



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

No. 103, 2005

**An Act to amend the law relating to fisheries and
fishers, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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

No. 103, 2005

An Act to amend the law relating to fisheries and fishers, and for related purposes

[Assented to 23 August 2005]

The Parliament of Australia enacts:

1 Short title

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

2 Commencement

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

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.	23 August 2005
2. Schedule 1, Part 1	The day after this Act receives the Royal Assent.	24 August 2005
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.	30 November 2005 (<i>see</i> F2005L03632)
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.	30 November 2005 (<i>see</i> F2005L03632)
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.	30 November 2005 (paragraph (b) applies)
6. Schedule 1, Parts 4 and 5	The day after this Act receives the Royal Assent.	24 August 2005
7. Schedule 2, Part 1	The day after this Act receives the Royal Assent.	24 August 2005

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
8. Schedule 2, Part 2	At the same time as the provision(s) covered by table item 3.	30 November 2005

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.

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

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Fisheries amendments

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

Fisheries Management Act 1991

1 After subsection 84(1B)

Insert:

(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:

- (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.

Torres Strait Fisheries Act 1984

2 After subsection 42(2)

Insert:

(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:

- (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.

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

Fisheries Management Act 1991

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

Repeal the paragraphs.

4 At the end of subsection 84(1)

Add:

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

5 Sections 84A and 84B

Repeal the sections.

6 Paragraph 87E(1)(aa)

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

7 Paragraph 87E(1)(ab)

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

8 Paragraph 87E(1)(ab)

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

9 Subsection 87E(5)

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

10 Subsection 87E(5) (note)

Repeal the note.

11 Section 98A

Repeal the section.

12 After Division 5A of Part 6

Insert:

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

105Q Provisions relating to detention of suspected illegal foreign fishers

Schedule 1A has effect.

13 Before Schedule 1

Insert:

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

Note: See section 105Q.

Part 1—Preliminary

Division 1—Objects of this Schedule

1 Main objects of this Schedule

- (1) This Schedule has 3 main objects.
- (2) The first main object is to provide for the detention (*fisheries detention*) in Australia or a Territory of persons who:
 - (a) are reasonably suspected by an officer of having committed an offence involving the use of a foreign boat; and
 - (b) are not Australian citizens or Australian residents;for a limited period for the purposes of determining whether to charge them with the offence.
- (3) The second main object is to provide for persons in fisheries detention to be searched, screened, given access to facilities for obtaining legal advice, and identified.
- (4) The third main object is to facilitate the transition of persons from fisheries detention to immigration detention under the *Migration Act 1958*:
 - (a) by providing for the things mentioned in subclause (3) to be done in a way corresponding to the way that Act provides for

Schedule 1 Fisheries amendments

Part 2 Provisions relating to detention of suspected illegal foreign fishers

those things to be done to persons in immigration detention;
and

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

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

Division 2—Definitions

2 Definitions

In this Schedule, unless the contrary intention appears:

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

detainee means a person detained under Part 2.

detention means detention under Part 2.

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

Division 3—Appointment etc. of detention officers

3 Minister may appoint persons to be detention officers

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

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

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

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

4 Detention officers subject to directions

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

5 Detention officer etc. not liable to certain actions

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

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

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

Division 4—Authorisation of officers and detention officers

6 AFMA may authorise officers and detention officers

- (1) AFMA may, by instrument, authorise one or more officers and/or detention officers for the purposes of a specified provision of this Schedule, from among officers and/or detention officers who have successfully completed minimum training prescribed by a legislative instrument.
- (2) An instrument authorising officers and/or detention officers:
 - (a) may identify them by reference to a class; and
 - (b) may provide for them to be authorised when they become members of the class at or after a time specified in the instrument.

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

- (1) A person who:
- (a) is an officer or detention officer; and
 - (b) is an authorised officer (as defined in the *Migration Act 1958*) for a provision of that Act listed in column 2 of an item of the table;

is, while he or she meets the conditions in paragraphs (a) and (b), taken to be authorised under clause 6 for the purposes of the provision of this Schedule listed in column 3 of the item.

