and

14 (f) must not be conducted on a detainee who is under 10; and

15 (g) if the detainee is at least 10 but under 18, or is incapable of
16 managing his or her affairs—must be conducted in the
17 presence of:

18 (i) the detainee's parent or guardian if that person is in
19 detention with the detainee and is readily available at
20 the same place; or

21 (ii) if that is not acceptable to the detainee or
22 subparagraph (i) does not apply—another person (other
23 than an authorised officer) who is capable of
24 representing the detainee's interests and who, as far as is
25 practicable in the circumstances, is acceptable to the
26 detainee; and

27 (h) subject to subclause (4), if the detainee is at least 18, and is
28 not incapable of managing his or her affairs—must be
29 conducted in the presence of another person (if any)
30 nominated by the detainee, if that other person is readily
31 available at the same place as the detainee, and willing to
32 attend the strip search within a reasonable time; and

33 (i) must not involve a search of the detainee's body cavities; and

34 (j) must not involve the removal of more items of clothing, or
35 more visual inspection, than the authorised officer
36 conducting the search believes on reasonable grounds to be
37 necessary to determine whether there is hidden on the
38 detainee, in his or her clothing or in a thing in his or her

- 1 possession a weapon or other thing described in subclause
2 17(1); and
- 3 (k) must not be conducted with greater force than is reasonably
4 necessary to conduct the strip search.
- 5 (2) Paragraphs (1)(d) and (e) do not apply to a parent or guardian, or
6 person present because of subparagraph (1)(g)(ii), if the detainee
7 has no objection to that person being present.
- 8 (3) Paragraphs (1)(d) and (e) do not apply to a person nominated by
9 the detainee under paragraph (1)(h) to attend the strip search.
- 10 (4) Neither:
- 11 (a) a detainee's refusal or failure to nominate a person under
12 paragraph (1)(h) within a reasonable time; nor
- 13 (b) a detainee's inability to nominate a person under that
14 paragraph who is readily available at the same place as the
15 detainee and willing to attend the strip search within a
16 reasonable time;
- 17 prevents a strip search being conducted.
- 18 (5) A strip search of a detainee may be conducted with the assistance
19 of another person if the authorised officer conducting the strip
20 search considers that to be necessary for the purposes of
21 conducting it. That person must not be of the opposite sex to the
22 detainee unless:
- 23 (a) the person is a medical practitioner; and
- 24 (b) a medical practitioner of the same sex as the detainee is not
25 available within a reasonable time.
- 26 (6) An action or proceeding, whether civil or criminal, does not lie
27 against a person who, at the request of an authorised officer, assists
28 in conducting a strip search if the person acts in good faith and
29 does not contravene this clause.
- 30 (7) A detainee must be provided with adequate clothing if during or as
31 a result of a strip search any of his or her clothing is:
- 32 (a) damaged or destroyed; or
- 33 (b) retained under clause 19.
- 34 Note: This clause corresponds closely to section 252B of the *Migration Act*
35 1958.
-

1 **Division 4—Keeping of things found by screening or strip**
2 **search of detainees**

3 **19 Possession and retention of certain things obtained during a**
4 **screening procedure or strip search**

- 5 (1) An authorised officer may take possession of and retain a thing
6 found in the course of conducting a screening procedure under
7 clause 16 or conducting a strip search under clause 17 if the thing:
8 (a) might provide evidence of the commission of an offence
9 against this Act; or
10 (b) is forfeited or forfeitable to the Commonwealth.
- 11 (2) A weapon or other thing described in subclause 16(1) or 17(1) that
12 is found in the course of conducting a screening procedure under
13 clause 16 or a strip search under clause 17 is forfeited to the
14 Commonwealth.
- 15 (3) An authorised officer must not return a thing that is forfeited or
16 forfeitable to the Commonwealth. Instead, the authorised officer
17 must, as soon as practicable, give a thing that is forfeited under
18 subclause (2) to a constable (within the meaning of the *Crimes Act*
19 *1914*).
- 20 Note: Subdivision C of Division 6 of Part 6 of this Act sets out the
21 procedure for dealing with things seized as being forfeited under
22 section 106A.
- 23 (4) An authorised officer must take reasonable steps to return anything
24 that is not forfeited or forfeitable but is retained under
25 subclause (1) to the person from whom it was taken, or to the
26 owner if that person is not entitled to possess it, if one of the
27 following happens:
28 (a) it is decided that the thing is not to be used in evidence;
29 (b) the period of 60 days after the authorised officer takes
30 possession of the thing ends.
- 31 (5) However, the authorised officer does not have to take those steps
32 if:
33 (a) in a paragraph (4)(b) case:
34 (i) proceedings in respect of which the thing might provide
35 evidence have been instituted before the end of the 60

- 1 day period and have not been completed (including an
2 appeal to a court in relation to those proceedings); or
3 (ii) the authorised officer may retain the thing because of an
4 order under clause 21; or
5 (b) in any case—the authorised officer is otherwise authorised
6 (by a law, or an order of a court or a tribunal, of the
7 Commonwealth or a State or Territory) to retain, destroy or
8 dispose of the thing.

9 Note: This clause corresponds closely to section 252C of the *Migration Act*
10 1958.

11 **20 Authorised officer may apply for a thing to be retained for a**
12 **further period**

- 13 (1) This clause applies if an authorised officer has taken possession of
14 a thing referred to in subclause 19(4) and proceedings in respect of
15 which the thing might provide evidence have not commenced
16 before the end of:
17 (a) 60 days after the authorised officer takes possession of the
18 thing; or
19 (b) a period previously specified in an order of a magistrate
20 under clause 21.
21 (2) The authorised officer may apply to a magistrate for an order that
22 the officer may retain the thing for a further period.
23 (3) Before making the application, the authorised officer must:
24 (a) take reasonable steps to discover which persons' interests
25 would be affected by the retention of the thing; and
26 (b) if it is practicable to do so, notify each person who the
27 authorised officer believes to be such a person of the
28 proposed application.

29 Note: This clause corresponds closely to section 252D of the *Migration Act*
30 1958.

- 31 (4) A notice under paragraph (3)(b) is not a legislative instrument.

32 **21 Magistrate may order that thing be retained**

- 33 (1) The magistrate may order that the authorised officer who made an
34 application under clause 20 may retain the thing if the magistrate is
35 satisfied that it is necessary for the authorised officer to do so:
-

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (a) for the purposes of an investigation as to whether an offence
2 has been committed; or
3 (b) to enable evidence of an offence to be secured for the
4 purposes of a prosecution.
- 5 (2) The order must specify the period for which the authorised officer
6 may retain the thing.
- 7 (3) A power conferred on a magistrate by this clause is conferred on
8 the magistrate in a personal capacity and not as a court or a
9 member of a court.
- 10 (4) The magistrate need not accept the power conferred.
- 11 (5) A magistrate exercising a power under this clause has the same
12 protection and immunity as if he or she were exercising that power
13 as, or as a member of, the court of which the magistrate is a
14 member.

15 Note: This clause corresponds closely to section 252E of the *Migration Act*
16 1958.

17 **Division 5—Law applying to detainee in State or Territory**
18 **prison etc.**

19 **22 Detainees held in State or Territory prisons or remand centres**

- 20 (1) This clause applies to a detainee if:
21 (a) he or she is held in detention in a prison or remand centre of
22 a State or Territory; and
23 (b) a law of that State or Territory confers a power to search
24 persons, or things in the possession of persons, serving
25 sentences or being held in the prison or remand centre.
- 26 (2) To the extent that the State or Territory law confers that power, or
27 affects the exercise of that power, it applies to the detainee as
28 though it were a law of the Commonwealth.
- 29 (3) Clauses 16 and 17 do not apply to a detainee to whom this clause
30 applies.

31 Note: This clause corresponds closely to section 252F of the *Migration Act*
32 1958.

1 **Division 6—Screening detainees’ visitors**

2 **23 Powers concerning entry to premises where detainee is detained**

- 3 (1) An officer or detention officer may request that a person about to
4 enter premises where a detainee is in detention do one or more of
5 the following:
6 (a) walk through screening equipment;
7 (b) allow an officer or detention officer to pass hand-held
8 screening equipment over or around the person or around
9 things in the person’s possession;
10 (c) allow things in the person’s possession to pass through
11 screening equipment or to be examined by X-ray.
- 12 (2) **Screening equipment** means a metal detector or similar device for
13 detecting objects or particular substances.
- 14 (3) If an authorised officer suspects on reasonable grounds that a
15 person about to enter premises where a detainee is in detention has
16 in the person’s possession a thing that might:
17 (a) endanger the safety of the detainees, staff or other persons on
18 the premises; or
19 (b) disrupt the order or security arrangements on the premises;
20 the authorised officer may request that the person do some or all of
21 the things in subclause (4) for the purpose of finding out whether
22 the person has such a thing. A request may be made whether or not
23 a request is also made to the person under subclause (1).
- 24 (4) An authorised officer may request that the person do one or more
25 of the following:
26 (a) allow the authorised officer to inspect the things in the
27 person’s possession;
28 (b) remove some or all of the person’s outer clothing such as a
29 coat, jacket or similar item;
30 (c) remove items from the pockets of the person’s clothing;
31 (d) open a thing in the person’s possession, or remove the thing’s
32 contents, to allow the authorised officer to inspect the thing
33 or its contents;
34 (e) leave a thing in the person’s possession, or some or all of its
35 contents, in a place specified by the authorised officer if he or

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 she suspects on reasonable grounds that the thing or its
2 contents are capable of concealing something that might:
3 (i) endanger the safety of the detainees, staff or other
4 persons on the premises; or
5 (ii) disrupt the order or security arrangements on the
6 premises.
- 7 (5) A person who leaves a thing (including any of its contents) in a
8 place specified by an authorised officer is entitled to its return
9 when the person leaves the premises.
- 10 (6) However, if possession of the thing, or any of those contents, by
11 the person is unlawful under a Commonwealth, State or Territory
12 law applying to the premises:
13 (a) the thing or the contents must not be returned to the person;
14 and
15 (b) an authorised officer must, as soon as practicable, give the
16 thing or the contents to a constable (within the meaning of
17 the *Crimes Act 1914*).
- 18 (7) A person who is about to enter premises where a detainee is
19 detained may be refused entry if the person does not comply with a
20 request under this clause.
- 21 Note: This clause corresponds closely to section 252G of the *Migration Act*
22 *1958*.

23 **Part 4—Detainees’ rights to facilities for obtaining**
24 **legal advice etc.**
25

26 **24 Detainee may have access to certain advice, facilities etc.**

- 27 The person responsible for detention of a detainee must, at the
28 detainee’s request, afford to him or her all reasonable facilities for
29 obtaining legal advice or taking legal proceedings in relation to his
30 or her detention.
- 31 Note: This clause corresponds to section 256 of the *Migration Act 1958*.

1 **Part 5—Identifying detainees**

2 **Division 1—Preliminary**

3 **25 Definitions**

4 In this Part, unless the contrary intention appears:

5 *identification test* means a test carried out in order to obtain a
6 personal identifier.

7 *incapable person* means a person who is incapable of
8 understanding the general nature and effect of, and purposes of, a
9 requirement to provide a personal identifier.

10 *independent person* means a person (other than an officer,
11 detention officer or authorised officer) who:

- 12 (a) is capable of representing the interests of a non-citizen who is
13 providing, or is to provide, a personal identifier; and
14 (b) as far as practicable, is acceptable to the non-citizen who is
15 providing, or is to provide, the personal identifier; and
16 (c) if the non-citizen is a minor—is capable of representing the
17 minor’s best interests.

18 *minor* means a person who is less than 18 years old.

19 *non-citizen* means a person who is not an Australian citizen.

20 *personal identifier* has the meaning given by clause 26.

21 Note: The definitions of expressions in this clause correspond closely to
22 definitions of those expressions in section 5 of the *Migration Act*
23 1958.

24 **26 Meaning of *personal identifier***

25 (1) In this Part:

26 *personal identifier* means any of the following (including any of
27 the following in digital form):

- 28 (a) fingerprints or handprints of a person (including those taken
29 using paper and ink or digital livescanning technologies);
30 (b) a measurement of a person’s height and weight;
31 (c) a photograph or other image of a person’s face and shoulders;
-

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (d) an audio or a video recording of a person (other than a video
2 recording under clause 37);
- 3 (e) an iris scan;
- 4 (f) a person's signature;
- 5 (g) any other identifier prescribed by the regulations, other than
6 an identifier the obtaining of which would involve the
7 carrying out of an intimate forensic procedure within the
8 meaning of section 23WA of the *Crimes Act 1914*.
- 9 (2) Before the Governor-General makes regulations for the purposes of
10 paragraph (1)(g) prescribing an identifier, the Minister must be
11 satisfied that:
- 12 (a) obtaining the identifier would not involve the carrying out of
13 an intimate forensic procedure within the meaning of
14 section 23WA of the *Crimes Act 1914*; and
- 15 (b) the identifier is an image of, or a measurement or recording
16 of, an external part of the body; and
- 17 (c) obtaining the identifier will promote one or more of the
18 purposes referred to in subclause (3).
- 19 (3) The purposes are:
- 20 (a) to assist in the identification of, and to authenticate the
21 identity of, any non-citizen who can be required under this
22 Act to provide a personal identifier; and
- 23 (b) to assist in identifying, in the future, any such non-citizen;
24 and
- 25 (c) to enhance AFMA's ability to identify non-citizens who have
26 a criminal history relating to fisheries; and
- 27 (d) to combat document and identity fraud in fisheries matters;
28 and
- 29 (e) to complement anti-people smuggling measures; and
- 30 (f) to inform the governments of foreign countries of the identity
31 of non-citizens who have been detained under, or charged
32 with offences against, this Act; and
- 33 (g) to facilitate international cooperation to combat fishing
34 activities that involve a breach of the laws of Australia or of a
35 foreign country.
- 36 Note: This clause corresponds closely to section 5A of the *Migration Act*
37 *1958*.
-

1 **27 Limiting the types of identification tests that authorised officers**
2 **may carry out**

- 3 (1) AFMA may, in an instrument authorising an officer or detention
4 officer as an authorised officer for the purposes of carrying out
5 identification tests under this Part, specify the types of
6 identification tests that the authorised officer may carry out.
- 7 (2) Such an authorised officer is not an authorised officer in relation to
8 carrying out an identification test that is not of a type so specified.

9 Note: This clause corresponds closely to section 5D of the *Migration Act*
10 1958.

11 **Division 2—Identification of detainees**

12 **Subdivision A—Provision of personal identifiers**

13 **28 Detainees must provide personal identifiers**

- 14 (1) A non-citizen in detention must (other than in the prescribed
15 circumstances) provide to an authorised officer one or more
16 personal identifiers.

17 Note: A person who is an Australian citizen, or is a non-citizen but an
18 Australian resident, may be in detention but must be released as soon
19 as an officer or detention officer knows or reasonably believes the
20 person is an Australian citizen or resident.

- 21 (2) An authorised officer must not require, for the purposes of
22 subclause (1), a detainee to provide a personal identifier other than
23 any of the following (including any of the following in digital
24 form):

- 25 (a) fingerprints or handprints of the detainee (including those
26 taken using paper and ink or digital liveness scanning
27 technologies);
28 (b) a measurement of the detainee's height and weight;
29 (c) a photograph or other image of the detainee's face and
30 shoulders;
31 (d) the detainee's signature;
32 (e) any other personal identifier of a type prescribed for the
33 purposes of this paragraph.

34 Note: Division 3 sets out further restrictions on the personal identifiers that
35 minors and incapable persons can be required to provide.

1 (3) The one or more personal identifiers are to be provided by way of
2 one or more identification tests carried out by the authorised officer
3 in accordance with this Division.

4 Note 1: Subject to certain restrictions, clause 32 allows reasonable force to be
5 used to carry out identification tests under this Division.

6 Note 2: This clause corresponds closely to section 261AA of the *Migration*
7 *Act 1958*.

8 **29 Authorised officers must require and carry out identification**
9 **tests**

10 (1) The authorised officer must, other than in the circumstances
11 prescribed for the purposes of subclause 28(1):
12 (a) require the non-citizen to provide one or more personal
13 identifiers, of the type or types prescribed, by way of one or
14 more identification tests carried out by the authorised officer;
15 and
16 (b) carry out the one or more identification tests on the
17 non-citizen.

18 (2) However:
19 (a) if the types of identification tests that the authorised officer
20 may carry out is specified under clause 27—each
21 identification test must be of a type so specified; and
22 (b) each identification test must be carried out in accordance
23 with Subdivision B; and
24 (c) unless the authorised officer has reasonable grounds to
25 believe that the non-citizen is not a minor or an incapable
26 person—each identification test must be carried out in
27 accordance with the additional requirements of Division 3.

28 Note: Subclauses (1) and (2) correspond closely to section 261AB of the
29 *Migration Act 1958*.

30 (3) If:
31 (a) the authorised officer is authorised because of clause 7
32 (which effectively treats as authorised officers for the
33 purposes of certain provisions of this Schedule certain
34 persons who are authorised officers for the purposes of
35 certain provisions of the *Migration Act 1958*); and
36 (b) an instrument under section 5D of that Act specifies the types
37 of identification test the authorised officer may carry out;

1 paragraph (2)(a) of this clause has effect as if the specified types
2 (except any specified under subclause 7(3) in relation to the
3 authorised officer) had been specified under clause 27.

