
Editorial commentary

AUSTRALIAN GOVERNMENT IMPOSES CUSTODIAL SENTENCE FOR ILLEGAL FOREIGN FISHERS

On the 23 June 2006 the operative provisions of the *Fisheries Legislation Amendment (Foreign Fishing Offences) Act 2006* (Cth) (the amending Act) came into force.¹ The main purpose of the amending Act is to introduce custodial penalties for foreign fishing offences which are committed in Australia's territorial sea.² In so doing, the legislative drafters have acknowledged the legal distinction between the regimes of the territorial sea and the exclusive economic zone (EEZ).³ That is, the fact that under international law a coastal State may impose the full force of its criminal laws within the territorial sea whilst within the EEZ the coastal State's rights in relation to the enforcement of its fisheries laws are limited by Art 73 of the *United Nations Convention on the Law of the Sea* (LOSC).⁴

In terms of the fight against the persistent and increasing numbers of illegal foreign fishers visiting Australia's waters, the distinction is long overdue. Whether the risk of incurring a custodial sentence will actually deter foreign fishers remains to be seen. In the interim, there are a number of observations to be made in relation to the amending Act. These observations are best appreciated when considered in the context of the legal framework under which Australian fisheries are managed, together with a brief account of the significant increase in the numbers of illegal fishers being sighted in the northern waters of the Australian Fishing Zone (AFZ).

COMMONWEALTH FISHERIES

The AFZ spans some 9 million sq km and is the third largest in the world. The Australian Fisheries Management Authority (AFMA) manages over 20 Commonwealth fisheries within the AFZ.⁵ Production from these fisheries is worth more than AU\$2.2 billion to the Australian economy each year.

Australia's maritime areas are governed by the states and Commonwealth through the *Offshore Constitutional Settlement 1979*,⁶ under which waters within 3 nautical miles of the low water mark are managed by the states and Northern Territory and the waters seaward of three nautical miles to 200 nautical miles are subject to Commonwealth management. Commonwealth fisheries are managed under the *Fisheries Management Act 1991* (Cth) and *Fisheries Administration Act 1991* (Cth)⁷ and until the commencement of the amending Act, there was no custodial penalty for foreign fisheries offences under Pt 6, Div 5 of the *Fisheries Management Act*.

¹ Act No 61, 2006. It received Royal assent on 22 June 2006 and the Schedules commenced the day after in accordance with s 2 of the Act. The Act also amends the *Torres Strait Fisheries Act 1994* (Cth).

² The separation of coastal waters from the 12 nautical mile territorial sea is discussed further below.

³ See Arts 2 and 55 of the *United Nations Convention on the Law of the Sea* opened for signature 10 December 1982, 19 ILM 1261 (entered into force 16 November 1994).

⁴ Also see Arts 2 and 55 of the *United Nations Convention on the Law of the Sea* opened for signature 10 December 1982, 19 ILM 1261 (entered into force 16 November 1994).

⁵ Under the *Offshore Constitutional Settlement* the Commonwealth generally manages fisheries from 3 nautical miles to the outer edge of the 200 nautical mile AFZ.

⁶ The *Offshore Constitutional Settlement 1979* under which the states have sovereignty to the three nautical mile limit and the Commonwealth has authority to legislate over marine areas claimed under international law from 3 to 200 nautical miles. For more on this, including a discussion of relevant High Court of Australia case law, see White M, *Pollution Laws of the Australasian Region* (The Federation Press, 1994) s 7.1.

⁷ The *Fisheries Management Act 1901* (Cth) defines both the AFZ and the EEZ. Whilst Australia has exercised rights under international law to declare an EEZ, the term AFZ has been retained for the purposes of Commonwealth fisheries management under the *Fisheries Management Act*.

ILLEGAL FISHING IN THE NORTHERN AFZ

Recent figures quoted in Commonwealth Parliamentary Hansard suggest that there were 13,018 sightings of foreign fishing vessels within the AFZ in the 2005 calendar year.⁸ This represents a significant increase from the 8,108 reported sightings in 2004 and the 1,588 sightings for the 15 months following 1 January 2003.⁹ Actual reported apprehensions are much lower. The evidence indicates that the fishers are predominantly Indonesian.¹⁰ The table below illustrates the increase in interceptions and apprehensions in recent years.¹¹

TABLE 1 Interceptions, Arrests and Forfeitures, 2000-2005

Year	Boats apprehended	Legislative Forfeitures	Total Boats Intercepted
2000	78	23	101
2001	80	39	119
2002	109	35	144
2003	138	56	196
2004	161	128	289
2005	280	32	607