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)

Limits on authorisation

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

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

Persons specified by AFMA not authorised

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

Part 2—Detaining suspected illegal foreign fishers

Division 1—Initial detention by an officer

8 Power to detain

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

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

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

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

Division 2—Continued detention by a detention officer

10 Detention officer may detain person already detained by officer

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

Division 3—Detention on behalf of an officer or detention officer

11 Detention on behalf of an officer or detention officer

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

Division 4—Moving detainees

12 Power to move detainees

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

(b) the welfare of the detainee.

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

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

Division 5—End of detention

13 End of detention

A detainee must be released from detention:

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

Division 6—Offence of escaping from detention

14 Escape from detention

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

Part 3—Searching and screening detainees and screening their visitors

Division 1—Searches of detainees

15 Searches of detainees

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

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Part 2 Provisions relating to detention of suspected illegal foreign fishers

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

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

Division 2—Screening of detainees

16 Power to conduct a screening procedure

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

greater indignity, than is reasonably necessary in order to conduct the screening procedure.

- (3) This clause does not authorise an authorised officer to remove any of the detainee's clothing, or to require a detainee to remove any of his or her clothing.
- (4) To avoid doubt, a screening procedure may be conducted in relation to a detainee under this clause irrespective of whether a search of the detainee is conducted under clause 15 or 17.
- (5) In this clause:

conducting a screening procedure, in relation to a detainee, means:

- (a) causing the detainee to walk, or to be moved, through screening equipment; or
- (b) passing hand-held screening equipment over or around the detainee or around things in the detainee's possession; or
- (c) passing things in the detainee's possession through screening equipment or examining such things by X-ray.

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

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

Division 3—Strip searches of detainees

17 Power to conduct a strip search

- (1) A strip search of a detainee, other than a detainee to whom clause 22 applies, may be conducted by an authorised officer, without warrant, to find out whether there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon, or other thing, capable of being used:
 - (a) to inflict bodily injury; or
 - (b) to help the detainee, or any other detainee, to escape from detention.

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

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Part 2 Provisions relating to detention of suspected illegal foreign fishers

- (2) A *strip search* of a detainee means a search of the detainee, of his or her clothing or of a thing in his or her possession. It may include:
- (a) requiring the detainee to remove some or all of his or her clothing; and
 - (b) an examination of that clothing and of the detainee's body (but not of the detainee's body cavities).
- (3) A strip search of a detainee may be conducted by an authorised officer only if:
- (a) an officer or detention officer suspects on reasonable grounds that there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon or other thing described in subclause (1); and
 - (b) the officer, or detention officer, referred to in paragraph (a) suspects on reasonable grounds that it is necessary to conduct a strip search of the detainee to recover that weapon or other thing; and
 - (c) the strip search is authorised as follows:
 - (i) if the detainee is at least 18—the Managing Director of AFMA, the Secretary of the Department, or an SES Band 3 employee in the Department (who is not the officer referred to in paragraphs (a) and (b) nor the authorised officer conducting the strip search), authorises the strip search because he or she is satisfied that there are reasonable grounds for those suspicions;
 - (ii) if the detainee is at least 10 but under 18—a magistrate orders the strip search because he or she is satisfied that there are reasonable grounds for those suspicions.
- (4) An officer or detention officer may form a suspicion on reasonable grounds for the purposes of paragraph (3)(a) on the basis of:
- (a) a search conducted under clause 15 (whether by that officer or detention officer or by another officer or detention officer); or
 - (b) a screening procedure conducted under clause 16 (whether by that officer or detention officer or by another officer or detention officer); or
 - (c) any other information that is available to the officer or detention officer.
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- (5) An authorisation of a strip search given for the purposes of paragraph (3)(c):
 - (a) may be given by telephone, fax or other electronic means;
and
 - (b) must be recorded in writing, and signed by the person giving the authorisation, within one business day after it is given.
- (6) A record made under paragraph (5)(b) is not a legislative instrument.
- (7) A failure to comply with paragraph (5)(b) does not affect the validity of a strip search conducted on the basis of that authorisation.
- (8) The power to authorise a strip search under paragraph (3)(c) cannot be delegated to any other person.
- (9) A power conferred on a magistrate by this clause is conferred on the magistrate in a personal capacity and not as a court or a member of a court.
- (10) The magistrate need not accept the power conferred.
- (11) A magistrate exercising a power under this clause has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the magistrate is a member.
- (12) To avoid doubt, a strip search of a detainee may be conducted under this clause irrespective of whether a search of the detainee is conducted under clause 15 or a screening procedure is conducted in relation to the detainee under clause 16.
- (13) In this clause:

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

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

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

18 Rules for conducting a strip search

- (1) A strip search of a detainee under clause 17:
- (a) must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search; and
 - (b) must be conducted in a private area; and
 - (c) must be conducted by an authorised officer of the same sex as the detainee; and
 - (d) subject to subclauses (2), (3) and (5), must not be conducted in the presence or view of a person who is of the opposite sex to the detainee; and
 - (e) subject to subclauses (2), (3) and (5), must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the strip search; and
 - (f) must not be conducted on a detainee who is under 10; and
 - (g) if the detainee is at least 10 but under 18, or is incapable of managing his or her affairs—must be conducted in the presence of:
 - (i) the detainee’s parent or guardian if that person is in detention with the detainee and is readily available at the same place; or
 - (ii) if that is not acceptable to the detainee or subparagraph (i) does not apply—another person (other than an authorised officer) who is capable of representing the detainee’s interests and who, as far as is practicable in the circumstances, is acceptable to the detainee; and
 - (h) subject to subclause (4), if the detainee is at least 18, and is not incapable of managing his or her affairs—must be conducted in the presence of another person (if any) nominated by the detainee, if that other person is readily available at the same place as the detainee, and willing to attend the strip search within a reasonable time; and
 - (i) must not involve a search of the detainee’s body cavities; and
 - (j) must not involve the removal of more items of clothing, or more visual inspection, than the authorised officer conducting the search believes on reasonable grounds to be necessary to determine whether there is hidden on the detainee, in his or her clothing or in a thing in his or her

possession a weapon or other thing described in subclause 17(1); and

- (k) must not be conducted with greater force than is reasonably necessary to conduct the strip search.
- (2) Paragraphs (1)(d) and (e) do not apply to a parent or guardian, or person present because of subparagraph (1)(g)(ii), if the detainee has no objection to that person being present.
- (3) Paragraphs (1)(d) and (e) do not apply to a person nominated by the detainee under paragraph (1)(h) to attend the strip search.
- (4) Neither:
 - (a) a detainee's refusal or failure to nominate a person under paragraph (1)(h) within a reasonable time; nor
 - (b) a detainee's inability to nominate a person under that paragraph who is readily available at the same place as the detainee and willing to attend the strip search within a reasonable time;prevents a strip search being conducted.
- (5) A strip search of a detainee may be conducted with the assistance of another person if the authorised officer conducting the strip search considers that to be necessary for the purposes of conducting it. That person must not be of the opposite sex to the detainee unless:
 - (a) the person is a medical practitioner; and
 - (b) a medical practitioner of the same sex as the detainee is not available within a reasonable time.
- (6) An action or proceeding, whether civil or criminal, does not lie against a person who, at the request of an authorised officer, assists in conducting a strip search if the person acts in good faith and does not contravene this clause.
- (7) A detainee must be provided with adequate clothing if during or as a result of a strip search any of his or her clothing is:
 - (a) damaged or destroyed; or
 - (b) retained under clause 19.

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

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

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

- (1) An authorised officer may take possession of and retain a thing found in the course of conducting a screening procedure under clause 16 or conducting a strip search under clause 17 if the thing:
 - (a) might provide evidence of the commission of an offence against this Act; or
 - (b) is forfeited or forfeitable to the Commonwealth.
- (2) A weapon or other thing described in subclause 16(1) or 17(1) that is found in the course of conducting a screening procedure under clause 16 or a strip search under clause 17 is forfeited to the Commonwealth.
- (3) An authorised officer must not return a thing that is forfeited or forfeitable to the Commonwealth. Instead, the authorised officer must, as soon as practicable, give a thing that is forfeited under subclause (2) to a constable (within the meaning of the *Crimes Act 1914*).