4 **30 Information to be provided before carrying out identification**
5 **tests**

- 6 (1) Before carrying out an identification test, the authorised officer
7 must:
- 8 (a) inform the non-citizen that the non-citizen may ask that an
9 independent person be present while the identification test is
10 carried out and that the test be carried out by a person of the
11 same sex as the non-citizen; and
 - 12 (b) inform the non-citizen of such other matters as are specified
13 in the regulations.
- 14 (2) For the purposes of subclause (1), the authorised officer *informs*
15 the non-citizen of a matter if the authorised officer informs the
16 non-citizen of the matter, through an interpreter if necessary, in a
17 language (including sign language or braille) in which the
18 non-citizen is able to communicate with reasonable fluency.
- 19 (3) The authorised officer may comply with this clause by giving to
20 the non-citizen, in accordance with the regulations, a form setting
21 out the information specified in the regulations. However, the
22 information must be in a language (including braille) in which the
23 non-citizen is able to communicate with reasonable fluency.
- 24 Note: This clause corresponds closely to section 261AC of the *Migration*
25 *Act 1958*.
- 26 (4) A form mentioned in subclause (3) is not a legislative instrument.

27 **Subdivision B—How identification tests are carried out**

28 **31 General rules for carrying out identification tests**

- 29 An identification test under this Division:
- 30 (a) must be carried out in circumstances affording reasonable
31 privacy to the non-citizen; and
 - 32 (b) if the non-citizen so requests and it is practicable to comply
33 with the request—must not be carried out in the presence or

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 view of a person who is of the opposite sex to the
2 non-citizen; and
- 3 (c) must not be carried out in the presence or view of a person
4 whose presence is not necessary for the purposes of the
5 identification test or is not required or permitted by another
6 provision of this Act; and
- 7 (d) must not involve the removal of more clothing than is
8 necessary for carrying out the test; and
- 9 (e) must not involve more visual inspection than is necessary for
10 carrying out the test; and
- 11 (f) if the test is one of 2 or more identification tests to be carried
12 out on the non-citizen—must be carried out at the same time
13 as the other identification tests, if it is practicable to do so.

14 Note: This clause corresponds closely to section 261AD of the *Migration*
15 *Act 1958*.

16 **32 Use of force in carrying out identification tests**

17 *When use of force is permitted*

- 18 (1) Subject to subclause (2) and clause 33, an authorised officer, or a
19 person authorised under clause 34 to help the authorised officer,
20 may use reasonable force:
- 21 (a) to enable the identification test to be carried out; or
22 (b) to prevent the loss, destruction or contamination of any
23 personal identifier or any meaningful identifier derived from
24 the personal identifier.
- 25 However, this clause does not authorise the use of force against a
26 minor or an incapable person, or if the personal identifier in
27 question is a person's signature.
- 28 (2) The authorised officer or person must not use force unless:
- 29 (a) the non-citizen required to provide the personal identifier in
30 question has refused to allow the identification test to be
31 carried out; and
- 32 (b) all reasonable measures to carry out the identification test
33 without the use of force have been exhausted; and
- 34 (c) use of force in carrying out the identification test is
35 authorised under subclause (4).

1 *Applications for authorisation to use force*

- 2 (3) An authorised officer may apply to a senior authorising officer
3 (who is not an authorised officer referred to in subclause (1)) for an
4 authorisation to use force in carrying out the identification test.

5 *Authorisation to use force*

- 6 (4) The senior authorising officer may authorise the use of force in
7 carrying out the identification test if he or she is reasonably
8 satisfied that:
- 9 (a) the non-citizen required to provide the personal identifier in
10 question has refused to allow the identification test to be
11 carried out; and
- 12 (b) all reasonable measures to carry out the identification test
13 without the use of force have been exhausted.
- 14 (5) An authorisation under subclause (4):
- 15 (a) may be given by telephone, fax or other electronic means;
16 and
- 17 (b) must be recorded in writing, and signed by the person giving
18 the authorisation, within one business day after it is given.
- 19 (6) A record made under paragraph (5)(b) is not a legislative
20 instrument.
- 21 (7) A failure to comply with paragraph (5)(b) does not affect the
22 validity of an identification test carried out on the basis of that
23 authorisation.
- 24 (8) The power to give an authorisation under subclause (4) cannot be
25 delegated to any other person.

26 *Definition*

- 27 (9) In this clause:

28 **senior authorising officer** means an officer, or detention officer,
29 whom AFMA has authorised, or who is included in a class of
30 officers or detention officers whom AFMA has authorised, to
31 perform the functions of a senior authorising officer under this
32 clause.

33 Note: This clause corresponds closely to section 261AE of the *Migration Act*
34 1958.

1 **33 Identification tests not to be carried out in cruel, inhuman or**
2 **degrading manner etc.**

3 For the purposes of this Act, the carrying out of the identification
4 test is not of itself taken:

- 5 (a) to be cruel, inhuman or degrading; or
6 (b) to be a failure to treat a person with humanity and with
7 respect for human dignity.

8 However, nothing in this Act authorises the carrying out of the
9 identification test in a cruel, inhuman or degrading manner, or in a
10 manner that fails to treat a person with humanity and with respect
11 for human dignity.

12 Note: This clause corresponds closely to section 261AF of the *Migration Act*
13 1958.

14 **34 Authorised officer may get help to carry out identification tests**

15 An authorised officer may ask another authorised officer or an
16 officer or detention officer to help him or her to carry out the
17 identification test, and the other person may give that help.

18 Note: This clause corresponds closely to section 261AG of the *Migration*
19 Act 1958.

20 **35 Identification tests to be carried out by authorised officer of same**
21 **sex as non-citizen**

22 If the non-citizen requests that the identification test be carried out
23 by an authorised officer of the same sex as the non-citizen, the test
24 must only be carried out by an authorised officer of the same sex as
25 the non-citizen.

26 Note: This clause corresponds closely to section 261AH of the *Migration*
27 Act 1958.

28 **36 Independent person to be present**

29 The identification test must be carried out in the presence of an
30 independent person if:

- 31 (a) force is used in carrying out the identification test; or
32 (b) both of the following apply:
33 (i) the non-citizen requests that an independent person be
34 present while the identification test is being carried out;

- 1 (ii) an independent person is readily available at the same
2 place as the non-citizen and is willing to attend the test
3 within a reasonable time.

4 Note: This clause corresponds closely to section 261AI of the *Migration Act*
5 1958.

6 **37 Recording of identification tests**

- 7 (1) An authorised officer may video record the carrying out of the
8 identification test.
- 9 (2) If the carrying out of the identification test is not video recorded,
10 the authorised officer may decide that the identification test must
11 be carried out in the presence of an independent person.

12 Note: This clause corresponds closely to section 261AJ of the *Migration Act*
13 1958.

14 **38 Retesting**

15 *When retesting is permitted*

- 16 (1) If:
- 17 (a) an authorised officer has carried out an identification test (the
18 *earlier test*) on a non-citizen in accordance with this Division
19 (including a test authorised under subclause (4)); and
20 (b) either:
- 21 (i) a personal identifier that is provided as a result of the
22 earlier test being carried out is unusable; or
23 (ii) an authorised officer, officer or detention officer is not
24 satisfied about the integrity of that personal identifier;
- 25 the authorised officer who carried out the earlier test or another
26 authorised officer may require the non-citizen to provide the
27 personal identifier again, and may carry out the test again in
28 accordance with this Division, if:
- 29 (c) the requirement is made while the earlier test is being carried
30 out or immediately after it was carried out; or
31 (d) carrying out the test again is authorised under subclause (4).
- 32 (2) If the non-citizen is required under subclause (1) to provide the
33 personal identifier again, the non-citizen is taken, for the purposes

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 of this Division, not to have provided the personal identifier as a
2 result of the earlier test being carried out.

3 *Applications for authorisation to retest*

- 4 (3) An authorised officer may apply for an authorisation to carry out
5 the test again. The application is to be made to:
- 6 (a) if the earlier test was not a test authorised under
7 subclause (4)—a senior authorising officer (who is not an
8 authorised officer, officer or detention officer referred to in
9 subclause (1)); or
 - 10 (b) if the earlier test was a test authorised under subclause (4) by
11 a senior authorising officer—the Managing Director of
12 AFMA, the Secretary of the Department or an SES Band 3
13 employee in the Department (who is not an authorised
14 officer, officer or detention officer referred to in
15 subclause (1)).

16 *Authorisation to retest*

- 17 (4) The senior authorising officer, Managing Director, Secretary or
18 SES Band 3 employee (as the case requires) may authorise the test
19 to be carried out again if:
- 20 (a) he or she is reasonably satisfied that the personal identifier
21 that is provided as a result of the earlier test being carried out
22 is unusable; or
 - 23 (b) he or she is not reasonably satisfied about the integrity of that
24 personal identifier.
- 25 (5) An authorisation under subclause (4):
- 26 (a) may be given by telephone, fax or other electronic means;
27 and
 - 28 (b) must be recorded in writing, and signed by the person giving
29 the authorisation, within one business day after it is given.
- 30 (6) A record made under paragraph (5)(b) is not a legislative
31 instrument.
- 32 (7) A failure to comply with paragraph (5)(b) does not affect the
33 validity of an identification test carried out on the basis of that
34 authorisation.

1 (8) The power to give an authorisation under subclause (4) cannot be
2 delegated to any other person.

3 *Use of force*

4 (9) An authorisation under subclause (4) does not authorise the use of
5 force in carrying out an identification test.

6 Note: See clause 32 on the use of force in carrying out identification tests.

7 *Effect of refusing to authorise retesting*

8 (10) If an application for an authorisation to carry out an identification
9 test again on a non-citizen is refused, the non-citizen is taken, for
10 the purposes of this Act, to have complied with any requirement
11 under this Act to provide the personal identifier in question.

12 *Definitions*

13 (11) In this clause:

14 *senior authorising officer* means an officer, or detention officer,
15 who:

16 (a) has been authorised, or is included in a class of officers or
17 detention officers who have been authorised, by AFMA to
18 perform the functions of a senior authorising officer under
19 this clause; and

20 (b) is not the Managing Director of AFMA, the Secretary of the
21 Department or an SES Band 3 employee in the Department.

22 *SES Band 3 employee* means an SES employee with a
23 classification of Senior Executive Band 3, and includes an SES
24 employee who has been temporarily assigned duties that have been
25 allocated a classification of Senior Executive Band 3.

26 Note: This clause corresponds closely to section 261AK of the *Migration*
27 *Act 1958*.

28 **Subdivision C—Obligations relating to video recordings of**
29 **identification tests**

30 **39 Definitions**

31 In this Subdivision, unless the contrary intention appears:

1 **permitted provision**, of a video recording, has the meaning given
2 by subclause 42(2).

3 **provide**, in relation to a video recording, includes provide access to
4 the recording.

5 **related document** means a document that contains information,
6 derived from a video recording made under clause 37 or from a
7 copy of such a recording, from which the identity of the individual
8 on whom the identification test in question was carried out is
9 apparent or can reasonably be ascertained.

10 **video recording** means a video recording made under clause 37 or
11 a copy of such a recording, and includes a related document.

12 Note: This clause corresponds closely to section 261AKA of the *Migration*
13 *Act 1958*.

14 **40 Accessing video recordings**

- 15 (1) A person commits an offence if:
16 (a) the person accesses a video recording; and
17 (b) the person is not authorised under clause 41 to access the
18 video recording for the purpose for which the person
19 accessed it.

20 Penalty: Imprisonment for 2 years.

- 21 (2) This clause does not apply if the access is through the provision of
22 a video recording that is a permitted provision.

23 Note 1: A defendant bears an evidential burden in relation to the matter in
24 subclause (2) (see subsection 13.3(3) of the *Criminal Code*).

25 Note 2: This clause corresponds closely to section 261AKB of the *Migration*
26 *Act 1958*.

27 **41 Authorising access to video recordings**

- 28 (1) AFMA may, in writing, authorise a specified person, or any person
29 included in a specified class of persons, to access:
30 (a) all video recordings; or
31 (b) a specified video recording, or video recordings of a
32 specified kind.

- 1 (2) AFMA must specify in an authorisation under this clause, as the
2 purpose or purposes for which access is authorised, one or more of
3 the following purposes:
4 (a) providing a video recording to another person in accordance
5 with this Subdivision;
6 (b) administering or managing the storage of video recordings;
7 (c) making a video recording available to the person to whom it
8 relates;
9 (d) modifying related documents in order to correct errors or
10 ensure compliance with appropriate standards;
11 (e) any purpose connected with determining whether a civil or
12 criminal liability has arisen from a person carrying out or
13 helping to carry out an identification test under this Act;
14 (f) complying with laws of the Commonwealth or the States or
15 Territories;
16 (g) disclosing personal information under clause 59 (about
17 disclosure of information about a person who has been in
18 detention, for the purposes of the immigration detention or
19 removal of the person).

- 20 (3) However, AFMA must not specify as a purpose for which access is
21 authorised a purpose that will include or involve the purpose of:
22 (a) investigating an offence against a law of the Commonwealth
23 or a State or Territory (other than an offence involving
24 whether an identification test was carried out lawfully); or
25 (b) prosecuting a person for such an offence;
26 if the identifying information in question relates to a personal
27 identifier of a prescribed type.

28 Note: This clause corresponds closely to section 261AKC of the *Migration*
29 *Act 1958*.

30 **42 Providing video recordings**

- 31 (1) A person commits an offence if:
32 (a) the person's conduct causes a video recording to be provided
33 to another person; and
34 (b) the provision of the recording is not a permitted provision of
35 the recording.

36 Penalty: Imprisonment for 2 years.

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (2) A *permitted provision* of a video recording is a provision of the
2 recording that:
- 3 (a) is for the purpose of administering or managing the storage
4 of video recordings; or
- 5 (b) is for the purpose of making the video recording in question
6 available to the non-citizen to whom it relates; or
- 7 (c) is for the purpose of a proceeding, before a court or tribunal,
8 relating to the non-citizen to whom the video recording in
9 question relates; or
- 10 (d) is for any purpose connected with determining whether a
11 civil or criminal liability has arisen from a person carrying
12 out or helping to carry out an identification test under this
13 Act; or
- 14 (e) is for the purpose of an investigation by the Privacy
15 Commissioner or the Ombudsman relating to carrying out an
16 identification test; or
- 17 (f) is made to a prescribed body or agency for the purpose of the
18 body or agency inquiring into the operation of provisions of
19 this Act relating to carrying out an identification test; or
- 20 (g) takes place with the written consent of the non-citizen to
21 whom the video recording in question relates; or
- 22 (h) is a disclosure authorised by clause 59 (about disclosure of
23 information about a person who has been in detention, for the
24 purposes of the immigration detention or removal of the
25 person).

- 26 (3) However, a provision of a video recording is not a permitted
27 provision of the recording if:
- 28 (a) it constitutes a disclosure of identifying information relating
29 to a personal identifier of a prescribed type; and
- 30 (b) it is for the purpose of:
- 31 (i) investigating an offence against a law of the
32 Commonwealth or a State or Territory (other than an
33 offence involving whether an identification test was
34 carried out lawfully); or
- 35 (ii) prosecuting a person for such an offence.

36 Note: This clause corresponds closely to section 261AKD of the *Migration*
37 *Act 1958*.

1 **43 Unauthorised modification of video recordings**

2 A person commits an offence if:

- 3 (a) the person causes any unauthorised modification of a video
4 recording; and
5 (b) the person intends to cause the modification; and
6 (c) the person knows that the modification is unauthorised.

7 Penalty: Imprisonment for 2 years.

8 **44 Unauthorised impairment of video recordings**

9 A person commits an offence if:

- 10 (a) the person causes any unauthorised impairment of:
11 (i) the reliability of a video recording; or
12 (ii) the security of the storage of a video recording; or
13 (iii) the operation of a system by which a video recording is
14 stored; and
15 (b) the person intends to cause the impairment; and
16 (c) the person knows that the impairment is unauthorised.

17 Penalty: Imprisonment for 2 years.

18 **45 Meanings of *unauthorised modification* and *unauthorised***
19 ***impairment etc.***

20 (1) In this Subdivision:

- 21 (a) modification of a video recording; or
22 (b) impairment of the reliability of a video recording; or
23 (c) impairment of the security of the storage of a video
24 recording; or
25 (d) impairment of the operation of a system by which a video
26 recording is stored;

27 by a person is unauthorised if the person is not entitled to cause
28 that modification or impairment.

29 (2) Any such modification or impairment caused by the person is not
30 unauthorised merely because he or she has an ulterior purpose for
31 causing it.

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 (3) For the purposes of an offence under this Subdivision, a person
2 causes any such unauthorised modification or impairment if the
3 person's conduct substantially contributes to it.

4 (4) For the purposes of subclause (1), if:

5 (a) a person causes any modification or impairment of a kind
6 mentioned in that subclause; and

7 (b) the person does so under a warrant issued under the law of
8 the Commonwealth, a State or a Territory;

9 the person is entitled to cause that modification or impairment.

10 Note: This clause corresponds closely to section 261AKG of the *Migration*
11 *Act 1958*.

12 **46 Destroying video recordings**

13 A person commits an offence if:

14 (a) the person is the person who has day-to-day responsibility for
15 the system under which a video recording is stored; and

16 (b) the person fails physically to destroy the recording, and all
17 copies of the recording, within 10 years after it was made.

18 Penalty: Imprisonment for 2 years.

19 **Division 3—Identification of minors and incapable persons**

20 **47 Minors**

21 *Minors less than 15 years old*

22 (1) A non-citizen who is less than 15 years old must not be required
23 under this Act to provide a personal identifier other than a personal
24 identifier consisting of:

25 (a) a measurement of the non-citizen's height and weight; or

26 (b) the non-citizen's photograph or other image of the
27 non-citizen's face and shoulders.

28 *Persons present while identification test is carried out*

29 (2) If a non-citizen who is a minor provides a personal identifier, in
30 accordance with a requirement under this Act, by way of an
31 identification test carried out by an authorised officer, the test must
32 be carried out in the presence of:

- 1 (a) a parent or guardian of the minor; or
2 (b) an independent person.

- 3 (3) However, if the Minister administering the *Immigration*
4 (*Guardianship of Children*) *Act 1946* is the guardian of the minor,
5 the test must be carried out in the presence of an independent
6 person other than that Minister.