As has been evidenced in the global campaign against illegal, unreported and unregulated (IUU) fishing,¹² there is no one strategy which can be employed to effectively deter illegal fishers. The 2006 Federal Budget committed an additional AU\$388.9 million to “boost the fight against illegal foreign fishing”.¹³ Included within this budgetary commitment are plans to establish a long-range helicopter response capability, the acquisition of a second armed patrol vessel (in addition to the *Oceanic Viking*) and improvements to facilities to manage the post arrest handling of apprehended fishers.¹⁴

As the threat from illegal fishers has increased in northern waters of the AFZ, the *Oceanic Viking* has been re-deployed from the Southern Ocean.¹⁵ In September 2005 the vessel was used in a week-long targeted operation which netted four large foreign flagged iceboats with over 15 tonnes of fish on board.¹⁶ The *Ocean Viking* reportedly fired shots from its machine guns after one vessel failed

⁸ Australia, House of Representatives, *Debates* (31 May 2006) p 68, per the Hon Member for Corio, available online at <http://www.aph.gov.au/hansard/reps/dailys/dr310506.pdf> (viewed 12 July 2006).

⁹ Australia, House of Representatives, n 8.

¹⁰ Australia, House of Representatives, *Debates* (31 May 2006) pp 72-74, per the Hon Member for Chisholm. The first Chinese nationals faced charges under fisheries legislation in June 2006. See, “Fire Flares on Illegal Fishing Boats” *ABC News Online*, 9 June 2006.

¹¹ This Table was extracted from Macdonald I, *Record Arrest for Northern Illegal Fishing* (media release, 3 January 2006) available online at <http://www.mffc.gov.au/releases/2006/06001m.html> (viewed 13 July 2006).

¹² Illegal, Unreported and Unregulated Fishing. For an understanding of the terms see the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by the 25th session of the FAO Committee on Fisheries on 2 March 2001, s II, Pt 3.

¹³ Abetz E, Nelson B, and Ellison C, *\$388.9 Budget Boost in Fight Against Illegal Foreign Fishing in Australian Waters* (joint media release, 9 May 2006) available online at <http://www.mffc.gov.au/releases/2006/06035aj.htm> (viewed 11 May 2006).

¹⁴ Abetz et al, n 13; see also Ellison C, *New Armed Patrol Vessel to Join Customs Fleet* (media release, 11 May 2006) available online at <http://www.customs.gov.au/site/page.cfm?c=7105> (viewed 15 May 2006).

¹⁵ The 2003 Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern Antarctic Territories (TAFF) Heard Island and the McDonald Islands provides for cooperative surveillance in the agreed area of cooperation and it is likely this has freed the *Oceanic Viking* to be deployed to the northern AFZ where there is a greater incidence of illegal fishing.

¹⁶ Macdonald I and Ellison C, *Armed Patrol Boat Makes Northern Arrests* (joint media release, 28 September 2005) available

to stop.¹⁷ April 2006 saw the *Ocean Viking* return to northern waters taking part in Operation Breakwater.¹⁸ Twenty-three vessels were arrested in a two week period.¹⁹

The May 2006 budget spending followed a commitment in October 2005 of AU\$88 million to assist government agencies to “better manage the growing numbers of foreign fishing boats and crews detained” in Australia’s northern waters.²⁰ With reference to the need to increase staffing in the Commonwealth agencies, the government stated:

An extra 28 Customs officers, 30 Fisheries officers and four new tactical response vessels would be deployed in Western Australia, Queensland and the Northern Territory. An extra 6 Customs officers will also be employed to coordinate the increased level of activity to combat illegal fishing.²¹

This increase in personnel was additional to an earlier commitment of 25 fisheries officers to establish a new AFMA base in Darwin.²² Also included in the AU\$88 million funding commitment was AU\$5 million to upgrade the detention facility at Horn Island.²³ The new Darwin AFMA office provides another detention facility to support post arrest procedures and the prosecution of foreign fishers apprehended on suspicion of illegal fishing. In a nod to the geographical shift in pressure from illegal fishers, Southern Ocean fisheries are slated to be managed out of the centralised Darwin office.²⁴ Finally, the May 2006 budget committed funds to establish a Joint Offshore Protection Command, the operational and logistical details of which, at the time of writing, were still unclear.

THE NEW OFFENCES AND INTERNATIONAL LAW

The amending Act introduces two new fault based offences applicable to foreign fishing vessels in the territorial sea. The new s 100B creates the offence of intentionally using a boat for commercial fishing, whilst s 101AA creates the offence of having a foreign boat equipped for fishing. The elements of both offences are noted in the Table below.

TABLE 2 New Custodial Penalties

Section	Elements	Penalties
100B	<ul style="list-style-type: none"> • intentional use of foreign boat • for commercial fishing • within the territorial sea (seaward of 3 nautical miles) 	<ul style="list-style-type: none"> • boat = or < 24 m in length: AU\$825,000 or three years imprisonment or both • boat less than 24 m: AU\$550,000 or two years imprisonment or both

online at <http://www.mffc.gov.au/releases/2005/05190mj.html> (viewed 13 July 2006).