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

- (4) An authorised officer must take reasonable steps to return anything that is not forfeited or forfeitable but is retained under subclause (1) to the person from whom it was taken, or to the owner if that person is not entitled to possess it, if one of the following happens:
 - (a) it is decided that the thing is not to be used in evidence;
 - (b) the period of 60 days after the authorised officer takes possession of the thing ends.
- (5) However, the authorised officer does not have to take those steps if:
 - (a) in a paragraph (4)(b) case:
 - (i) proceedings in respect of which the thing might provide evidence have been instituted before the end of the 60

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

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

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

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

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

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

21 Magistrate may order that thing be retained

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

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

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

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

22 Detainees held in State or Territory prisons or remand centres

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

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

Division 6—Screening detainees’ visitors

23 Powers concerning entry to premises where detainee is detained

- (1) An officer or detention officer may request that a person about to enter premises where a detainee is in detention do one or more of the following:
 - (a) walk through screening equipment;
 - (b) allow an officer or detention officer to pass hand-held screening equipment over or around the person or around things in the person’s possession;
 - (c) allow things in the person’s possession to pass through screening equipment or to be examined by X-ray.
- (2) **Screening equipment** means a metal detector or similar device for detecting objects or particular substances.
- (3) If an authorised officer suspects on reasonable grounds that a person about to enter premises where a detainee is in detention has in the person’s possession a thing that might:
 - (a) endanger the safety of the detainees, staff or other persons on the premises; or
 - (b) disrupt the order or security arrangements on the premises;the authorised officer may request that the person do some or all of the things in subclause (4) for the purpose of finding out whether the person has such a thing. A request may be made whether or not a request is also made to the person under subclause (1).
- (4) An authorised officer may request that the person do one or more of the following:
 - (a) allow the authorised officer to inspect the things in the person’s possession;
 - (b) remove some or all of the person’s outer clothing such as a coat, jacket or similar item;
 - (c) remove items from the pockets of the person’s clothing;
 - (d) open a thing in the person’s possession, or remove the thing’s contents, to allow the authorised officer to inspect the thing or its contents;
 - (e) leave a thing in the person’s possession, or some or all of its contents, in a place specified by the authorised officer if he or

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she suspects on reasonable grounds that the thing or its contents are capable of concealing something that might:

- (i) endanger the safety of the detainees, staff or other persons on the premises; or
 - (ii) disrupt the order or security arrangements on the premises.
- (5) A person who leaves a thing (including any of its contents) in a place specified by an authorised officer is entitled to its return when the person leaves the premises.
- (6) However, if possession of the thing, or any of those contents, by the person is unlawful under a Commonwealth, State or Territory law applying to the premises:
- (a) the thing or the contents must not be returned to the person; and
 - (b) an authorised officer must, as soon as practicable, give the thing or the contents to a constable (within the meaning of the *Crimes Act 1914*).
- (7) A person who is about to enter premises where a detainee is detained may be refused entry if the person does not comply with a request under this clause.

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

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

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

The person responsible for detention of a detainee must afford to him or her all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his or her detention.

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

Part 5—Identifying detainees

Division 1—Preliminary

25 Definitions

In this Part, unless the contrary intention appears:

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

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

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

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

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

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

personal identifier has the meaning given by clause 26.

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

26 Meaning of *personal identifier*

(1) In this Part:

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

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

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- (d) an audio or a video recording of a person (other than a video recording under clause 37);
 - (e) an iris scan;
 - (f) a person's signature;
 - (g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*.
- (2) Before the Governor-General makes regulations for the purposes of paragraph (1)(g) prescribing an identifier, the Minister must be satisfied that:
- (a) obtaining the identifier would not involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*; and
 - (b) the identifier is an image of, or a measurement or recording of, an external part of the body; and
 - (c) obtaining the identifier will promote one or more of the purposes referred to in subclause (3).
- (3) The purposes are:
- (a) to assist in the identification of, and to authenticate the identity of, any non-citizen who can be required under this Act to provide a personal identifier; and
 - (b) to assist in identifying, in the future, any such non-citizen; and
 - (c) to enhance AFMA's ability to identify non-citizens who have a criminal history relating to fisheries; and
 - (d) to combat document and identity fraud in fisheries matters; and
 - (e) to complement anti-people smuggling measures; and
 - (f) to inform the governments of foreign countries of the identity of non-citizens who have been detained under, or charged with offences against, this Act; and
 - (g) to facilitate international cooperation to combat fishing activities that involve a breach of the laws of Australia or of a foreign country.