7 Note: This clause corresponds closely to subsections 261AL(1), (5) and (6)
8 of the *Migration Act 1958*.

9 **48 Incapable persons**

10 *Incapable persons*

- 11 (1) A non-citizen who is an incapable person must not be required
12 under this Act to provide a personal identifier other than a personal
13 identifier consisting of:
14 (a) a measurement of the non-citizen's height and weight; or
15 (b) the non-citizen's photograph or other image of the
16 non-citizen's face and shoulders.

17 *Persons present while identification test is carried out*

- 18 (2) If a non-citizen who is an incapable person provides a personal
19 identifier, in accordance with a requirement under this Act, by way
20 of an identification test carried out by an authorised officer, the test
21 must be carried out in the presence of:
22 (a) a parent or guardian of the incapable person; or
23 (b) an independent person.

24 Note: This clause corresponds closely to subsections 261AM(1) and (4) of
25 the *Migration Act 1958*.

26 **Division 4—Obligations relating to detainees' identifying** 27 **information**

28 **Subdivision A—Preliminary**

29 **49 Definitions**

30 In this Division:

1 *disclose*, in relation to identifying information that is a personal
2 identifier, includes provide access to the personal identifier.

3 *identifying information* means the following:

- 4 (a) any personal identifier;
- 5 (b) any meaningful identifier derived from any personal
6 identifier;
- 7 (c) any record of a result of analysing any personal identifier or
8 any meaningful identifier derived from any personal
9 identifier;
- 10 (d) any other information, derived from any personal identifier,
11 from any meaningful identifier derived from any personal
12 identifier or from any record of a kind referred to in
13 paragraph (c), that could be used to discover a particular
14 person's identity or to get information about a particular
15 person.

16 *permitted disclosure* has the meaning given by subclauses 53(2)
17 and (3).

18 *unauthorised impairment* has the meaning given by clause 57.

19 *unauthorised modification* has the meaning given by clause 57.

20 Note: This clause corresponds closely to section 336A of the *Migration Act*
21 1958.

22 **50 Application**

23 Section 15.4 of the *Criminal Code* (extended geographical
24 jurisdiction—category D) applies to all offences against this
25 Division.

26 Note: This clause corresponds closely to section 336B of the *Migration Act*
27 1958.

28 **Subdivision B—Accessing identifying information**

29 **51 Accessing identifying information**

- 30 (1) A person commits an offence if:
31 (a) the person accesses identifying information; and
-

1 (b) the person is not authorised under clause 52 to access the
2 identifying information for the purpose for which the person
3 accessed it.

4 Penalty: Imprisonment for 2 years.

5 (2) This clause does not apply if the access is through a disclosure that
6 is a permitted disclosure.

7 Note 1: A defendant bears an evidential burden in relation to the matter in
8 subclause (2) (see subsection 13.3(3) of the *Criminal Code*).

9 Note 2: This clause corresponds closely to section 336C of the *Migration Act*
10 *1958*.

11 **52 Authorising access to identifying information**

12 (1) AFMA may, in writing, authorise a specified person, or any person
13 included in a specified class of persons, to access identifying
14 information of the kind specified in the authorisation.

15 (2) AFMA must specify in an authorisation under this clause, as the
16 purpose or purposes for which access is authorised, one or more of
17 the following purposes:

- 18 (a) one or more of the purposes set out in subclause 26(3);
19 (b) disclosing identifying information in accordance with this
20 Division;
21 (c) administering or managing the storage of identifying
22 information;
23 (d) making identifying information available to the person to
24 whom it relates;
25 (e) modifying identifying information to enable it to be matched
26 with other identifying information;
27 (f) modifying identifying information in order to correct errors
28 or ensure compliance with appropriate standards;
29 (g) making decisions under this Act;
30 (h) complying with laws of the Commonwealth or the States or
31 Territories;
32 (i) disclosing personal information under clause 59 (about
33 disclosure of information about a person who has been in
34 detention, for the purposes of the immigration detention or
35 removal of the person).

- 1 (3) However, AFMA must not specify as a purpose for which access is
2 authorised a purpose that will include or involve the purpose of:
3 (a) investigating an offence against a law of the Commonwealth
4 or a State or Territory; or
5 (b) prosecuting a person for such an offence;
6 if the identifying information in question relates to a personal
7 identifier of a prescribed type.

8 Note: This clause corresponds closely to section 336D of the *Migration Act*
9 *1958*.

10 Subdivision C—Disclosing identifying information

11 53 Disclosing identifying information

- 12 (1) A person commits an offence if:
13 (a) the person's conduct causes disclosure of identifying
14 information; and
15 (b) the disclosure is not a permitted disclosure.

16 Penalty: Imprisonment for 2 years.

- 17 (2) A *permitted disclosure* is a disclosure that:
18 (a) is for the purpose of data-matching in order to:
19 (i) identify, or authenticate the identity of, a non-citizen; or
20 (ii) facilitate the processing of non-citizens entering or
21 departing from Australia; or
22 (iii) identify non-citizens who have a criminal history, who
23 are of character concern (as defined in the *Migration*
24 *Act 1958*) or who are of national security concern; or
25 (iv) combat document and identity fraud in immigration
26 matters; or
27 (v) ascertain whether an applicant for a protection visa had
28 sufficient opportunity to avail himself or herself of
29 protection before arriving in Australia; or
30 (vi) inform the governments of foreign countries of the
31 identity of non-citizens who are, or are to be, removed
32 from Australia; or
33 (b) is for the purpose of administering or managing the storage
34 of identifying information; or

- 1 (c) is authorised under clause 54 and is for the purpose, or one or
2 more of the purposes, for which the disclosure is authorised;
3 or
4 (d) is for the purpose of making the identifying information in
5 question available to the non-citizen to whom it relates; or
6 (e) takes place under an arrangement entered into with an agency
7 of the Commonwealth, or with a State or Territory or an
8 agency of a State or Territory, for the exchange of identifying
9 information; or
10 (f) is for the purpose of a proceeding, before a court or tribunal,
11 relating to the non-citizen to whom the identifying
12 information in question relates; or
13 (g) is for the purpose of an investigation by the Privacy
14 Commissioner or the Ombudsman relating to:
15 (i) carrying out an identification test; or
16 (ii) requiring the provision of a personal identifier; or
17 (h) is made to a prescribed body or agency for the purpose of the
18 body or agency inquiring into the operation of provisions of
19 this Act relating to:
20 (i) carrying out an identification test; or
21 (ii) requiring the provision of a personal identifier; or
22 (i) takes place with the written consent of the non-citizen to
23 whom the identifying information in question relates; or
24 (j) is a disclosure authorised by clause 59 (about disclosure of
25 information about a person who has been in detention, for the
26 purposes of the immigration detention or removal of the
27 person).
- 28 (3) However, a disclosure is not a permitted disclosure if:
29 (a) it is a disclosure of identifying information relating to a
30 personal identifier of a prescribed type; and
31 (b) it is for the purpose of:
32 (i) investigating an offence against a law of the
33 Commonwealth or a State or Territory; or
34 (ii) prosecuting a person for such an offence.

35 Note: This clause corresponds closely to section 336E of the *Migration Act*
36 1958.

1 **54 Authorising disclosure of identifying information to foreign**
2 **countries etc.**

3 (1) AFMA may, in writing, authorise a specified officer or detention
4 officer, any officer or detention officer included in a specified class
5 of officers or detention officers, or an Agency (as defined in the
6 *Public Service Act 1999*) prescribed by the regulations, to disclose
7 identifying information of the kind specified in the authorisation to
8 one or more of the following:

- 9 (a) one or more specified foreign countries;
10 (b) one or more specified bodies each of which is:
11 (i) a police force or police service of a foreign country; or
12 (ii) a law enforcement body of a foreign country; or
13 (iii) a border control body of a foreign country;
14 (c) one or more specified international organisations, or
15 specified organisations of foreign countries, that are
16 responsible for fisheries matters;
17 (d) one or more prescribed bodies of a foreign country, of the
18 Commonwealth or of a State or Territory;
19 (e) one or more prescribed international organisations.

20 (2) AFMA must specify in the authorisation, as the purpose or
21 purposes for which disclosure is authorised, one or more of the
22 purposes set out in subclause 26(3).

23 Note: This clause corresponds closely to subsections 336F(1) and (2) of the
24 *Migration Act 1958*.

25 **Subdivision D—Modifying and impairing identifying**
26 **information**

27 **55 Unauthorised modification of identifying information**

28 A person commits an offence if:

- 29 (a) the person causes any unauthorised modification of
30 identifying information; and
31 (b) the person intends to cause the modification; and
32 (c) the person knows that the modification is unauthorised.

33 Penalty: Imprisonment for 2 years.

1 **56 Unauthorised impairment of identifying information**

2 A person commits an offence if:

- 3 (a) the person causes any unauthorised impairment of:
- 4 (i) the reliability of identifying information; or
- 5 (ii) the security of the storage of identifying information; or
- 6 (iii) the operation of a system by which identifying
- 7 information is stored; and
- 8 (b) the person intends to cause the impairment; and
- 9 (c) the person knows that the impairment is unauthorised.

10 Penalty: Imprisonment for 2 years.

11 **57 Meanings of *unauthorised modification* and *unauthorised***
12 ***impairment* etc.**

13 (1) In this Division:

- 14 (a) modification of identifying information; or
- 15 (b) impairment of the reliability of identifying information; or
- 16 (c) impairment of the security of the storage of identifying
- 17 information; or
- 18 (d) impairment of the operation of a system by which identifying
- 19 information is stored;

20 by a person is unauthorised if the person is not entitled to cause

21 that modification or impairment.

22 (2) Any such modification or impairment caused by the person is not

23 unauthorised merely because he or she has an ulterior purpose for

24 causing it.

25 (3) For the purposes of an offence under this Division, a person causes

26 any such unauthorised modification or impairment if the person's

27 conduct substantially contributes to it.

28 (4) For the purposes of subclause (1), if:

- 29 (a) a person causes any modification or impairment of a kind
- 30 mentioned in that subclause; and
- 31 (b) the person does so under a warrant issued under the law of
- 32 the Commonwealth, a State or a Territory;

33 the person is entitled to cause that modification or impairment.

1 Note: This clause corresponds closely to section 336J of the *Migration Act*
2 1958.

3 **Subdivision E—Retaining identifying information**

4 **58 Identifying information may be indefinitely retained**

5 Identifying information may be indefinitely retained.

6 Note: This clause corresponds closely to paragraph 336L(1)(a) of the
7 *Migration Act 1958*, because under this Schedule identifying
8 information will always be about someone who is or has been in
9 detention.

10 **Part 6—Disclosure of detainees’ personal**
11 **information**
12

13 **59 Disclosure of detainees’ personal information**

- 14 (1) For the purposes described in subclause (2), an agency or
15 organisation that is or has been responsible for the detention of an
16 individual may disclose personal information about the individual
17 to an agency, or organisation, that is or will be responsible for:
18 (a) taking the individual into immigration detention; or
19 (b) keeping the individual in immigration detention; or
20 (c) causing the individual to be kept in immigration detention; or
21 (d) the removal of the individual.
- 22 (2) The purposes are:
23 (a) the immigration detention of the individual; and
24 (b) the removal of the individual; and
25 (c) the welfare of the individual while in immigration detention
26 or being removed.

27 (3) In this clause:

28 **agency** has the same meaning as in the *Privacy Act 1988*.

29 **immigration detention** has the same meaning as in the *Migration*
30 *Act 1958*.

31 **organisation** has the same meaning as in the *Privacy Act 1988*.

1 *personal information* has the same meaning as in the *Privacy Act*
2 *1988*.

3 *removal* has the same meaning as in the *Migration Act 1958*.

4 **14 Transitional—persons detained just before**
5 **commencement**

6 Schedule 1A to the *Fisheries Management Act 1991* applies in relation
7 to a person who, just before the commencement of that Schedule, was
8 being detained by an officer under paragraph 84(1)(ia) of that Act as if
9 the person had been detained by the officer under that Schedule.

10 ***Torres Strait Fisheries Act 1984***

11 **15 Subsection 3(1)**

12 Insert:

13 *Australian resident* means:

- 14 (a) a person who holds a permanent visa (as defined in the
15 *Migration Act 1958*) that is in effect; or
16 (b) a New Zealand citizen who is usually resident in Australia or
17 a Territory and who holds a special category visa (as defined
18 in the *Migration Act 1958*) that is in effect; or
19 (c) any other person who is usually resident in Australia or a
20 Territory and whose continued presence in Australia or a
21 Territory is not subject to a limitation as to time imposed by
22 law.

23 **16 At the end of subsection 42(1)**

24 Add:

25 Note: Schedule 2 gives officers powers relating to detention of suspected
26 illegal foreign fishers.

27 **17 After subsection 42(6)**

28 Insert:

29 (6AA) An officer, or a person assisting an officer in the exercise of
30 powers under this Act or the regulations, is not liable to an action,
31 suit or proceeding for or in respect of anything done in good faith
32 or omitted to be done in good faith in the exercise or purported
33 exercise of any power conferred by this Act or the regulations.

1 **18 At the end of Part VI**

2 Add:

3 **Division 7—Provisions relating to detention of suspected**
4 **illegal foreign fishers**

5 **54A Provisions relating to detention of suspected illegal foreign**
6 **fishers**

7 Schedule 2 has effect.

8 **19 Schedule (heading)**

9 Repeal the heading, substitute:

10 **Schedule 1—Torres Strait Treaty**

11 **20 At the end of the Act**

12 Add:

13 **Schedule 2—Provisions relating to detention**
14 **of suspected illegal foreign fishers**

15 Note: See section 54A.

16 **Part 1—Preliminary**

17 **Division 1—Objects of this Schedule**

18 **1 Main objects of this Schedule**

19 (1) This Schedule has 3 main objects.

20 (2) The first main object is to provide for the detention (*fisheries*
21 *detention*) in Australia or a Territory of persons who:

22 (a) are reasonably suspected by an officer of having committed
23 an offence involving the use of a foreign boat or a Papua
24 New Guinea boat; and

25 (b) are not Australian citizens or Australian residents;

- 1 for a limited period for the purposes of determining whether to
2 charge them with the offence.
- 3 (3) The second main object is to provide for persons in fisheries
4 detention to be searched, screened, given access to facilities for
5 obtaining legal advice, and identified.
- 6 (4) The third main object is to facilitate the transition of persons from
7 fisheries detention to immigration detention under the *Migration*
8 *Act 1958*:
- 9 (a) by providing for the things mentioned in subclause (3) to be
10 done in a way corresponding to the way that Act provides for
11 those things to be done to persons in immigration detention;
12 and
- 13 (b) by authorising the disclosure of personal information about
14 individuals who are or have been in fisheries detention to
15 persons, agencies and organisations responsible for holding
16 the individuals in immigration detention, for the purpose of
17 the immigration detention and welfare of the individuals.
- 18 Note: The enforcement visa of a person who is neither an Australian citizen
19 nor an Australian resident ceases to have effect under the *Migration*
20 *Act 1958* when the person ceases to be in fisheries detention, so that
21 Act requires the person to be taken into immigration detention.

22 **Division 2—Definitions**

23 **2 Definitions**

24 In this Schedule, unless the contrary intention appears:

25 ***authorised officer*** means an officer, or detention officer, who is
26 authorised under Division 4 for the purposes of the provision in
27 which the expression occurs.

28 ***detainee*** means a person detained under Part 2.

29 ***detention*** means detention under Part 2.

30 ***detention officer*** means a person appointed under clause 3 to be a
31 detention officer.

1 **Division 3—Appointment etc. of detention officers**

2 **3 Minister may appoint persons to be detention officers**

- 3 (1) The Minister may, by instrument, appoint one or more persons
4 (except persons who are officers) to be detention officers.

5 Note: Officers have the same powers as detention officers, as well as other
6 powers, so there is no reason for officers to be appointed as detention
7 officers.

- 8 (2) An instrument appointing persons to be detention officers:
9 (a) may identify the persons by reference to a class; and
10 (b) may provide for persons to be appointed when they become
11 members of the class at or after a time specified in the
12 instrument.

13 **4 Detention officers subject to directions**

14 A detention officer is, in the exercise of his or her powers, and the
15 performance of his or her duties, under this Schedule, subject to the
16 directions given by the Minister or AFMA.

17 **5 Detention officer etc. not liable to certain actions**

- 18 (1) A detention officer, or a person assisting a detention officer in the
19 exercise of powers under this Act or the regulations, is not liable to
20 an action, suit or proceeding for or in respect of anything done in
21 good faith or omitted to be done in good faith in the exercise or
22 purported exercise of any power conferred by this Act or the
23 regulations.

24 Note: Subsection 42(6AA) makes similar provision for officers and their
25 assistants.

- 26 (2) However, subsection (1) does not affect a contractual liability of a
27 detention officer or person assisting a detention officer.

1 **Division 4—Authorisation of officers and detention officers**

2 **6 AFMA may authorise officers and detention officers**

- 3 (1) AFMA may, by instrument, authorise one or more officers and/or
4 detention officers for the purposes of a specified provision of this
5 Schedule.
- 6 (2) An instrument authorising officers and/or detention officers:
7 (a) may identify them by reference to a class; and
8 (b) may provide for them to be authorised when they become
9 members of the class at or after a time specified in the
10 instrument.