¹⁷ Macdonald and Ellison, n 16.

¹⁸ Abetz E, Nelson B, and Ellison C, *Operation Breakwater – Protecting our Waters While Netting 23 Suspected Illegal Fishing Vessels* (joint media release, 5 April 2006) available online at <http://www.mffc.gov.au/releases/2006/06022aj.htm> (viewed 7 April 2006).

¹⁹ Abetz et al, n 18.

²⁰ Macdonald I, and Ellison C, *\$88 million Boost to Combat Foreign Fishing in Northern Australian Waters* (joint media release, 11 October 2005) available online at <http://www.mffc.gov.au/releases/2005/05194mj.html> (viewed 21 October 2005).

²¹ Macdonald and Ellison, n 20.

²² Macdonald and Ellison, n 20. The Office was opened on 5 April 2006.

²³ Horn Island is adjacent to Thursday Island at the top of Cape York Peninsula.

²⁴ Abetz E, *Fight Against Illegal Fishing Enhanced* (media release, 5 April 2006) available online at <http://www.mffc.gov.au/releases/2006/06021a.htm> (viewed 7 April 2006).

TABLE 2 *continued*

Section	Elements	Penalties
101AA	<ul style="list-style-type: none"> • intentional use of foreign boat • in possession or charge of that boat • boat equipped with nets, traps or other equipment for fishing • within territorial sea (seaward of 3 nautical miles) 	AU\$550,000 or two years imprisonment or both

These offences are restricted in application to the limits of the territorial sea (12 nautical miles) in recognition of the fact that Art 73 of the LOSC provides that:

Coastal State penalties for violation of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or by any other form of corporeal punishment.

This limitation imposed by international law²⁵ has been seen as a weakness by some for it fetters the ability of coastal States to provide real deterrents to would be illegal fishers. However, the Article's purpose is to safeguard against transgressions of flag state authority. During UNCLOS III, the rights of the coastal State to manage living marine resources in the newly established (and significant extension of) coastal State authority had to be weighed against the traditional rights of freedom of navigation and the presumptive authority of flag States. The brokered outcome reflected in Art 73 has been described as a "fair balance" between the rights of the coastal State to take measures as appropriate to ensure compliance with its laws and regulations adopted in respect of its EEZ and in conformity with Pt V of the LOSC, and the interest of the flag state rights in securing the prompt release of apprehended vessels and crew.²⁶ However, it also argued that given the changed environment in which marine fisheries are now conducted,²⁷ including the development of IUU fishing on a scale unforeseeable in the 1970s: "a new balance has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal states on the other".²⁸

COMMENTS

It has been estimated that the trade in shark fin (a target catch in the northern AFZ) may be worth up to AU\$23 million annually.²⁹ It is understandable that the Australian government would seek to utilise every lawful device to address what has become a very significant problem³⁰ and one which raises a number of disparate issues including:

- political issues such as incursions into Australian sovereignty and the maintenance of diplomatic relations with Indonesia (the source of the great majority of fishers);

²⁵ As of 23 June 2006 there were 149 parties to the LOSC.

²⁶ For example see the judgement in *Seychelles v France (the Monte Confurco case)* International Tribunal for the Law of the Sea, Case No 6 (18 December 2000) at [70]. Justice ad hoc Shearer confirms the existence of this balance in his dissenting opinion in *Russian Federation v Australia (the Volga case)* International Tribunal for the Law of the Sea, Case No 11 (23 December 2002) at [19], although he expresses the opinion that the balance struck in 1982 should be considered in light of changed circumstances such as privately owned fishing vessels and greater financial incentives to participate in illegal fishing in regions where detection is difficult.

²⁷ For an analysis of the environment of IUU fisheries see Baird R, "Corporate Criminals and their Involvement in IUU Fishing: An Australian Perspective" (2005) 1(3) *International Fisheries law and Policy Review* 170. See also Organisation for Economic Co-operation and Development, *Fish Piracy: Combating illegal, Unreported and Unregulated Fishing* (OECD 2004).

²⁸ Judge ad hoc Shearer, Dissenting opinion in *The Volga Case*, n 26 at [19].

²⁹ Australia, House of Representatives, *Debates* (31 May 2006) p 74, per the Hon Member for Chisholm.

³⁰ One that occupied 51 pages of Hansard in the House of Representatives and approximately 5.5 hours of debate on 31 May 2006.