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

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

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

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

Division 2—Identification of detainees

Subdivision A—Provision of personal identifiers

28 Detainees must provide personal identifiers

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

Note: A person who is an Australian citizen, or is a non-citizen but an Australian resident, may be in detention but must be released as soon as an officer or detention officer knows or reasonably believes the person is an Australian citizen or resident.
- (2) An authorised officer must not require, for the purposes of subclause (1), a detainee to provide a personal identifier other than any of the following (including any of the following in digital form):
 - (a) fingerprints or handprints of the detainee (including those taken using paper and ink or digital liveness technologies);
 - (b) a measurement of the detainee's height and weight;
 - (c) a photograph or other image of the detainee's face and shoulders;
 - (d) the detainee's signature;
 - (e) any other personal identifier of a type prescribed for the purposes of this paragraph.

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

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

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

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

29 Authorised officers must require and carry out identification tests

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

- (2) However:

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

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

- (3) If:

- (a) the authorised officer is authorised because of clause 7 (which effectively treats as authorised officers for the purposes of certain provisions of this Schedule certain persons who are authorised officers for the purposes of certain provisions of the *Migration Act 1958*); and
 - (b) an instrument under section 5D of that Act specifies the types of identification test the authorised officer may carry out;
-

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

30 Information to be provided before carrying out identification tests

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

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

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

Subdivision B—How identification tests are carried out

31 General rules for carrying out identification tests

An identification test under this Division:

- (a) must be carried out in circumstances affording reasonable privacy to the non-citizen; and
- (b) if the non-citizen so requests and it is practicable to comply with the request—must not be carried out in the presence or

view of a person who is of the opposite sex to the non-citizen; and

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

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

32 Use of force in carrying out identification tests

When use of force is permitted

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

Applications for authorisation to use force

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

Authorisation to use force

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

Definition

- (9) In this clause:

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

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

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

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

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

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

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

34 Authorised officer may get help to carry out identification tests

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

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

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

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

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

36 Independent person to be present

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

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

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

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

37 Recording of identification tests

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

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

38 Retesting

When retesting is permitted

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

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

Applications for authorisation to retest

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

Authorisation to retest

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

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

Use of force

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

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

Effect of refusing to authorise retesting

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

Definitions

- (11) In this clause:

senior authorising officer means an officer, or detention officer, who:

- (a) has been authorised, or is included in a class of officers or detention officers who have been authorised, by AFMA to perform the functions of a senior authorising officer under this clause; and
- (b) is not the Managing Director of AFMA, the Secretary of the Department or an SES Band 3 employee in the Department.

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

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

Subdivision C—Obligations relating to video recordings of identification tests

39 Definitions

In this Subdivision, unless the contrary intention appears:

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

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

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

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

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

40 Accessing video recordings

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

Penalty: Imprisonment for 2 years.

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

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

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

41 Authorising access to video recordings

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

- (2) AFMA must specify in an authorisation under this clause, as the purpose or purposes for which access is authorised, one or more of the following purposes:
- (a) providing a video recording to another person in accordance with this Subdivision;
 - (b) administering or managing the storage of video recordings;
 - (c) making a video recording available to the person to whom it relates;
 - (d) modifying related documents in order to correct errors or ensure compliance with appropriate standards;
 - (e) any purpose connected with determining whether a civil or criminal liability has arisen from a person carrying out or helping to carry out an identification test under this Act;
 - (f) complying with laws of the Commonwealth or the States or Territories;
 - (g) disclosing personal information under clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).
- (3) However, AFMA must not specify as a purpose for which access is authorised a purpose that will include or involve the purpose of:
- (a) investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully); or
 - (b) prosecuting a person for such an offence;
- if the identifying information in question relates to a personal identifier of a prescribed type.