11 **7 Persons who are authorised officers for purposes of *Migration Act***
12 ***1958* are taken to be authorised for this Schedule**

- 13 (1) A person who:
14 (a) is an officer or detention officer; and
15 (b) is an authorised officer (as defined in the *Migration Act*
16 *1958*) for a provision of that Act listed in column 2 of an
17 item of the table;
18 is, while he or she meets the conditions in paragraphs (a) and (b),
19 taken to be authorised under clause 6 for the purposes of the
20 provision of this Schedule listed in column 3 of the item.
21

Corresponding provisions of the *Migration Act 1958* and this Schedule

Column 1 Item	Column 2 Provision of <i>Migration Act 1958</i>	Column 3 Provision of this Schedule
1	Subsection 252(4)	Subclause 15(3)
2	Paragraph 252(6)(a)	Paragraph 15(5)(a)
3	Subparagraph 252(6)(b)(i)	Subparagraph 15(5)(b)(i)
4	Subsection 252AA(1)	Subclause 16(1)
5	Subsection 252A(1)	Subclause 17(1)
6	Subsection 252C(1)	Subclause 19(1)
7	Subsection 252D(2)	Subclause 20(2)
8	Subsection 252G(3)	Subclause 23(3)
9	Section 261AA	Clause 28

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

Corresponding provisions of the *Migration Act 1958* and this Schedule

Column 1 Item	Column 2 Provision of <i>Migration Act 1958</i>	Column 3 Provision of this Schedule
10	Subsection 261AE(1)	Subclause 32(1)
11	Subsection 261AE(3)	Subclause 32(3)
12	Section 261AG	Clause 34
13	Section 261AJ	Clause 37
14	Subsection 261AK(1) (except paragraph (a))	Subclause 38(1) (except paragraph (a))
15	Subsection 261AK(3)	Subclause 38(3)

1 *Limits on authorisation*

2 (2) However, the person is not taken to be authorised to carry out an
3 identification test in relation to which section 5D of the *Migration*
4 *Act 1958* provides that the person is not an authorised officer (for
5 the purposes of that Act).

6 Note: This is relevant to items 9 to 15 of the table in subclause (1).

7 *Persons specified by AFMA not authorised*

8 (3) AFMA may, by instrument, specify that the person is not taken to
9 be authorised:

10 (a) for the purposes of the provision of this Schedule; or

11 (b) for the purposes of carrying out under this Schedule
12 identification tests of a type specified under section 5D of the
13 *Migration Act 1958* in relation to the person.

14 The instrument has effect according to its terms, despite
15 subclause (1).

16 (4) An instrument under subclause (3) may specify one or more
17 persons by reference to their being members of a specified class at
18 or after a time specified in the instrument.

19 (5) An instrument made under subclause (3) is not a legislative
20 instrument.

1 **Part 2—Detaining suspected illegal foreign fishers**

2 **Division 1—Initial detention by an officer**

3 **8 Power to detain**

4 (1) An officer may detain a person in Australia or a Territory for the
5 purposes of investigating and determining, during the period of
6 detention, whether or not the person committed an offence against
7 section 45, 48, 49 or 51 or an offence against section 6 of the
8 *Crimes Act 1914* relating to such an offence, if the officer has
9 reasonable grounds to believe that the person:

- 10 (a) is not an Australian citizen or an Australian resident; and
11 (b) was on a foreign boat, or a Papua New Guinea boat, when it
12 was used in the commission of such an offence.

13 (2) Subclause (1) does not authorise an officer to use more force in
14 detaining a person than is reasonably necessary.

15 **9 Relationship with Part IC of the *Crimes Act 1914***

16 (1) Part IC of the *Crimes Act 1914* applies in relation to the detainee
17 while detained under this Part as if:

- 18 (a) he or she were a protected suspect for a Commonwealth
19 offence for the purposes of that Part; and
20 (b) an officer were an investigating official for the purposes of
21 that Part.

22 (2) Subclause (1) does not affect the operation of Division 2 of Part IC
23 of the *Crimes Act 1914* as it applies of its own force in relation to a
24 person who is lawfully arrested.

25 **Division 2—Continued detention by a detention officer**

26 **10 Detention officer may detain person already detained by officer**

27 (1) For the purposes of facilitating an officer investigating and
28 determining whether or not a person committed an offence against
29 section 45, 48, 49 or 51 or an offence against section 6 of the
30 *Crimes Act 1914* relating to such an offence, a detention officer

1 may detain the person in Australia or a Territory if the detention
2 officer has reasonable grounds to believe that the person:

- 3 (a) has been detained by an officer under Division 1; and
4 (b) has been presented, while detained by that officer, to a
5 detention officer for detention by a detention officer.

6 (2) However, the detention officer may not detain the person if the
7 detention officer has reasonable grounds to believe that the person
8 has ceased to be in detention since the last time the person was
9 detained by an officer under Division 1.

10 **Division 3—Detention on behalf of an officer or detention**
11 **officer**

12 **11 Detention on behalf of an officer or detention officer**

13 (1) A person is taken to be detained by an officer or detention officer
14 under this Part while the person is held, on behalf of the officer or
15 detention officer, in any of the following:

- 16 (a) a prison or remand centre of the Commonwealth, a State or a
17 Territory;
18 (b) a police station or watch house;
19 (c) a hospital or other place where the person is receiving
20 medical treatment;
21 (d) another place approved by the Minister in writing;
22 (e) a boat.

23 (2) This clause has effect even while the officer or detention officer is
24 not present where the person is held on behalf of the officer or
25 detention officer.

26 (3) An approval of a place by the Minister is not a legislative
27 instrument.

28 **Division 4—Moving detainees**

29 **12 Power to move detainees**

30 (1) An officer or a detention officer may:
31 (a) take a detainee in Australia to another place in Australia or to
32 a place in an external Territory; and

- 1 (b) take a detainee in an external Territory to another place in the
2 Territory or to a place in Australia or another Territory.
- 3 (2) Subclause (1) does not authorise an officer or detention officer to
4 use more force than is reasonably necessary to take the detainee to
5 the place.
- 6 (3) In exercising the power under subclause (1), the officer or
7 detention officer must have regard to all matters that he or she
8 considers relevant, including:
9 (a) the administration of justice; and
10 (b) the welfare of the detainee.

11 **Division 5—End of detention**

12 **13 End of detention**

13 *Detainee who was on a foreign boat*

- 14 (1) A detainee who was detained under subclause 8(1) because the
15 officer mentioned in that subclause had reasonable grounds to
16 believe that the detainee was on a foreign boat must be released
17 from detention:
18 (a) as soon as an officer or detention officer knows or reasonably
19 believes that the detainee is an Australian citizen or an
20 Australian resident; or
21 (b) at the time the detainee is brought before a magistrate
22 following a decision to charge the detainee with an offence
23 referred to in subclause 8(1); or
24 (c) at the time a decision is made not to charge the detainee with
25 an offence referred to in that subclause; or
26 (d) at the end of 168 hours after the detention began;
27 whichever occurs first.

28 *Detainee who was on a Papua New Guinea boat*

- 29 (2) A detainee who was detained under subclause 8(1) because the
30 officer mentioned in that subclause had reasonable grounds to
31 believe that the detainee was on a Papua New Guinea boat must be
32 released from detention:

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (a) as soon as an officer or detention officer knows or reasonably
2 believes that the detainee is an Australian citizen or an
3 Australian resident; or
4 (b) as soon as an officer believes that the detainee did not
5 commit an offence described in that subclause; or
6 (c) as soon as an officer finishes investigating whether the
7 detainee committed an offence described in that subclause; or
8 (d) at the end of 72 hours after the detention began;
9 whichever occurs first.

10 *Papua New Guineans on foreign boats*

- 11 (3) Subclause (1) ceases to apply to a detainee, and subclause (2)
12 applies instead to the detainee (as if the officer mentioned in
13 subclause 8(1) had reasonable grounds to believe that the detainee
14 had been on a Papua New Guinea boat), if an officer or detention
15 officer knows or reasonably believes that the detainee is:
16 (a) a citizen of Papua New Guinea; or
17 (b) a person who is usually resident in Papua New Guinea and
18 whose continued presence there is not subject to a limitation
19 as to time imposed by law.

20 Note: The fact that subclause (2) applies as if the officer mentioned in
21 subclause 8(1) had reasonable grounds to believe that the detainee had
22 been on a Papua New Guinea boat does not affect whether the
23 detainee was using a foreign boat in an offence against section 45 or
24 48.

- 25 (4) To avoid doubt, subclause (3) does not affect the validity of the
26 detention of a detainee before the first time (the *recognition time*)
27 an officer or detention officer knew or reasonably believed that the
28 detainee was:
29 (a) a citizen of Papua New Guinea; or
30 (b) a person who is usually resident in Papua New Guinea and
31 whose continued presence there is not subject to a limitation
32 as to time imposed by law.

33 This has effect even if the recognition time is more than 72 hours
34 after the detention began.

35 Note: If the recognition time was more than 72 hours after the detention
36 began, the effect of subclause (3) applying subclause (2) is to require
37 the release of the detainee at the recognition time. However,
38 subclause (3) does not affect the validity of detention in the period

1 starting 72 hours after the detention began and ending at the
2 recognition time.

3 **Division 6—Offence of escaping from detention**

4 **14 Escape from detention**

- 5 (1) A person commits an offence if:
6 (a) the person is in detention; and
7 (b) the person escapes from that detention.
- 8 (2) The offence is punishable on conviction by imprisonment for up to
9 2 years.

10 **Part 3—Searching and screening detainees and** 11 **screening their visitors**

12 **Division 1—Searches of detainees**

13 **15 Searches of detainees**

- 14 (1) For the purposes set out in subclause (2), a detainee, and the
15 detainee's clothing and any property under the immediate control
16 of the detainee, may, without warrant, be searched.
- 17 (2) The purposes for which a detainee, and the detainee's clothing and
18 any property under the immediate control of the detainee, may be
19 searched under this clause are as follows:
- 20 (a) to find out whether there is hidden on the detainee's person,
21 in the clothing or in the property, a weapon or other thing
22 capable of being used to inflict bodily injury or to help the
23 detainee to escape from detention;
- 24 (b) to find out whether there is hidden on the detainee's person,
25 in the clothing or in the property, a document or other thing
26 that is, or may be, evidence of:
- 27 (i) an offence against section 45, 48, 49 or 51; or
28 (ii) an offence against section 6 of the *Crimes Act 1914*
29 relating to an offence described in subparagraph (i).

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (3) If, in the course of a search under this clause, a weapon or other
2 thing referred to in paragraph (2)(a), or a document or other thing
3 referred to in paragraph (2)(b), is found, an authorised officer:
4 (a) may take possession of the weapon, document or other thing;
5 and
6 (b) may retain the weapon, document or other thing for such
7 time as he or she thinks necessary for the purposes of this Act
8 or the *Migration Act 1958*.
- 9 (4) This clause does not authorise an authorised officer, or another
10 person conducting a search under subclause (5), to remove any of
11 the detainee’s clothing, or to require a detainee to remove any of
12 his or her clothing.
- 13 (5) A search under this clause of a detainee, and the detainee’s
14 clothing, must be conducted by:
15 (a) an authorised officer of the same sex as the detainee; or
16 (b) in a case where an authorised officer of the same sex as the
17 detainee is not available to conduct the search—any other
18 person who is of the same sex and:
19 (i) is requested by an authorised officer; and
20 (ii) agrees;
21 to conduct the search.
- 22 (6) An action or proceeding, whether civil or criminal, does not lie
23 against a person who, at the request of an authorised officer,
24 conducts a search under this clause if the person acts in good faith
25 and does not contravene subclause (7).
- 26 (7) An authorised officer or other person who conducts a search under
27 this clause must not use more force, or subject a detainee to greater
28 indignity, than is reasonably necessary in order to conduct the
29 search.
- 30 (8) To avoid doubt, a search of a detainee may be conducted under this
31 clause irrespective of whether a screening procedure is conducted
32 in relation to the detainee under clause 16 or a strip search of the
33 detainee is conducted under clause 17.
- 34 Note: This clause corresponds closely to section 252 of the *Migration Act*
35 *1958*.
-

1 **Division 2—Screening of detainees**

2 **16 Power to conduct a screening procedure**

- 3 (1) A screening procedure in relation to a detainee, other than a
4 detainee to whom clause 22 applies, may be conducted by an
5 authorised officer, without warrant, to find out whether there is
6 hidden on the detainee, in his or her clothing or in a thing in his or
7 her possession, a weapon, or other thing, capable of being used:
8 (a) to inflict bodily injury; or
9 (b) to help the detainee, or any other detainee, to escape from
10 detention.
- 11 (2) An authorised officer who conducts a screening procedure under
12 this clause must not use greater force, or subject the detainee to
13 greater indignity, than is reasonably necessary in order to conduct
14 the screening procedure.
- 15 (3) This clause does not authorise an authorised officer to remove any
16 of the detainee's clothing, or to require a detainee to remove any of
17 his or her clothing.
- 18 (4) To avoid doubt, a screening procedure may be conducted in
19 relation to a detainee under this clause irrespective of whether a
20 search of the detainee is conducted under clause 15 or 17.
- 21 (5) In this clause:
- 22 ***conducting a screening procedure***, in relation to a detainee,
23 means:
24 (a) causing the detainee to walk, or to be moved, through
25 screening equipment; or
26 (b) passing hand-held screening equipment over or around the
27 detainee or around things in the detainee's possession; or
28 (c) passing things in the detainee's possession through screening
29 equipment or examining such things by X-ray.

30 ***screening equipment*** means a metal detector or similar device for
31 detecting objects or particular substances.

32 Note: This clause corresponds closely to section 252AA of the *Migration*
33 *Act 1958*.

1 **Division 3—Strip searches of detainees**

2 **17 Power to conduct a strip search**

3 (1) A strip search of a detainee, other than a detainee to whom
4 clause 22 applies, may be conducted by an authorised officer,
5 without warrant, to find out whether there is hidden on the
6 detainee, in his or her clothing or in a thing in his or her possession
7 a weapon, or other thing, capable of being used:

8 (a) to inflict bodily injury; or

9 (b) to help the detainee, or any other detainee, to escape from
10 detention.

11 Note: Clause 18 sets out rules for conducting a strip search under this clause.

12 (2) A *strip search* of a detainee means a search of the detainee, of his
13 or her clothing or of a thing in his or her possession. It may
14 include:

15 (a) requiring the detainee to remove some or all of his or her
16 clothing; and

17 (b) an examination of that clothing and of the detainee's body
18 (but not of the detainee's body cavities).

19 (3) A strip search of a detainee may be conducted by an authorised
20 officer only if:

21 (a) an officer or detention officer suspects on reasonable grounds
22 that there is hidden on the detainee, in his or her clothing or
23 in a thing in his or her possession a weapon or other thing
24 described in subclause (1); and

25 (b) the officer, or detention officer, referred to in paragraph (a)
26 suspects on reasonable grounds that it is necessary to conduct
27 a strip search of the detainee to recover that weapon or other
28 thing; and

29 (c) the strip search is authorised as follows:

30 (i) if the detainee is at least 18—the Managing Director of
31 AFMA, the Secretary of the Department, or an SES
32 Band 3 employee in the Department (who is not the
33 officer referred to in paragraphs (a) and (b) nor the
34 authorised officer conducting the strip search),
35 authorises the strip search because he or she is satisfied
36 that there are reasonable grounds for those suspicions;

- 1 (ii) if the detainee is at least 10 but under 18—a magistrate
2 orders the strip search because he or she is satisfied that
3 there are reasonable grounds for those suspicions.
- 4 (4) An officer or detention officer may form a suspicion on reasonable
5 grounds for the purposes of paragraph (3)(a) on the basis of:
6 (a) a search conducted under clause 15 (whether by that officer
7 or detention officer or by another officer or detention
8 officer); or
9 (b) a screening procedure conducted under clause 16 (whether by
10 that officer or detention officer or by another officer or
11 detention officer); or
12 (c) any other information that is available to the officer or
13 detention officer.
- 14 (5) An authorisation of a strip search given for the purposes of
15 paragraph (3)(c):
16 (a) may be given by telephone, fax or other electronic means;
17 and
18 (b) must be recorded in writing, and signed by the person giving
19 the authorisation, within one business day after it is given.
- 20 (6) A record made under paragraph (5)(b) is not a legislative
21 instrument.
- 22 (7) A failure to comply with paragraph (5)(b) does not affect the
23 validity of a strip search conducted on the basis of that
24 authorisation.
- 25 (8) The power to authorise a strip search under paragraph (3)(c) cannot
26 be delegated to any other person.
- 27 (9) A power conferred on a magistrate by this clause is conferred on
28 the magistrate in a personal capacity and not as a court or a
29 member of a court.
- 30 (10) The magistrate need not accept the power conferred.
- 31 (11) A magistrate exercising a power under this clause has the same
32 protection and immunity as if he or she were exercising that power
33 as, or as a member of, the court of which the magistrate is a
34 member.
-

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 (12) To avoid doubt, a strip search of a detainee may be conducted
2 under this clause irrespective of whether a search of the detainee is
3 conducted under clause 15 or a screening procedure is conducted in
4 relation to the detainee under clause 16.

5 (13) In this clause:

6 *business day* means a day that is not a Saturday, Sunday or public
7 holiday in the place where the authorisation is given.

8 *SES Band 3 employee* means an SES employee with a
9 classification of Senior Executive Band 3, and includes an SES
10 employee who has been temporarily assigned duties that have been
11 allocated a classification of Senior Executive Band 3.