- environmental issues including natural resource management and quarantine concerns;
- social issues such as the detention of hundreds of illegal fishers and their timely processing and repatriation to Indonesian fishing villages; and
- economic issues such as the maintenance of the livelihood of those involved in the commercial fishing industry in northern Western Australia, Northern Territory and Queensland.³¹

However, the new custodial penalties have a very limited geographical range. They do not apply to coastal waters (landward of 3 nautical miles) and can be applied only to extent of the territorial sea. Therefore the penalties apply to a narrow band of 9 nautical miles.³² Whilst the experience has been that illegal fishing in the northern AFZ is very different to illegal fishing in the Southern Ocean in the Heard and McDonald Islands' EEZ, in that increasing numbers of illegal fishers are penetrating coastal and internal waters and actually making landfall, it has been suggested that the penalties will apply to limited numbers of fishers.³³ Whilst this probability does not detract from the merit of the amending Act, it does limit its impact. Furthermore, one wonders how long it will take the illegal fishers to adjust their practices so that they avoid detection within the territorial sea.³⁴

The new custodial penalties also raise logistical challenges in terms of housing the fishers once convicted and sentenced to serve prison terms. Though the May 2006 federal budget provided for the upgrade of detention facilities, there will be increasing pressure placed upon facilities in the "top end". Over 2000 illegal fishers were detained in 2005. The Immigration Department reportedly estimates that up to 6000 illegal fishers will be arrested in the 2006/2007 financial year.³⁵ Whilst it is impossible to predict what proportion might be subject (by virtue of the place of arrest) to the custodial penalties introduced by the amending Act, the numbers suggest detention facilities and jails will quickly become overcrowded.

In addition to the infrastructure costs associated with constructing and upgrading appropriate accommodation for the illegal fishers, the cost to taxpayers in housing, feeding and securing these offenders must be weighed against the benefit in keeping them off the seas for up to two or three years. Furthermore, the expected increase in the burning of boats forfeited under the *Fisheries Management Act*, raises environmental concerns and yet another dilemma the Commonwealth government.³⁶ There comes a point when the government must address the question of how much more money should be spent to safeguard Australia's sovereign interests when the value of the natural resources being protected has long been surpassed.

Inevitably, when considering the problem of illegal fishing, one returns to the reality that whilst there remain many drivers for illegal fishing (legal, economic, political, social and cultural)³⁷ the measures to address the problem must be multi-faceted and applied in a coordinated manner. Hence, it is perhaps premature to prejudge the viability of the custodial penalties. Applied in isolation, their impact may well be limited. Applied in concert with firm diplomatic approaches to Jakarta, initiatives to educate and re-deploy local Indonesian fishers to sustainable livelihoods and continued efforts to

³¹ It has been estimated that in the Northern Territory alone over 1500 people are employed in the seafood industry. Labour Transport and Maritime Security Taskforce, *Maritime Security and Illegal Fishing: A National Disgrace* (June 2006) p 14 available online at http://www.alp.org.au/download/now/060607_maritime_security_and_illegal_fishing_a_national_disgrace.pdf (viewed 13 July 2006).

³² Although it is noted that illegal fishers are charged under state legislation if arrested in coastal waters. For example, under the *Fish Resources Management Act 1994* (WA), individuals currently face imprisonment for up to two years and or a fine of \$50,000. Amendments are proposed to increase that maximum penalty to four years and \$150,000.

³³ It has been reported that the Managing Director of AFMA reported to the Senate Rural and Regional Affairs and Transport Legislation Committee that, *There are many more vessels apprehended outside the three to 12 mile zone than are apprehended inside it*. See, Australia, House of Representatives, *Debates* (31 May 2006) p 78, per the Hon Member for Lingiari.

³⁴ Given the documented difficulties experienced by Australian naval vessels in locating the small wooden vessels typically used by illegal fishers hidden amongst mangroves and the lack of signature on naval vessel radar, this is a possibility.

³⁵ "6000 Illegal Fishers Expected in Year Ahead" *ABC News Online*, 23 May 2006.

³⁶ See Gerard I, *Burning Boats "Risk to the Environment"* *The Australian* (28 June 2006) p 5.

³⁷ See Baird R, "Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal and, Economic and Historical factors Relevant to its Development and Persistence" (2004) 5(2) *Melbourne Journal of International Law* 299.

implement international responses to the wider problem of IUU fishing the custodial penalties may well find their mark.³⁸ That said, there is also a pressing need to focus the combined force of minds within the various Commonwealth and State departments and agencies, the halls of academia and the Australian fishing industry itself, on the task of identifying more efficient ways of curbing the problem. The current high level of government spending on surveillance enforcement and prosecution is unsustainable.

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³⁸ The pressing problem with Indonesian fishers operating illegally in the northern AFZ indeed prompted the amendments to the *Fisheries Management Act*. It is the most pressing problem currently for fisheries managers and the focus on the northern AFZ is reflected in the priorities in the 2006 Federal Budget.