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

42 Providing video recordings

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

Penalty: Imprisonment for 2 years.

- (2) A *permitted provision* of a video recording is a provision of the recording that:
- (a) is for the purpose of administering or managing the storage of video recordings; or
 - (b) is for the purpose of making the video recording in question available to the non-citizen to whom it relates; or
 - (c) is for the purpose of a proceeding, before a court or tribunal, relating to the non-citizen to whom the video recording in question relates; or
 - (d) is for any purpose connected with determining whether a civil or criminal liability has arisen from a person carrying out or helping to carry out an identification test under this Act; or
 - (e) is for the purpose of an investigation by the Privacy Commissioner or the Ombudsman relating to carrying out an identification test; or
 - (f) is made to a prescribed body or agency for the purpose of the body or agency inquiring into the operation of provisions of this Act relating to carrying out an identification test; or
 - (g) takes place with the written consent of the non-citizen to whom the video recording in question relates; or
 - (h) is a disclosure authorised by clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).
- (3) However, a provision of a video recording is not a permitted provision of the recording if:
- (a) it constitutes a disclosure of identifying information relating to a personal identifier of a prescribed type; and
 - (b) it is for the purpose of:
 - (i) investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully); or
 - (ii) prosecuting a person for such an offence.

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

43 Unauthorised modification of video recordings

A person commits an offence if:

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

Penalty: Imprisonment for 2 years.

44 Unauthorised impairment of video recordings

A person commits an offence if:

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

Penalty: Imprisonment for 2 years.

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

- (1) In this Subdivision:
 - (a) modification of a video recording; or
 - (b) impairment of the reliability of a video recording; or
 - (c) impairment of the security of the storage of a video recording; or
 - (d) impairment of the operation of a system by which a video recording is stored;by a person is unauthorised if the person is not entitled to cause that modification or impairment.
- (2) Any such modification or impairment caused by the person is not unauthorised merely because he or she has an ulterior purpose for causing it.

- (3) For the purposes of an offence under this Subdivision, a person causes any such unauthorised modification or impairment if the person's conduct substantially contributes to it.
- (4) For the purposes of subclause (1), if:
- (a) a person causes any modification or impairment of a kind mentioned in that subclause; and
 - (b) the person does so under a warrant issued under the law of the Commonwealth, a State or a Territory;
- the person is entitled to cause that modification or impairment.

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

46 Destroying video recordings

A person commits an offence if:

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

Penalty: Imprisonment for 2 years.

Division 3—Identification of minors and incapable persons

47 Minors

Minors less than 15 years old

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

Persons present while identification test is carried out

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

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

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

48 Incapable persons

Incapable persons

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

Persons present while identification test is carried out

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

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

Division 4—Obligations relating to detainees' identifying information

Subdivision A—Preliminary

49 Definitions

In this Division:

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

identifying information means the following:

- (a) any personal identifier;
- (b) any meaningful identifier derived from any personal identifier;
- (c) any record of a result of analysing any personal identifier or any meaningful identifier derived from any personal identifier;
- (d) any other information, derived from any personal identifier, from any meaningful identifier derived from any personal identifier or from any record of a kind referred to in paragraph (c), that could be used to discover a particular person's identity or to get information about a particular person.

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

unauthorised impairment has the meaning given by clause 57.

unauthorised modification has the meaning given by clause 57.

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

50 Application

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

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

Subdivision B—Accessing identifying information

51 Accessing identifying information

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

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

Penalty: Imprisonment for 2 years.