12 Note: This clause corresponds closely to section 252A of the *Migration Act*
13 *1958*.

14 **18 Rules for conducting a strip search**

15 (1) A strip search of a detainee under clause 17:

- 16 (a) must not subject the detainee to greater indignity than is
17 reasonably necessary to conduct the strip search; and
18 (b) must be conducted in a private area; and
19 (c) must be conducted by an authorised officer of the same sex
20 as the detainee; and
21 (d) subject to subclauses (2), (3) and (5), must not be conducted
22 in the presence or view of a person who is of the opposite sex
23 to the detainee; and
24 (e) subject to subclauses (2), (3) and (5), must not be conducted
25 in the presence or view of a person whose presence is not
26 necessary for the purposes of the strip search; and
27 (f) must not be conducted on a detainee who is under 10; and
28 (g) if the detainee is at least 10 but under 18, or is incapable of
29 managing his or her affairs—must be conducted in the
30 presence of:
31 (i) the detainee's parent or guardian if that person is in
32 detention with the detainee and is readily available at
33 the same place; or
34 (ii) if that is not acceptable to the detainee or
35 subparagraph (i) does not apply—another person (other
36 than an authorised officer) who is capable of

- 1 representing the detainee’s interests and who, as far as is
2 practicable in the circumstances, is acceptable to the
3 detainee; and
- 4 (h) subject to subclause (4), if the detainee is at least 18, and is
5 not incapable of managing his or her affairs—must be
6 conducted in the presence of another person (if any)
7 nominated by the detainee, if that other person is readily
8 available at the same place as the detainee, and willing to
9 attend the strip search within a reasonable time; and
- 10 (i) must not involve a search of the detainee’s body cavities; and
- 11 (j) must not involve the removal of more items of clothing, or
12 more visual inspection, than the authorised officer
13 conducting the search believes on reasonable grounds to be
14 necessary to determine whether there is hidden on the
15 detainee, in his or her clothing or in a thing in his or her
16 possession a weapon or other thing described in subclause
17 17(1); and
- 18 (k) must not be conducted with greater force than is reasonably
19 necessary to conduct the strip search.
- 20 (2) Paragraphs (1)(d) and (e) do not apply to a parent or guardian, or a
21 person present because of subparagraph (1)(g)(ii), if the detainee
22 has no objection to that person being present.
- 23 (3) Paragraphs (1)(d) and (e) do not apply to a person nominated by
24 the detainee under paragraph (1)(h) to attend the strip search.
- 25 (4) Neither:
- 26 (a) a detainee’s refusal or failure to nominate a person under
27 paragraph (1)(h) within a reasonable time; nor
- 28 (b) a detainee’s inability to nominate a person under that
29 paragraph who is readily available at the same place as the
30 detainee and willing to attend the strip search within a
31 reasonable time;
- 32 prevents a strip search being conducted.
- 33 (5) A strip search of a detainee may be conducted with the assistance
34 of another person if the authorised officer conducting the strip
35 search considers that to be necessary for the purposes of
36 conducting it. That person must not be of the opposite sex to the
37 detainee unless:
- 38 (a) the person is a medical practitioner; and
-

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 (b) a medical practitioner of the same sex as the detainee is not
2 available within a reasonable time.

3 (6) An action or proceeding, whether civil or criminal, does not lie
4 against a person who, at the request of an authorised officer, assists
5 in conducting a strip search if the person acts in good faith and
6 does not contravene this clause.

7 (7) A detainee must be provided with adequate clothing if during or as
8 a result of a strip search any of his or her clothing is:

9 (a) damaged or destroyed; or

10 (b) retained under clause 19.

11 Note: This clause corresponds closely to section 252B of the *Migration Act*
12 *1958*.

13 **Division 4—Keeping of things found by screening or strip**
14 **search of detainees**

15 **19 Possession and retention of certain things obtained during a**
16 **screening procedure or strip search**

17 (1) An authorised officer may take possession of and retain a thing
18 found in the course of conducting a screening procedure under
19 clause 16 or conducting a strip search under clause 17 if the thing:

20 (a) might provide evidence of the commission of an offence
21 against this Act; or

22 (b) is forfeited or forfeitable to the Commonwealth.

23 (2) A weapon or other thing described in subclause 16(1) or 17(1) that
24 is found in the course of conducting a screening procedure under
25 clause 16 or a strip search under clause 17 is forfeited to the
26 Commonwealth.

27 (3) An authorised officer must not return a thing that is forfeited or
28 forfeitable to the Commonwealth. Instead, the authorised officer
29 must, as soon as practicable, give a thing that is forfeited under
30 subclause (2) to a constable (within the meaning of the *Crimes Act*
31 *1914*).

32 Note: Subdivision C of Division 6 of Part 6 of this Act sets out the
33 procedure for dealing with things seized as being forfeited under
34 section 106A.

- 1 (4) An authorised officer must take reasonable steps to return anything
2 that is not forfeited or forfeitable but is retained under
3 subclause (1) to the person from whom it was taken, or to the
4 owner if that person is not entitled to possess it, if one of the
5 following happens:
6 (a) it is decided that the thing is not to be used in evidence;
7 (b) the period of 60 days after the authorised officer takes
8 possession of the thing ends.
- 9 (5) However, the authorised officer does not have to take those steps
10 if:
11 (a) in a paragraph (4)(b) case:
12 (i) proceedings in respect of which the thing might provide
13 evidence have been instituted before the end of the 60
14 day period and have not been completed (including an
15 appeal to a court in relation to those proceedings); or
16 (ii) the authorised officer may retain the thing because of an
17 order under clause 21; or
18 (b) in any case—the authorised officer is otherwise authorised
19 (by a law, or an order of a court or a tribunal, of the
20 Commonwealth or a State or Territory) to retain, destroy or
21 dispose of the thing.

22 Note: This clause corresponds closely to section 252C of the *Migration Act*
23 *1958*.

24 **20 Authorised officer may apply for a thing to be retained for a** 25 **further period**

- 26 (1) This clause applies if an authorised officer has taken possession of
27 a thing referred to in subclause 19(4) and proceedings in respect of
28 which the thing might provide evidence have not commenced
29 before the end of:
30 (a) 60 days after the authorised officer takes possession of the
31 thing; or
32 (b) a period previously specified in an order of a magistrate
33 under clause 21.
- 34 (2) The authorised officer may apply to a magistrate for an order that
35 the officer may retain the thing for a further period.
- 36 (3) Before making the application, the authorised officer must:

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (a) take reasonable steps to discover which persons' interests
2 would be affected by the retention of the thing; and
3 (b) if it is practicable to do so, notify each person who the
4 authorised officer believes to be such a person of the
5 proposed application.

6 Note: This clause corresponds closely to section 252D of the *Migration Act*
7 *1958*.

- 8 (4) A notice under paragraph (3)(b) is not a legislative instrument.

9 **21 Magistrate may order that thing be retained**

10 (1) The magistrate may order that the authorised officer who made an
11 application under clause 20 may retain the thing if the magistrate is
12 satisfied that it is necessary for the authorised officer to do so:

13 (a) for the purposes of an investigation as to whether an offence
14 has been committed; or

15 (b) to enable evidence of an offence to be secured for the
16 purposes of a prosecution.

17 (2) The order must specify the period for which the authorised officer
18 may retain the thing.

19 (3) A power conferred on a magistrate by this clause is conferred on
20 the magistrate in a personal capacity and not as a court or a
21 member of a court.

22 (4) The magistrate need not accept the power conferred.

23 (5) A magistrate exercising a power under this clause has the same
24 protection and immunity as if he or she were exercising that power
25 as, or as a member of, the court of which the magistrate is a
26 member.

27 Note: This clause corresponds closely to section 252E of the *Migration Act*
28 *1958*.

29 **Division 5—Law applying to detainee in State or Territory**
30 **prison etc.**

31 **22 Detainees held in State or Territory prisons or remand centres**

- 32 (1) This clause applies to a detainee if:
-

- 1 (a) he or she is held in detention in a prison or remand centre of
2 a State or Territory; and
3 (b) a law of that State or Territory confers a power to search
4 persons, or things in the possession of persons, serving
5 sentences or being held in the prison or remand centre.

6 (2) To the extent that the State or Territory law confers that power, or
7 affects the exercise of that power, it applies to the detainee as
8 though it were a law of the Commonwealth.

9 (3) Clauses 16 and 17 do not apply to a detainee to whom this clause
10 applies.

11 Note: This clause corresponds closely to section 252F of the *Migration Act*
12 1958.

13 **Division 6—Screening detainees’ visitors**

14 **23 Powers concerning entry to premises where detainee is detained**

- 15 (1) An officer or detention officer may request that a person about to
16 enter premises where a detainee is in detention do one or more of
17 the following:
18 (a) walk through screening equipment;
19 (b) allow an officer or detention officer to pass hand-held
20 screening equipment over or around the person or around
21 things in the person’s possession;
22 (c) allow things in the person’s possession to pass through
23 screening equipment or to be examined by X-ray.
- 24 (2) **Screening equipment** means a metal detector or similar device for
25 detecting objects or particular substances.
- 26 (3) If an authorised officer suspects on reasonable grounds that a
27 person about to enter premises where a detainee is in detention has
28 in the person’s possession a thing that might:
29 (a) endanger the safety of the detainees, staff or other persons on
30 the premises; or
31 (b) disrupt the order or security arrangements on the premises;
32 the authorised officer may request that the person do some or all of
33 the things in subclause (4) for the purpose of finding out whether
34 the person has such a thing. A request may be made whether or not
35 a request is also made to the person under subclause (1).
-

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (4) An authorised officer may request that the person do one or more
2 of the following:
- 3 (a) allow the authorised officer to inspect the things in the
4 person's possession;
- 5 (b) remove some or all of the person's outer clothing such as a
6 coat, jacket or similar item;
- 7 (c) remove items from the pockets of the person's clothing;
- 8 (d) open a thing in the person's possession, or remove the thing's
9 contents, to allow the authorised officer to inspect the thing
10 or its contents;
- 11 (e) leave a thing in the person's possession, or some or all of its
12 contents, in a place specified by the authorised officer if he or
13 she suspects on reasonable grounds that the thing or its
14 contents are capable of concealing something that might:
- 15 (i) endanger the safety of the detainees, staff or other
16 persons on the premises; or
- 17 (ii) disrupt the order or security arrangements on the
18 premises.
- 19 (5) A person who leaves a thing (including any of its contents) in a
20 place specified by an authorised officer is entitled to its return
21 when the person leaves the premises.
- 22 (6) However, if possession of the thing, or any of those contents, by
23 the person is unlawful under a Commonwealth, State or Territory
24 law applying to the premises:
- 25 (a) the thing or the contents must not be returned to the person;
26 and
- 27 (b) an authorised officer must, as soon as practicable, give the
28 thing or the contents to a constable (within the meaning of
29 the *Crimes Act 1914*).
- 30 (7) A person who is about to enter premises where a detainee is
31 detained may be refused entry if the person does not comply with a
32 request under this clause.
- 33 Note: This clause corresponds closely to section 252G of the *Migration Act*
34 *1958*.
- 35 (8) In this clause:
- 36 ***premises*** includes a place, a vessel, a vehicle and an aircraft.
-

1 **Part 4—Detainees’ rights to facilities for obtaining**
2 **legal advice etc.**
3

4 **24 Detainee may have access to certain advice, facilities etc.**

5 The person responsible for detention of a detainee must, at the
6 detainee’s request, afford to him or her all reasonable facilities for
7 obtaining legal advice or taking legal proceedings in relation to his
8 or her detention.

9 Note: This clause corresponds to section 256 of the *Migration Act 1958*.

10 **Part 5—Identifying detainees**

11 **Division 1—Preliminary**

12 **25 Definitions**

13 In this Part, unless the contrary intention appears:

14 *identification test* means a test carried out in order to obtain a
15 personal identifier.

16 *incapable person* means a person who is incapable of
17 understanding the general nature and effect of, and purposes of, a
18 requirement to provide a personal identifier.

19 *independent person* means a person (other than an officer,
20 detention officer or authorised officer) who:

- 21 (a) is capable of representing the interests of a non-citizen who is
22 providing, or is to provide, a personal identifier; and
23 (b) as far as practicable, is acceptable to the non-citizen who is
24 providing, or is to provide, the personal identifier; and
25 (c) if the non-citizen is a minor—is capable of representing the
26 minor’s best interests.

27 *minor* means a person who is less than 18 years old.

28 *non-citizen* means a person who is not an Australian citizen.

29 *personal identifier* has the meaning given by clause 26.

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 Note: The definitions of expressions in this clause correspond closely to
2 definitions of those expressions in section 5 of the *Migration Act*
3 *1958*.

4 **26 Meaning of *personal identifier***

5 (1) In this Part:

6 ***personal identifier*** means any of the following (including any of
7 the following in digital form):

- 8 (a) fingerprints or handprints of a person (including those taken
9 using paper and ink or digital livescanning technologies);
- 10 (b) a measurement of a person's height and weight;
- 11 (c) a photograph or other image of a person's face and shoulders;
- 12 (d) an audio or a video recording of a person (other than a video
13 recording under clause 37);
- 14 (e) an iris scan;
- 15 (f) a person's signature;
- 16 (g) any other identifier prescribed by the regulations, other than
17 an identifier the obtaining of which would involve the
18 carrying out of an intimate forensic procedure within the
19 meaning of section 23WA of the *Crimes Act 1914*.

20 (2) Before the Governor-General makes regulations for the purposes of
21 paragraph (1)(g) prescribing an identifier, the Minister must be
22 satisfied that:

- 23 (a) obtaining the identifier would not involve the carrying out of
24 an intimate forensic procedure within the meaning of
25 section 23WA of the *Crimes Act 1914*; and
- 26 (b) the identifier is an image of, or a measurement or recording
27 of, an external part of the body; and
- 28 (c) obtaining the identifier will promote one or more of the
29 purposes referred to in subclause (3).

30 (3) The purposes are:

- 31 (a) to assist in the identification of, and to authenticate the
32 identity of, any non-citizen who can be required under this
33 Act to provide a personal identifier; and
- 34 (b) to assist in identifying, in the future, any such non-citizen;
35 and

- 1 (c) to enhance AFMA's ability to identify non-citizens who have
2 a criminal history relating to fisheries; and
3 (d) to combat document and identity fraud in fisheries matters;
4 and
5 (e) to complement anti-people smuggling measures; and
6 (f) to inform the governments of foreign countries of the identity
7 of non-citizens who have been detained under, or charged
8 with offences against, this Act; and
9 (g) to facilitate international cooperation to combat fishing
10 activities that involve a breach of the laws of Australia or of a
11 foreign country.

12 Note: This clause corresponds closely to section 5A of the *Migration Act*
13 1958.

14 **27 Limiting the types of identification tests that authorised officers**
15 **may carry out**

- 16 (1) AFMA may, in an instrument authorising an officer or detention
17 officer as an authorised officer for the purposes of carrying out
18 identification tests under this Part, specify the types of
19 identification tests that the authorised officer may carry out.
20 (2) Such an authorised officer is not an authorised officer in relation to
21 carrying out an identification test that is not of a type so specified.

22 Note: This clause corresponds closely to section 5D of the *Migration Act*
23 1958.

24 **Division 2—Identification of detainees**

25 **Subdivision A—Provision of personal identifiers**

26 **28 Detainees must provide personal identifiers**

- 27 (1) A non-citizen in detention must (other than in the prescribed
28 circumstances) provide to an authorised officer one or more
29 personal identifiers.

30 Note: A person who is an Australian citizen, or is a non-citizen but an
31 Australian resident, may be in detention but must be released as soon
32 as an officer or detention officer knows or reasonably believes the
33 person is an Australian citizen or resident.

- 1 (2) An authorised officer must not require, for the purposes of
2 subclause (1), a detainee to provide a personal identifier other than
3 any of the following (including any of the following in digital
4 form):
5 (a) fingerprints or handprints of the detainee (including those
6 taken using paper and ink or digital liveness scanning
7 technologies);
8 (b) a measurement of the detainee's height and weight;
9 (c) a photograph or other image of the detainee's face and
10 shoulders;
11 (d) the detainee's signature;
12 (e) any other personal identifier of a type prescribed for the
13 purposes of this paragraph.

14 Note: Division 3 sets out further restrictions on the personal identifiers that
15 minors and incapable persons can be required to provide.

- 16 (3) The one or more personal identifiers are to be provided by way of
17 one or more identification tests carried out by the authorised officer
18 in accordance with this Division.

19 Note 1: Subject to certain restrictions, clause 32 allows reasonable force to be
20 used to carry out identification tests under this Division.

21 Note 2: This clause corresponds closely to section 261AA of the *Migration*
22 *Act 1958*.

23 **29 Authorised officers must require and carry out identification** 24 **tests**

- 25 (1) The authorised officer must, other than in the circumstances
26 prescribed for the purposes of subclause 28(1):
27 (a) require the non-citizen to provide one or more personal
28 identifiers, of the type or types prescribed, by way of one or
29 more identification tests carried out by the authorised officer;
30 and
31 (b) carry out the one or more identification tests on the
32 non-citizen.
- 33 (2) However:
34 (a) if the types of identification tests that the authorised officer
35 may carry out is specified under clause 27—each
36 identification test must be of a type so specified; and

- 1 (b) each identification test must be carried out in accordance
2 with Subdivision B; and
3 (c) unless the authorised officer has reasonable grounds to
4 believe that the non-citizen is not a minor or an incapable
5 person—each identification test must be carried out in
6 accordance with the additional requirements of Division 3.

7 Note: Subclauses (1) and (2) correspond closely to section 261AB of the
8 *Migration Act 1958*.

- 9 (3) If:
10 (a) the authorised officer is authorised because of clause 7
11 (which effectively treats as authorised officers for the
12 purposes of certain provisions of this Schedule certain
13 persons who are authorised officers for the purposes of
14 certain provisions of the *Migration Act 1958*); and
15 (b) an instrument under section 5D of that Act specifies the types
16 of identification test the authorised officer may carry out;
17 paragraph (2)(a) of this clause has effect as if the specified types
18 (except any specified under subclause 7(3) in relation to the
19 authorised officer) had been specified under clause 27.

20 **30 Information to be provided before carrying out identification** 21 **tests**

- 22 (1) Before carrying out an identification test, the authorised officer
23 must:
24 (a) inform the non-citizen that the non-citizen may ask that an
25 independent person be present while the identification test is
26 carried out and that the test be carried out by a person of the
27 same sex as the non-citizen; and
28 (b) inform the non-citizen of such other matters as are specified
29 in the regulations.
- 30 (2) For the purposes of subclause (1), the authorised officer *informs*
31 the non-citizen of a matter if the authorised officer informs the
32 non-citizen of the matter, through an interpreter if necessary, in a
33 language (including sign language or braille) in which the
34 non-citizen is able to communicate with reasonable fluency.
- 35 (3) The authorised officer may comply with this clause by giving to
36 the non-citizen, in accordance with the regulations, a form setting
37 out the information specified in the regulations. However, the
-

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 information must be in a language (including braille) in which the
2 non-citizen is able to communicate with reasonable fluency.

3 Note: This clause corresponds closely to section 261AC of the *Migration*
4 *Act 1958*.

5 (4) A form mentioned in subclause (3) is not a legislative instrument.

6 **Subdivision B—How identification tests are carried out**

7 **31 General rules for carrying out identification tests**

8 An identification test under this Division:

- 9 (a) must be carried out in circumstances affording reasonable
10 privacy to the non-citizen; and
11 (b) if the non-citizen so requests and it is practicable to comply
12 with the request—must not be carried out in the presence or
13 view of a person who is of the opposite sex to the
14 non-citizen; and
15 (c) must not be carried out in the presence or view of a person
16 whose presence is not necessary for the purposes of the
17 identification test or is not required or permitted by another
18 provision of this Act; and
19 (d) must not involve the removal of more clothing than is
20 necessary for carrying out the test; and
21 (e) must not involve more visual inspection than is necessary for
22 carrying out the test; and
23 (f) if the test is one of 2 or more identification tests to be carried
24 out on the non-citizen—must be carried out at the same time
25 as the other identification tests, if it is practicable to do so.

26 Note: This clause corresponds closely to section 261AD of the *Migration*
27 *Act 1958*.

28 **32 Use of force in carrying out identification tests**

29 *When use of force is permitted*

30 (1) Subject to subclause (2) and clause 33, an authorised officer, or a
31 person authorised under clause 34 to help the authorised officer,
32 may use reasonable force:

- 33 (a) to enable the identification test to be carried out; or

1 (b) to prevent the loss, destruction or contamination of any
2 personal identifier or any meaningful identifier derived from
3 the personal identifier.

4 However, this clause does not authorise the use of force against a
5 minor or an incapable person, or if the personal identifier in
6 question is a person's signature.

- 7 (2) The authorised officer or person must not use force unless:
- 8 (a) the non-citizen required to provide the personal identifier in
9 question has refused to allow the identification test to be
10 carried out; and
 - 11 (b) all reasonable measures to carry out the identification test
12 without the use of force have been exhausted; and
 - 13 (c) use of force in carrying out the identification test is
14 authorised under subclause (4).

15 *Applications for authorisation to use force*

- 16 (3) An authorised officer may apply to a senior authorising officer
17 (who is not an authorised officer referred to in subclause (1)) for an
18 authorisation to use force in carrying out the identification test.

19 *Authorisation to use force*

- 20 (4) The senior authorising officer may authorise the use of force in
21 carrying out the identification test if he or she is reasonably
22 satisfied that:
- 23 (a) the non-citizen required to provide the personal identifier in
24 question has refused to allow the identification test to be
25 carried out; and
 - 26 (b) all reasonable measures to carry out the identification test
27 without the use of force have been exhausted.
- 28 (5) An authorisation under subclause (4):
- 29 (a) may be given by telephone, fax or other electronic means;
30 and
 - 31 (b) must be recorded in writing, and signed by the person giving
32 the authorisation, within one business day after it is given.
- 33 (6) A record made under paragraph (5)(b) is not a legislative
34 instrument.

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 (7) A failure to comply with paragraph (5)(b) does not affect the
2 validity of an identification test carried out on the basis of that
3 authorisation.

4 (8) The power to give an authorisation under subclause (4) cannot be
5 delegated to any other person.

6 *Definition*

7 (9) In this clause:

8 *senior authorising officer* means an officer, or detention officer,
9 whom AFMA has authorised, or who is included in a class of
10 officers or detention officers whom AFMA has authorised, to
11 perform the functions of a senior authorising officer under this
12 clause.

13 Note: This clause corresponds closely to section 261AE of the *Migration Act*
14 1958.

15 **33 Identification tests not to be carried out in cruel, inhuman or**
16 **degrading manner etc.**

17 For the purposes of this Act, the carrying out of the identification
18 test is not of itself taken:

- 19 (a) to be cruel, inhuman or degrading; or
20 (b) to be a failure to treat a person with humanity and with
21 respect for human dignity.

22 However, nothing in this Act authorises the carrying out of the
23 identification test in a cruel, inhuman or degrading manner, or in a
24 manner that fails to treat a person with humanity and with respect
25 for human dignity.

26 Note: This clause corresponds closely to section 261AF of the *Migration Act*
27 1958.

28 **34 Authorised officer may get help to carry out identification tests**

29 An authorised officer may ask another authorised officer or an
30 officer or detention officer to help him or her to carry out the
31 identification test, and the other person may give that help.

32 Note: This clause corresponds closely to section 261AG of the *Migration*
33 *Act 1958*.

1 **35 Identification tests to be carried out by authorised officer of same**
2 **sex as non-citizen**

3 If the non-citizen requests that the identification test be carried out
4 by an authorised officer of the same sex as the non-citizen, the test
5 must only be carried out by an authorised officer of the same sex as
6 the non-citizen.

7 Note: This clause corresponds closely to section 261AH of the *Migration*
8 *Act 1958*.

9 **36 Independent person to be present**

10 The identification test must be carried out in the presence of an
11 independent person if:

- 12 (a) force is used in carrying out the identification test; or
13 (b) both of the following apply:
14 (i) the non-citizen requests that an independent person be
15 present while the identification test is being carried out;
16 (ii) an independent person is readily available at the same
17 place as the non-citizen and is willing to attend the test
18 within a reasonable time.

19 Note: This clause corresponds closely to section 261AI of the *Migration Act*
20 *1958*.

21 **37 Recording of identification tests**

- 22 (1) An authorised officer may video record the carrying out of the
23 identification test.
24 (2) If the carrying out of the identification test is not video recorded,
25 the authorised officer may decide that the identification test must
26 be carried out in the presence of an independent person.

27 Note: This clause corresponds closely to section 261AJ of the *Migration Act*
28 *1958*.

29 **38 Retesting**

30 *When retesting is permitted*

- 31 (1) If:

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (a) an authorised officer has carried out an identification test (the
2 *earlier test*) on a non-citizen in accordance with this Division
3 (including a test authorised under subclause (4)); and
4 (b) either:
5 (i) a personal identifier that is provided as a result of the
6 earlier test being carried out is unusable; or
7 (ii) an authorised officer, officer or detention officer is not
8 satisfied about the integrity of that personal identifier;
9 the authorised officer who carried out the earlier test or another
10 authorised officer may require the non-citizen to provide the
11 personal identifier again, and may carry out the test again in
12 accordance with this Division, if:
13 (c) the requirement is made while the earlier test is being carried
14 out or immediately after it was carried out; or
15 (d) carrying out the test again is authorised under subclause (4).
- 16 (2) If the non-citizen is required under subclause (1) to provide the
17 personal identifier again, the non-citizen is taken, for the purposes
18 of this Division, not to have provided the personal identifier as a
19 result of the earlier test being carried out.

20 *Applications for authorisation to retest*

- 21 (3) An authorised officer may apply for an authorisation to carry out
22 the test again. The application is to be made to:
23 (a) if the earlier test was not a test authorised under
24 subclause (4)—a senior authorising officer (who is not an
25 authorised officer, officer or detention officer referred to in
26 subclause (1)); or
27 (b) if the earlier test was a test authorised under subclause (4) by
28 a senior authorising officer—the Managing Director of
29 AFMA, the Secretary of the Department or an SES Band 3
30 employee in the Department (who is not an authorised
31 officer, officer or detention officer referred to in
32 subclause (1)).

33 *Authorisation to retest*

- 34 (4) The senior authorising officer, Managing Director, Secretary or
35 SES Band 3 employee (as the case requires) may authorise the test
36 to be carried out again if:

- 1 (a) he or she is reasonably satisfied that the personal identifier
2 that is provided as a result of the earlier test being carried out
3 is unusable; or
4 (b) he or she is not reasonably satisfied about the integrity of that
5 personal identifier.
- 6 (5) An authorisation under subclause (4):
7 (a) may be given by telephone, fax or other electronic means;
8 and
9 (b) must be recorded in writing, and signed by the person giving
10 the authorisation, within one business day after it is given.
- 11 (6) A record made under paragraph (5)(b) is not a legislative
12 instrument.
- 13 (7) A failure to comply with paragraph (5)(b) does not affect the
14 validity of an identification test carried out on the basis of that
15 authorisation.
- 16 (8) The power to give an authorisation under subclause (4) cannot be
17 delegated to any other person.

18 *Use of force*

- 19 (9) An authorisation under subclause (4) does not authorise the use of
20 force in carrying out an identification test.

21 Note: See clause 32 on the use of force in carrying out identification tests.

22 *Effect of refusing to authorise retesting*

- 23 (10) If an application for an authorisation to carry out an identification
24 test again on a non-citizen is refused, the non-citizen is taken, for
25 the purposes of this Act, to have complied with any requirement
26 under this Act to provide the personal identifier in question.

27 *Definitions*

- 28 (11) In this clause:

29 **senior authorising officer** means an officer, or detention officer,
30 who:

- 31 (a) has been authorised, or is included in a class of officers or
32 detention officers who have been authorised, by AFMA to

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 perform the functions of a senior authorising officer under
2 this clause; and

3 (b) is not the Managing Director of AFMA, the Secretary of the
4 Department or an SES Band 3 employee in the Department.

5 **SES Band 3 employee** means an SES employee with a
6 classification of Senior Executive Band 3, and includes an SES
7 employee who has been temporarily assigned duties that have been
8 allocated a classification of Senior Executive Band 3.

9 Note: This clause corresponds closely to section 261AK of the *Migration*
10 *Act 1958*.

11 **Subdivision C—Obligations relating to video recordings of**
12 **identification tests**

13 **39 Definitions**

14 In this Subdivision, unless the contrary intention appears:

15 **permitted provision**, of a video recording, has the meaning given
16 by subclause 42(2).

17 **provide**, in relation to a video recording, includes provide access to
18 the recording.

19 **related document** means a document that contains information,
20 derived from a video recording made under clause 37 or from a
21 copy of such a recording, from which the identity of the individual
22 on whom the identification test in question was carried out is
23 apparent or can reasonably be ascertained.

24 **video recording** means a video recording made under clause 37 or
25 a copy of such a recording, and includes a related document.

26 Note: This clause corresponds closely to section 261AKA of the *Migration*
27 *Act 1958*.

28 **40 Accessing video recordings**

29 (1) A person commits an offence if:

30 (a) the person accesses a video recording; and

31 (b) the person is not authorised under clause 41 to access the
32 video recording for the purpose for which the person
33 accessed it.

1 Penalty: Imprisonment for 2 years.

2 (2) This clause does not apply if the access is through the provision of
3 a video recording that is a permitted provision.

4 Note 1: A defendant bears an evidential burden in relation to the matter in
5 subclause (2) (see subsection 13.3(3) of the *Criminal Code*).

6 Note 2: This clause corresponds closely to section 261AKB of the *Migration*
7 *Act 1958*.

8 **41 Authorising access to video recordings**

9 (1) AFMA may, in writing, authorise a specified person, or any person
10 included in a specified class of persons, to access:

11 (a) all video recordings; or

12 (b) a specified video recording, or video recordings of a
13 specified kind.

14 (2) AFMA must specify in an authorisation under this clause, as the
15 purpose or purposes for which access is authorised, one or more of
16 the following purposes:

17 (a) providing a video recording to another person in accordance
18 with this Subdivision;

19 (b) administering or managing the storage of video recordings;

20 (c) making a video recording available to the person to whom it
21 relates;

22 (d) modifying related documents in order to correct errors or
23 ensure compliance with appropriate standards;

24 (e) any purpose connected with determining whether a civil or
25 criminal liability has arisen from a person carrying out or
26 helping to carry out an identification test under this Act;

27 (f) complying with laws of the Commonwealth or the States or
28 Territories;

29 (g) disclosing personal information under clause 59 (about
30 disclosure of information about a person who has been in
31 detention, for the purposes of the immigration detention or
32 removal of the person).

33 (3) However, AFMA must not specify as a purpose for which access is
34 authorised a purpose that will include or involve the purpose of:

- 1 (a) investigating an offence against a law of the Commonwealth
2 or a State or Territory (other than an offence involving
3 whether an identification test was carried out lawfully); or
4 (b) prosecuting a person for such an offence;
5 if the identifying information in question relates to a personal
6 identifier of a prescribed type.

7 Note: This clause corresponds closely to section 261AKC of the *Migration*
8 *Act 1958*.

9 **42 Providing video recordings**

- 10 (1) A person commits an offence if:
11 (a) the person's conduct causes a video recording to be provided
12 to another person; and
13 (b) the provision of the recording is not a permitted provision of
14 the recording.

15 Penalty: Imprisonment for 2 years.

- 16 (2) A ***permitted provision*** of a video recording is a provision of the
17 recording that:
18 (a) is for the purpose of administering or managing the storage
19 of video recordings; or
20 (b) is for the purpose of making the video recording in question
21 available to the non-citizen to whom it relates; or
22 (c) is for the purpose of a proceeding, before a court or tribunal,
23 relating to the non-citizen to whom the video recording in
24 question relates; or
25 (d) is for any purpose connected with determining whether a
26 civil or criminal liability has arisen from a person carrying
27 out or helping to carry out an identification test under this
28 Act; or
29 (e) is for the purpose of an investigation by the Privacy
30 Commissioner or the Ombudsman relating to carrying out an
31 identification test; or
32 (f) is made to a prescribed body or agency for the purpose of the
33 body or agency inquiring into the operation of provisions of
34 this Act relating to carrying out an identification test; or
35 (g) takes place with the written consent of the non-citizen to
36 whom the video recording in question relates; or

1 (h) is a disclosure authorised by clause 59 (about disclosure of
2 information about a person who has been in detention, for the
3 purposes of the immigration detention or removal of the
4 person).

- 5 (3) However, a provision of a video recording is not a permitted
6 provision of the recording if:
- 7 (a) it constitutes a disclosure of identifying information relating
8 to a personal identifier of a prescribed type; and
 - 9 (b) it is for the purpose of:
 - 10 (i) investigating an offence against a law of the
11 Commonwealth or a State or Territory (other than an
12 offence involving whether an identification test was
13 carried out lawfully); or
 - 14 (ii) prosecuting a person for such an offence.

15 Note: This clause corresponds closely to section 261AKD of the *Migration*
16 *Act 1958*.

17 **43 Unauthorised modification of video recordings**

- 18 A person commits an offence if:
- 19 (a) the person causes any unauthorised modification of a video
20 recording; and
 - 21 (b) the person intends to cause the modification; and
 - 22 (c) the person knows that the modification is unauthorised.

23 Penalty: Imprisonment for 2 years.

24 **44 Unauthorised impairment of video recordings**

- 25 A person commits an offence if:
- 26 (a) the person causes any unauthorised impairment of:
 - 27 (i) the reliability of a video recording; or
 - 28 (ii) the security of the storage of a video recording; or
 - 29 (iii) the operation of a system by which a video recording is
30 stored; and
 - 31 (b) the person intends to cause the impairment; and
 - 32 (c) the person knows that the impairment is unauthorised.

33 Penalty: Imprisonment for 2 years.

1 **45 Meanings of *unauthorised modification and unauthorised***
2 ***impairment etc.***

3 (1) In this Subdivision:

- 4 (a) modification of a video recording; or
5 (b) impairment of the reliability of a video recording; or
6 (c) impairment of the security of the storage of a video
7 recording; or
8 (d) impairment of the operation of a system by which a video
9 recording is stored;

10 by a person is unauthorised if the person is not entitled to cause
11 that modification or impairment.

12 (2) Any such modification or impairment caused by the person is not
13 unauthorised merely because he or she has an ulterior purpose for
14 causing it.

15 (3) For the purposes of an offence under this Subdivision, a person
16 causes any such unauthorised modification or impairment if the
17 person's conduct substantially contributes to it.

18 (4) For the purposes of subclause (1), if:

- 19 (a) a person causes any modification or impairment of a kind
20 mentioned in that subclause; and
21 (b) the person does so under a warrant issued under the law of
22 the Commonwealth, a State or a Territory;

23 the person is entitled to cause that modification or impairment.

24 Note: This clause corresponds closely to section 261AKG of the *Migration*
25 *Act 1958*.

26 **46 Destroying video recordings**

27 A person commits an offence if:

- 28 (a) the person is the person who has day-to-day responsibility for
29 the system under which a video recording is stored; and
30 (b) the person fails physically to destroy the recording, and all
31 copies of the recording, within 10 years after it was made.

32 Penalty: Imprisonment for 2 years.

1 **Division 3—Identification of minors and incapable persons**

2 **47 Minors**

3 *Minors less than 15 years old*

- 4 (1) A non-citizen who is less than 15 years old must not be required
5 under this Act to provide a personal identifier other than a personal
6 identifier consisting of:
7 (a) a measurement of the non-citizen's height and weight; or
8 (b) the non-citizen's photograph or other image of the
9 non-citizen's face and shoulders.

10 *Persons present while identification test is carried out*

- 11 (2) If a non-citizen who is a minor provides a personal identifier, in
12 accordance with a requirement under this Act, by way of an
13 identification test carried out by an authorised officer, the test must
14 be carried out in the presence of:
15 (a) a parent or guardian of the minor; or
16 (b) an independent person.
- 17 (3) However, if the Minister administering the *Immigration*
18 (*Guardianship of Children*) Act 1946 is the guardian of the minor,
19 the test must be carried out in the presence of an independent
20 person other than that Minister.

21 Note: This clause corresponds closely to subsections 261AL(1), (5) and (6)
22 of the *Migration Act 1958*.

23 **48 Incapable persons**

24 *Incapable persons*

- 25 (1) A non-citizen who is an incapable person must not be required
26 under this Act to provide a personal identifier other than a personal
27 identifier consisting of:
28 (a) a measurement of the non-citizen's height and weight; or
29 (b) the non-citizen's photograph or other image of the
30 non-citizen's face and shoulders.

1 *Persons present while identification test is carried out*

- 2 (2) If a non-citizen who is an incapable person provides a personal
3 identifier, in accordance with a requirement under this Act, by way
4 of an identification test carried out by an authorised officer, the test
5 must be carried out in the presence of:
6 (a) a parent or guardian of the incapable person; or
7 (b) an independent person.

8 Note: This clause corresponds closely to subsections 261AM(1) and (4) of
9 the *Migration Act 1958*.

10 **Division 4—Obligations relating to detainees’ identifying**
11 **information**

12 **Subdivision A—Preliminary**

13 **49 Definitions**

14 In this Division:

15 *disclose*, in relation to identifying information that is a personal
16 identifier, includes provide access to the personal identifier.

17 *identifying information* means the following:

- 18 (a) any personal identifier;
19 (b) any meaningful identifier derived from any personal
20 identifier;
21 (c) any record of a result of analysing any personal identifier or
22 any meaningful identifier derived from any personal
23 identifier;
24 (d) any other information, derived from any personal identifier,
25 from any meaningful identifier derived from any personal
26 identifier or from any record of a kind referred to in
27 paragraph (c), that could be used to discover a particular
28 person’s identity or to get information about a particular
29 person.

30 *permitted disclosure* has the meaning given by subclauses 53(2)
31 and (3).

32 *unauthorised impairment* has the meaning given by clause 57.

1 *unauthorised modification* has the meaning given by clause 57.

2 Note: This clause corresponds closely to section 336A of the *Migration Act*
3 1958.

4 **50 Application**

5 Section 15.4 of the *Criminal Code* (extended geographical
6 jurisdiction—category D) applies to all offences against this
7 Division.

8 Note: This clause corresponds closely to section 336B of the *Migration Act*
9 1958.

10 **Subdivision B—Accessing identifying information**

11 **51 Accessing identifying information**

- 12 (1) A person commits an offence if:
13 (a) the person accesses identifying information; and
14 (b) the person is not authorised under clause 52 to access the
15 identifying information for the purpose for which the person
16 accessed it.

17 Penalty: Imprisonment for 2 years.

- 18 (2) This clause does not apply if the access is through a disclosure that
19 is a permitted disclosure.

20 Note 1: A defendant bears an evidential burden in relation to the matter in
21 subclause (2) (see subsection 13.3(3) of the *Criminal Code*).

22 Note 2: This clause corresponds closely to section 336C of the *Migration Act*
23 1958.

24 **52 Authorising access to identifying information**

- 25 (1) AFMA may, in writing, authorise a specified person, or any person
26 included in a specified class of persons, to access identifying
27 information of the kind specified in the authorisation.
- 28 (2) AFMA must specify in an authorisation under this clause, as the
29 purpose or purposes for which access is authorised, one or more of
30 the following purposes:
31 (a) one or more of the purposes set out in subclause 26(3);

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (b) disclosing identifying information in accordance with this
2 Division;
- 3 (c) administering or managing the storage of identifying
4 information;
- 5 (d) making identifying information available to the person to
6 whom it relates;
- 7 (e) modifying identifying information to enable it to be matched
8 with other identifying information;
- 9 (f) modifying identifying information in order to correct errors
10 or ensure compliance with appropriate standards;
- 11 (g) making decisions under this Act;
- 12 (h) complying with laws of the Commonwealth or the States or
13 Territories;
- 14 (i) disclosing personal information under clause 59 (about
15 disclosure of information about a person who has been in
16 detention, for the purposes of the immigration detention or
17 removal of the person).
- 18 (3) However, AFMA must not specify as a purpose for which access is
19 authorised a purpose that will include or involve the purpose of:
- 20 (a) investigating an offence against a law of the Commonwealth
21 or a State or Territory; or
- 22 (b) prosecuting a person for such an offence;
- 23 if the identifying information in question relates to a personal
24 identifier of a prescribed type.
- 25 Note: This clause corresponds closely to section 336D of the *Migration Act*
26 *1958*.

27 **Subdivision C—Disclosing identifying information**

28 **53 Disclosing identifying information**

- 29 (1) A person commits an offence if:
- 30 (a) the person's conduct causes disclosure of identifying
31 information; and
- 32 (b) the disclosure is not a permitted disclosure.
- 33 Penalty: Imprisonment for 2 years.
- 34 (2) A *permitted disclosure* is a disclosure that:
- 35 (a) is for the purpose of data-matching in order to:
-

- 1 (i) identify, or authenticate the identity of, a non-citizen; or
2 (ii) facilitate the processing of non-citizens entering or
3 departing from Australia; or
4 (iii) identify non-citizens who have a criminal history, who
5 are of character concern (as defined in the *Migration*
6 *Act 1958*) or who are of national security concern; or
7 (iv) combat document and identity fraud in immigration
8 matters; or
9 (v) ascertain whether an applicant for a protection visa had
10 sufficient opportunity to avail himself or herself of
11 protection before arriving in Australia; or
12 (vi) inform the governments of foreign countries of the
13 identity of non-citizens who are, or are to be, removed
14 from Australia; or
15 (b) is for the purpose of administering or managing the storage
16 of identifying information; or
17 (c) is authorised under clause 54 and is for the purpose, or one or
18 more of the purposes, for which the disclosure is authorised;
19 or
20 (d) is for the purpose of making the identifying information in
21 question available to the non-citizen to whom it relates; or
22 (e) takes place under an arrangement entered into with an agency
23 of the Commonwealth, or with a State or Territory or an
24 agency of a State or Territory, for the exchange of identifying
25 information; or
26 (f) is for the purpose of a proceeding, before a court or tribunal,
27 relating to the non-citizen to whom the identifying
28 information in question relates; or
29 (g) is for the purpose of an investigation by the Privacy
30 Commissioner or the Ombudsman relating to:
31 (i) carrying out an identification test; or
32 (ii) requiring the provision of a personal identifier; or
33 (h) is made to a prescribed body or agency for the purpose of the
34 body or agency inquiring into the operation of provisions of
35 this Act relating to:
36 (i) carrying out an identification test; or
37 (ii) requiring the provision of a personal identifier; or
38 (i) takes place with the written consent of the non-citizen to
39 whom the identifying information in question relates; or
-

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

1 (j) is a disclosure authorised by clause 59 (about disclosure of
2 information about a person who has been in detention, for the
3 purposes of the immigration detention or removal of the
4 person).

- 5 (3) However, a disclosure is not a permitted disclosure if:
6 (a) it is a disclosure of identifying information relating to a
7 personal identifier of a prescribed type; and
8 (b) it is for the purpose of:
9 (i) investigating an offence against a law of the
10 Commonwealth or a State or Territory; or
11 (ii) prosecuting a person for such an offence.

12 Note: This clause corresponds closely to section 336E of the *Migration Act*
13 *1958*.

14 **54 Authorising disclosure of identifying information to foreign**
15 **countries etc.**

- 16 (1) AFMA may, in writing, authorise a specified officer or detention
17 officer, any officer or detention officer included in a specified class
18 of officers or detention officers, or an Agency (as defined in the
19 *Public Service Act 1999*) prescribed by the regulations, to disclose
20 identifying information of the kind specified in the authorisation to
21 one or more of the following:
22 (a) one or more specified foreign countries;
23 (b) one or more specified bodies each of which is:
24 (i) a police force or police service of a foreign country; or
25 (ii) a law enforcement body of a foreign country; or
26 (iii) a border control body of a foreign country;
27 (c) one or more specified international organisations, or
28 specified organisations of foreign countries, that are
29 responsible for fisheries matters;
30 (d) one or more prescribed bodies of a foreign country, of the
31 Commonwealth or of a State or Territory;
32 (e) one or more prescribed international organisations.
- 33 (2) AFMA must specify in the authorisation, as the purpose or
34 purposes for which disclosure is authorised, one or more of the
35 purposes set out in subclause 26(3).

1 Note: This clause corresponds closely to subsections 336F(1) and (2) of the
2 *Migration Act 1958*.

3 **Subdivision D—Modifying and impairing identifying**
4 **information**

5 **55 Unauthorised modification of identifying information**

- 6 A person commits an offence if:
- 7 (a) the person causes any unauthorised modification of
 - 8 identifying information; and
 - 9 (b) the person intends to cause the modification; and
 - 10 (c) the person knows that the modification is unauthorised.

11 Penalty: Imprisonment for 2 years.

12 **56 Unauthorised impairment of identifying information**

- 13 A person commits an offence if:
- 14 (a) the person causes any unauthorised impairment of:
 - 15 (i) the reliability of identifying information; or
 - 16 (ii) the security of the storage of identifying information; or
 - 17 (iii) the operation of a system by which identifying
 - 18 information is stored; and
 - 19 (b) the person intends to cause the impairment; and
 - 20 (c) the person knows that the impairment is unauthorised.

21 Penalty: Imprisonment for 2 years.

22 **57 Meanings of *unauthorised modification* and *unauthorised***
23 ***impairment* etc.**

- 24 (1) In this Division:
- 25 (a) modification of identifying information; or
 - 26 (b) impairment of the reliability of identifying information; or
 - 27 (c) impairment of the security of the storage of identifying
 - 28 information; or
 - 29 (d) impairment of the operation of a system by which identifying
 - 30 information is stored;
- 31 by a person is unauthorised if the person is not entitled to cause
32 that modification or impairment.
-

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

- 1 (2) Any such modification or impairment caused by the person is not
2 unauthorised merely because he or she has an ulterior purpose for
3 causing it.
- 4 (3) For the purposes of an offence under this Division, a person causes
5 any such unauthorised modification or impairment if the person's
6 conduct substantially contributes to it.
- 7 (4) For the purposes of subclause (1), if:
8 (a) a person causes any modification or impairment of a kind
9 mentioned in that subclause; and
10 (b) the person does so under a warrant issued under the law of
11 the Commonwealth, a State or a Territory;
12 the person is entitled to cause that modification or impairment.
- 13 Note: This clause corresponds closely to section 336J of the *Migration Act*
14 *1958*.

15 **Subdivision E—Retaining identifying information**

16 **58 Identifying information may be indefinitely retained**

17 Identifying information may be indefinitely retained.

18 Note: This clause corresponds closely to paragraph 336L(1)(a) of the
19 *Migration Act 1958*, because under this Schedule identifying
20 information will always be about someone who is or has been in
21 detention.

22 **Part 6—Disclosure of detainees' personal**
23 **information**
24

25 **59 Disclosure of detainees' personal information**

- 26 (1) For the purposes described in subclause (2), an agency or
27 organisation that is or has been responsible for the detention of an
28 individual may disclose personal information about the individual
29 to an agency, or organisation, that is or will be responsible for:
30 (a) taking the individual into immigration detention; or
31 (b) keeping the individual in immigration detention; or
32 (c) causing the individual to be kept in immigration detention; or
33 (d) the removal of the individual.
-

- 1 (2) The purposes are:
- 2 (a) the immigration detention of the individual; and
- 3 (b) the removal of the individual; and
- 4 (c) the welfare of the individual while in immigration detention
- 5 or while being removed.
- 6 (3) In this clause:
- 7 **agency** has the same meaning as in the *Privacy Act 1988*.
- 8 **immigration detention** has the same meaning as in the *Migration*
- 9 *Act 1958*.
- 10 **organisation** has the same meaning as in the *Privacy Act 1988*.
- 11 **personal information** has the same meaning as in the *Privacy Act*
- 12 *1988*.
- 13 **removal** has the same meaning as in the *Migration Act 1958*.

1

2 **Part 3—Searching persons on boats suspected of**
3 **illegal fishing**

4 **Division 1—Main amendments**

5 *Fisheries Management Act 1991*

6 **21 After paragraph 84(1)(a)**

7 Insert:

8 (aaa) subject to section 84AA, search without warrant:

9 (i) a person on a boat that the officer reasonably suspects is
10 a foreign boat used in an offence against subsection
11 95(2) or section 99, 100, 100A, 101 or 101A or a
12 foreign boat used as the support boat in an offence
13 against section 101B; and

14 (ii) the person's clothing;
15 to find out whether there is hidden on the person or in the
16 clothing:

17 (iii) a weapon; or

18 (iv) a thing capable of being used to inflict bodily injury on
19 another person; or

20 (v) a thing that may afford evidence as to the commission
21 of an offence against subsection 95(2) or section 99,
22 100, 100A, 101, 101A or 101B; and

23 **22 Paragraph 84(1)(c)**

24 After "(a)", insert ", (aaa)".

25 **23 After section 84**

26 Insert:

27 **84AA Searches under paragraph 84(1)(aaa)**

28 (1) A search under paragraph 84(1)(aaa) of a person (the *subject*) may
29 only be conducted by an officer of the same sex as the subject.

- 1 (2) However, if an officer of the same sex as the subject is not
2 available to conduct the search, it may be conducted by another
3 person who:
4 (a) is of the same sex as the subject; and
5 (b) agrees, at the request of an officer, to conduct the search.
- 6 (3) Paragraph 84(1)(aaa) and this section do not authorise the officer
7 or other person:
8 (a) to remove any of the subject's clothing; or
9 (b) to require the subject to remove any of his or her clothing; or
10 (c) to use more force, or subject the subject to greater indignity,
11 than is reasonably necessary to conduct the search.
- 12 (4) If, in conducting a search, an officer finds a weapon, or a thing
13 mentioned in subparagraph 84(1)(aaa)(iv) or (v), an officer may:
14 (a) take possession of the weapon or thing; and
15 (b) keep the weapon or thing for such time as he or she thinks
16 necessary for the purposes of this Act.
- 17 (5) If, in conducting a search, the other person finds a weapon or thing
18 mentioned in subsection (4):
19 (a) he or she must take possession of it and give it to an officer;
20 and
21 (b) an officer may keep it for such time as he or she thinks
22 necessary for the purposes of this Act.
- 23 (6) If:
24 (a) under subsection (4) or (5) an officer is keeping a weapon, or
25 a thing mentioned in subparagraph 84(1)(aaa)(iv), found in a
26 search of the subject; and
27 (b) the subject is detained under this Act;
28 the officer may continue to keep the weapon or thing for such time
29 as he or she thinks necessary for the purposes of this Act or the
30 *Migration Act 1958*.
- 31 Note: Once the subject ceases to be detained under this Act, the subject will
32 generally need to be detained under the *Migration Act 1958* while he
33 or she is in the migration zone (because his or her enforcement visa
34 under that Act will cease to have effect). Subsection (6) ensures the
35 officer can keep the weapon or thing while the subject is detained
36 under this Act or that Act.

37 **24 Subsection 87A(1)**

1 After “(a),” insert “(aaa) (except subparagraph (aaa)(v)),”.

2 **25 Subsection 87B(1) (after table item 2)**

3 Insert:

4

- | | | |
|----|-------------------------|--|
| 2A | Paragraph
84(1)(aaa) | Applies as if: <ul style="list-style-type: none">(a) a reference to an offence against subsection 95(2) or section 99, 100, 100A, 101 or 101A were a reference to an offence against section 105E or 105F; and(b) the reference to a foreign boat used as the support boat in an offence against section 101B were omitted; and(c) subparagraph 84(1)(aaa)(v) were omitted |
|----|-------------------------|--|

5 **26 After subsection 87H(2)**

6 Insert:

7 *Searching persons for weapons*

8 (2A) An officer who has boarded the boat may search without warrant a
9 person on the boat and the person’s clothing to find out whether
10 there is hidden on the person or in the clothing a weapon or a thing
11 capable of being used to inflict bodily injury on another person.

12 (2B) Section 84AA:

- 13 (a) applies in relation to the search, and weapons and other
- 14 things found in the search, in the same way as that section
- 15 applies in relation to a search under paragraph 84(1)(aaa) and
- 16 weapons and things found in a search under that paragraph;
- 17 and
- 18 (b) applies in relation to subsection (2A) of this section in the
- 19 same way as it applies in relation to paragraph 84(1)(aaa).

20 ***Torres Strait Fisheries Act 1984***

21 **27 At the end of paragraph 42(1)(a)**

22 Add “and”.

23 **28 After paragraph 42(1)(a)**

1 Insert:

2 (aa) subject to section 42A, search without warrant:

3 (i) a person on a boat that the officer reasonably suspects is
4 a foreign boat, or Papua New Guinea boat, used in a
5 contravention of paragraph 45(1)(a) or in an offence
6 against section 48, 49 or 51; and

7 (ii) the person's clothing;

8 to find out whether there is hidden on the person or in the
9 clothing:

10 (iii) a weapon; or

11 (iv) a thing capable of being used to inflict bodily injury on
12 another person; or

13 (v) a thing that may afford evidence as to the commission
14 of an offence against subsection 45(2) or section 48, 49
15 or 51; and

16 **29 At the end of paragraphs 42(1)(b) and (ba)**

17 Add "and".

18 **30 Paragraph 42(1)(c)**

19 Repeal the paragraph, substitute:

20 (c) examine anything found by action taken under paragraph (a)
21 or (aa); and

22 **31 At the end of paragraphs 42(1)(d) and (e)**

23 Add "and".

24 **32 At the end of paragraphs 42(1)(f) to (oa)**

25 Add "and".

26 **33 After section 42**

27 Insert:

28 **42A Searches under paragraph 42(1)(aa)**

29 (1) A search under paragraph 42(1)(aa) of a person (the *subject*) may
30 only be conducted by an officer of the same sex as the subject.

Schedule 1 Fisheries amendments

Part 3 Searching persons on boats suspected of illegal fishing

- 1 (2) However, if an officer of the same sex as the subject is not
2 available to conduct the search, it may be conducted by another
3 person who:
4 (a) is of the same sex as the subject; and
5 (b) agrees, at the request of an officer, to conduct the search.
- 6 (3) Paragraph 42(1)(aa) and this section do not authorise the officer or
7 other person:
8 (a) to remove any of the subject's clothing; or
9 (b) to require the subject to remove any of his or her clothing; or
10 (c) to use more force, or subject the subject to greater indignity,
11 than is reasonably necessary to conduct the search.
- 12 (4) If, in conducting a search, an officer finds a weapon, or a thing
13 mentioned in subparagraph 42(1)(aa)(iv) or (v), an officer may:
14 (a) take possession of the weapon or thing; and
15 (b) keep the weapon or thing for such time as he or she thinks
16 necessary for the purposes of this Act.
- 17 (5) If, in conducting a search, the other person finds a weapon or thing
18 mentioned in subsection (4):
19 (a) he or she must take possession of it and give it to an officer;
20 and
21 (b) an officer may keep it for such time as he or she thinks
22 necessary for the purposes of this Act.

23 **Division 2—Amendment contingent on detention power**

24 ***Torres Strait Fisheries Act 1984***

25 **34 At the end of section 42A**

26 Add:

- 27 (6) If:
28 (a) under subsection (4) or (5) an officer is keeping a weapon, or
29 a thing mentioned in subparagraph 42(1)(aa)(iv), found in a
30 search of the subject; and
31 (b) the subject is detained under Schedule 2;

1 the officer may continue to keep the weapon or thing for such time
2 as he or she thinks necessary for the purposes of this Act or the
3 *Migration Act 1958*.

4 Note: Once the subject ceases to be detained under this Act, the subject will
5 generally need to be detained under the *Migration Act 1958* while he
6 or she is in the migration zone (because his or her enforcement visa
7 under that Act will cease to have effect). Subsection (6) ensures the
8 officer can keep the weapon or thing while the subject is detained
9 under this Act or that Act.

1

2 **Part 4—Forfeiture etc. of things involved in illegal**
3 **fishing**

4 **Division 1—Main amendments**

5 *Torres Strait Fisheries Act 1984*

6 **35 After paragraph 42(1)(e)**

7 Insert:

- 8 (ea) seize all or any of the following that are forfeited to the
9 Commonwealth under section 52A or that the officer has
10 reasonable grounds to believe are forfeited under that section:
11 (i) a boat;
12 (ii) a net, trap or other equipment;
13 (iii) fish; and

14 **36 After section 52**

15 Insert:

16 **Subdivision B—Automatic forfeiture of things used in offences**

17 **52A Forfeiture of things used in certain offences**

18 The following things are forfeited to the Commonwealth:

- 19 (a) a foreign boat used in an offence against:
20 (i) subsection 45(2); or
21 (ii) section 48; or
22 (iii) section 49; or
23 (iv) section 51;
24 (b) a net or trap, or equipment, that:
25 (i) was on a boat described in paragraph (a) at the time of
26 the offence mentioned in that paragraph; or
27 (ii) was used in the commission of an offence against
28 subsection 45(2) or section 48, 49 or 51;
29 (c) fish:
30 (i) on a boat described in paragraph (a) at the time of the
31 offence mentioned in that paragraph; or
-

- 1 (ii) involved in the commission of an offence against
2 subsection 45(2) or section 48, 49 or 51.

3 Note: Paragraph 42(1)(ea) allows an officer to seize a thing that is forfeited
4 under this section or that the officer has reasonable grounds to believe
5 is forfeited.

6 **Subdivision C—Dealing with things seized as automatically**
7 **forfeited**

8 **52B Application of this Subdivision**

9 This Subdivision sets out rules about a thing that an officer seizes
10 under paragraph 42(1)(ea) because:

- 11 (a) the thing is forfeited under section 52A because:
12 (i) it was, or was on, a boat described in that section at the
13 time of an offence described in that section; or
14 (ii) it was used or involved in the commission of an offence
15 described in that section and involving a boat; or
16 (b) the officer has reasonable grounds to believe the thing is
17 forfeited under section 52A because the officer has
18 reasonable grounds to believe the thing:
19 (i) was, or was on, a boat described in that section at the
20 time of an offence described in that section; or
21 (ii) was used or involved in the commission of an offence
22 described in that section and involving a boat.

23 **52C Notice of seizure**

24 *Giving notice*

- 25 (1) The officer must give written notice of the seizure of the thing to
26 the person:
27 (a) who was the master of the boat immediately before the
28 seizure; or
29 (b) whom the officer has reasonable grounds to believe was the
30 master of the boat immediately before the seizure.

31 However, if the officer cannot conveniently give the notice to the
32 person in person, the officer may give written notice of the seizure
33 of the thing by fixing the notice to a prominent part of the thing,
34 unless the thing is a fish.

1 *Content of notice*

- 2 (2) The notice must:
- 3 (a) identify the thing; and
- 4 (b) state that the thing has been seized; and
- 5 (c) state that the thing will be condemned as forfeited unless the
- 6 owner of the thing or the person who had possession, custody
- 7 or control of the thing immediately before it was seized gives
- 8 the Managing Director of AFMA within 30 days a written
- 9 claim in English for the thing; and
- 10 (d) specify the address of the Managing Director of AFMA.

11 Note: Section 52E condemns the thing if it is not claimed within 30 days.

12 Section 52G condemns the thing if it is claimed but the claimant does

13 not get a court order supporting the claim.

14 *Status of notice*

- 15 (3) A notice under subsection (1) is not a legislative instrument.

16 **52D Dealing with thing before it is condemned**

- 17 (1) On behalf of the Commonwealth, AFMA may cause the thing to be
- 18 disposed of or destroyed if it is a boat and AFMA is satisfied that:
- 19 (a) the boat is unseaworthy; or
- 20 (b) the boat poses a serious risk to safety, public health or
- 21 quarantine; or
- 22 (c) the boat poses a serious risk of damage to other property or
- 23 the environment; or
- 24 (d) the expenses of custody and maintenance of the boat between
- 25 its seizure and condemnation are likely to be greater than its
- 26 value.
- 27 (2) If AFMA causes the boat to be disposed of, it may cause the
- 28 disposal to be made subject to specified conditions.
- 29 (3) The table lists some other provisions relevant to dealing with
- 30 things before they are condemned as forfeited to the
- 31 Commonwealth:
- 32

Provisions about dealing with things before they are condemned

Item	Provision	Subject of provision
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Provisions about dealing with things before they are condemned

Item	Provision	Subject of provision
1	Paragraph 42(1)(q)	Officer's power to dispose of seized fish
2	Section 52I	Release of seized property

52E Thing condemned if not claimed in time

(1) By force of this subsection, the thing is condemned as forfeited to the Commonwealth 30 days after notice of seizure of the thing has been given under section 52C, unless:

- (a) within the 30 days the owner of the thing or the person who had possession, custody or control of it immediately before it was seized gives the Managing Director of AFMA a written claim for the thing; and
- (b) the claim is in English; and
- (c) the claim sets out an address for service on the person making the claim.

Note: Section 52H requires things condemned as forfeited to be dealt with in accordance with the Minister's directions.

(2) A person may claim the thing even if it is disposed of or destroyed before or after the claim.

52F Dealing with claim for thing

(1) If the thing is claimed as described in section 52E:

- (a) an officer may retain possession of the thing without starting any proceedings for the condemnation of the goods; and
- (b) the Managing Director of AFMA may give the claimant a written notice stating that the thing will be condemned if the claimant does not institute proceedings against the Commonwealth within 2 months:
 - (i) to recover the thing; or
 - (ii) for a declaration that the thing is not forfeited.

Note 1: An officer may retain possession even if the Managing Director of AFMA does not give notice. If so, the claimant will be able to recover the thing only if it is released under section 52I or a court orders its release to the claimant.

Note 2: If the Managing Director does give the notice and the claimant institutes proceedings, whether the claimant recovers the thing will depend on the outcome of the proceedings.

Schedule 1 Fisheries amendments

Part 4 Forfeiture etc. of things involved in illegal fishing

1 (2) The Managing Director of AFMA may give the notice to the
2 claimant by posting it prepaid as a letter to the last address of the
3 claimant that is known to the Managing Director. If the Managing
4 Director does so, the letter is taken to be properly addressed for the
5 purposes of section 29 of the *Acts Interpretation Act 1901*.

6 (3) Subsection (2) does not limit the ways in which the notice may be
7 given.

8 Note: Sections 28A and 29 of the *Acts Interpretation Act 1901* explain how
9 a notice can be given, and when it is taken to be given.

10 (4) To avoid doubt, the Managing Director of AFMA may give the
11 notice even if the thing has been released under section 52I.

12 (5) A notice under paragraph (1)(b) is not a legislative instrument.

13 **52G Condemnation of thing if it is claimed**

14 *Application*

15 (1) This section applies if the Managing Director of AFMA gives the
16 claimant a notice under section 52F about instituting proceedings:

- 17 (a) to recover the thing; or
18 (b) for a declaration that the thing is not forfeited.

19 *Condemnation if proceedings not started within 2 months*

20 (2) By force of this subsection, the thing is condemned as forfeited to
21 the Commonwealth 2 months after the notice is given if the
22 claimant does not institute the proceedings within that period.

23 *Condemnation at end of proceedings started within 2 months*

24 (3) By force of this subsection, the thing is condemned as forfeited to
25 the Commonwealth at the end of the proceedings that are instituted
26 by the claimant against the Commonwealth within 2 months of the
27 claimant being given the notice if, at the end of the proceedings,
28 there is not:

- 29 (a) an order for the claimant to recover the thing; or
30 (b) an order for the Commonwealth to pay the claimant the
31 proceeds of the sale of the thing if it has been sold before the
32 end of the proceedings; or
-

- 1 (c) an order for the Commonwealth to pay the claimant the
2 market value of the thing at the time it was disposed of
3 (except by sale) or destroyed, if it has been disposed of
4 (except by sale) or destroyed before the end of the
5 proceedings; or
6 (d) a declaration that the thing is not forfeited.

7 *End of proceedings that go to judgment*

- 8 (4) For the purposes of subsection (3), if the proceedings go to
9 judgment, they end:
10 (a) at the end of the period for lodging an appeal against the
11 judgment, if no appeal is lodged within that period; or
12 (b) when the appeal lapses or is finally determined, if an appeal
13 is lodged against the judgment within that period.

14 *Proceedings relating to thing that has been disposed of*

- 15 (5) Proceedings relating to the thing may be instituted or continued
16 even if it is disposed of or destroyed.

17 *Order for payment if thing has been disposed of or destroyed*

- 18 (6) If the court hearing the proceedings decides that it would have
19 ordered that the thing be delivered to a person apart from the fact
20 that the thing had been disposed of or destroyed, the court must
21 order the Commonwealth to pay the person an amount equal to:
22 (a) the proceeds of the sale of the thing, if it has been sold before
23 the end of the proceedings; or
24 (b) the market value of the thing at the time it was disposed of
25 (except by sale) or destroyed, if it has been disposed of
26 (except by sale) or destroyed before the end of the
27 proceedings.

28 **52H Dealing with thing after it is condemned**

29 If the thing is condemned as forfeited to the Commonwealth, the
30 thing must be dealt with or disposed of in accordance with the
31 directions of the Minister.

1 **Division 4—Dealing with property that has been seized etc.**

2 **52I Release of property that has been seized etc.**

3 (1) If any property is under the control of an officer because of the
4 exercise by an officer of powers under section 42, AFMA may
5 direct that the property be released:

6 (a) in the case of a boat—to the owner or the master of the boat;
7 and

8 (b) in any other case—to the owner of the property or to the
9 person from whose possession the property was seized, or
10 from whose control the property was removed;

11 on such conditions (if any) as AFMA thinks fit, including
12 conditions as to the giving of security:

13 (c) for payment of the value of the property if it is forfeited; and

14 (d) for the payment of any fines that may be imposed under this
15 Act in respect of offences that AFMA has reason to believe
16 have been committed with the use of, or in relation to, that
17 property.

18 (2) If:

19 (a) any property referred to in subsection (1):

20 (i) is also property referred to in section 52; and

21 (ii) was under the control of an officer because an offence
22 referred to in that section is alleged to have been
23 committed in respect of the property; and

24 (b) were the person to be convicted of the offence an order could
25 be made by the court directing the person to pay the costs of
26 the prosecution;

27 the conditions on which the property may be released under
28 subsection (1) include a condition as to the giving of security for
29 payment of those costs if the person is convicted of the offence.

30 (3) For the purposes of this section:

31 (a) a reference to property includes a reference to fish; and

32 (b) property is taken to be under the control of an officer if any
33 person is, in relation to that property, subject to the directions
34 of the officer.

1 **52J Seizure or forfeiture has effect despite admiralty proceedings**

- 2 (1) The seizure, detention or forfeiture of a boat under this Act has
3 effect despite any or all of the following events:
4 (a) the arrest of the boat under the *Admiralty Act 1988*;
5 (b) the making of an order for the sale of the boat by a court in
6 proceedings brought under the *Admiralty Act 1988*;
7 (c) the sale of the boat under an order made by a court in
8 proceedings brought under the *Admiralty Act 1988*.
- 9 (2) Subsection (1) has effect regardless of whether the seizure,
10 detention or forfeiture, or the event that was the basis for the
11 seizure, detention or forfeiture, occurred before or after the arrest,
12 making of the order or sale (as appropriate).

13 **Division 2—Related amendments**

14 ***Torres Strait Fisheries Act 1984***

15 **37 Before section 42**

16 Insert:

17 **Division 1—Officers' powers**

18 **38 Before section 44**

19 Insert:

20 **Division 2—Offences**

21 **39 Before section 52**

22 Insert:

23 **Division 3—Forfeiture for offences**

24 **Subdivision A—Forfeiture by court order**

25 **40 Before section 53**

26 Insert:

1 **Division 5—Ancillary offences and provisions**

2 **41 Before section 54**

3 Insert:

4 **Division 6—Offence of contravening Papua New Guinea**
5 **law**

1

2

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

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4

Fisheries Management Act 1991

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42 Paragraph 108(1)(e)

6

After “officer”, insert “or other person exercising a power or performing a function under this Act”.

7

8

43 Paragraph 108(1)(f)

9

Omit “an officer in the exercise of the officer’s powers under this Act”, substitute “an officer or other person exercising a power or performing a function under this Act in the exercise of the power or performance of the function”.

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Torres Strait Fisheries Act 1984

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

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Add “or other person exercising a power or performing a function under this Act”.

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45 After paragraph 43(1)(e)

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Insert:

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; and (f) must not assault, resist or obstruct an officer or other person exercising a power or performing a function under this Act in the exercise of the power or performance of the function.

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Schedule 2—Enforcement visas etc.

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

Migration Act 1958

1 Subsection 5(1) (definition of *fisheries detention offence*)

Repeal the definition, substitute:

fisheries detention offence means:

- (a) an offence against section 99, 100, 100A, 101, 101A, 101B, 105E or 105F of the *Fisheries Management Act 1991*; or
- (b) an offence against section 45, 48, 49 or 51 of the *Torres Strait Fisheries Act 1984*; or
- (c) an offence against section 6 of the *Crimes Act 1914* relating to an offence described in paragraph (a) or (b).

2 Subsection 5(1) (definition of *fisheries officer*)

Repeal the definition, substitute:

fisheries officer means an officer as defined in the *Fisheries Management Act 1991* or the *Torres Strait Fisheries Act 1984*.

3 Subparagraph 43(3)(b)(i)

After “1991”, insert “or paragraph 42(1)(g) of the *Torres Strait Fisheries Act 1984*”.

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

Omit “that Act”, substitute “the *Fisheries Management Act 1991* or paragraph 42(1)(h) of the *Torres Strait Fisheries Act 1984*”.

5 Paragraph 164B(1)(a)

After “1991”, insert “or paragraph 42(1)(g) of the *Torres Strait Fisheries Act 1984*”.

6 Paragraph 164B(1)(b)

1 Omit “that Act”, substitute “the *Fisheries Management Act 1991* or
2 paragraph 42(1)(h) of the *Torres Strait Fisheries Act 1984*”.

3 **7 Subsection 164B(1) (note 2)**

4 Repeal the note, substitute:

5 Note 2: Under paragraph 42(1)(g) of the *Torres Strait Fisheries Act 1984*, a
6 fisheries officer may require the master of a boat to bring or take the
7 boat into the migration zone. Under paragraph 42(1)(h) of that Act, a
8 fisheries officer may bring a boat into the migration zone.

9 Note 3: The grant of an enforcement visa effectively cancels any temporary
10 visa that the non-citizen may have held (see subsection 82(2A)).

11 **8 Subsections 164B(3) and (4)**

12 After “1991”, insert “or the *Torres Strait Fisheries Act 1984*”.

13 **9 Saving of enforcement visas**

14 The amendments made by this Part do not affect the validity of an
15 enforcement visa granted before the commencement of the
16 amendments.

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Part 2—Amendments relating to new fisheries detention provisions

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Migration Act 1958

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10 Section 164A (definition of *fisheries detention*)

6

Repeal the definition, substitute:

7

fisheries detention means detention under:

8

(a) Schedule 1A to the *Fisheries Management Act 1991*; or

9

(b) Schedule 2 to the *Torres Strait Fisheries Act 1984*.

10

11 Subsection 164B(2)

11

Omit “paragraph 84(1)(ia) of the *Fisheries Management Act 1991*”,

12

substitute “Schedule 1A to the *Fisheries Management Act 1991* or

13

Schedule 2 to the *Torres Strait Fisheries Act 1984*”.

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12 Saving of enforcement visas

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The amendments made by this Part do not affect the validity of an

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enforcement visa granted before the commencement of the

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amendments.