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

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

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

52 Authorising access to identifying information

- (1) AFMA may, in writing, authorise a specified person, or any person included in a specified class of persons, to access identifying information of the kind specified in the authorisation.
- (2) AFMA must specify in an authorisation under this clause, as the purpose or purposes for which access is authorised, one or more of the following purposes:
 - (a) one or more of the purposes set out in subclause 26(3);
 - (b) disclosing identifying information in accordance with this Division;
 - (c) administering or managing the storage of identifying information;
 - (d) making identifying information available to the person to whom it relates;
 - (e) modifying identifying information to enable it to be matched with other identifying information;
 - (f) modifying identifying information in order to correct errors or ensure compliance with appropriate standards;
 - (g) making decisions under this Act;
 - (h) complying with laws of the Commonwealth or the States or Territories;
 - (i) disclosing personal information under clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).

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

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

Subdivision C—Disclosing identifying information

53 Disclosing identifying information

- (1) A person commits an offence if:
- (a) the person's conduct causes disclosure of identifying information; and
 - (b) the disclosure is not a permitted disclosure.
- Penalty: Imprisonment for 2 years.
- (2) A *permitted disclosure* is a disclosure that:
- (a) is for the purpose of data-matching in order to:
 - (i) identify, or authenticate the identity of, a non-citizen; or
 - (ii) facilitate the processing of non-citizens entering or departing from Australia; or
 - (iii) identify non-citizens who have a criminal history, who are of character concern (as defined in the *Migration Act 1958*) or who are of national security concern; or
 - (iv) combat document and identity fraud in immigration matters; or
 - (v) ascertain whether an applicant for a protection visa had sufficient opportunity to avail himself or herself of protection before arriving in Australia; or
 - (vi) inform the governments of foreign countries of the identity of non-citizens who are, or are to be, removed from Australia; or
 - (b) is for the purpose of administering or managing the storage of identifying information; or

- (c) is authorised under clause 54 and is for the purpose, or one or more of the purposes, for which the disclosure is authorised; or
 - or
 - (d) is for the purpose of making the identifying information in question available to the non-citizen to whom it relates; or
 - (e) takes place under an arrangement entered into with an agency of the Commonwealth, or with a State or Territory or an agency of a State or Territory, for the exchange of identifying information; or
 - (f) is for the purpose of a proceeding, before a court or tribunal, relating to the non-citizen to whom the identifying information in question relates; or
 - (g) is for the purpose of an investigation by the Privacy Commissioner or the Ombudsman relating to:
 - (i) carrying out an identification test; or
 - (ii) requiring the provision of a personal identifier; or
 - (h) is made to a prescribed body or agency for the purpose of the body or agency inquiring into the operation of provisions of this Act relating to:
 - (i) carrying out an identification test; or
 - (ii) requiring the provision of a personal identifier; or
 - (i) takes place with the written consent of the non-citizen to whom the identifying information in question relates; or
 - (j) is a disclosure authorised by clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).
- (3) However, a disclosure is not a permitted disclosure if:
- (a) it is a disclosure of identifying information relating to a personal identifier of a prescribed type; and
 - (b) it is for the purpose of:
 - (i) investigating an offence against a law of the Commonwealth or a State or Territory; or
 - (ii) prosecuting a person for such an offence.

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

54 Authorising disclosure of identifying information to foreign countries etc.

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

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

Subdivision D—Modifying and impairing identifying information

55 Unauthorised modification of identifying information

A person commits an offence if:

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

Penalty: Imprisonment for 2 years.

56 Unauthorised impairment of identifying information

A person commits an offence if:

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

Penalty: Imprisonment for 2 years.

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

- (1) In this Division:
 - (a) modification of identifying information; or
 - (b) impairment of the reliability of identifying information; or
 - (c) impairment of the security of the storage of identifying information; or
 - (d) impairment of the operation of a system by which identifying information is stored;by a person is unauthorised if the person is not entitled to cause that modification or impairment.
- (2) Any such modification or impairment caused by the person is not unauthorised merely because he or she has an ulterior purpose for causing it.
- (3) For the purposes of an offence under this Division, a person causes any such unauthorised modification or impairment if the person's conduct substantially contributes to it.
- (4) For the purposes of subclause (1), if:
 - (a) a person causes any modification or impairment of a kind mentioned in that subclause; and
 - (b) the person does so under a warrant issued under the law of the Commonwealth, a State or a Territory;the person is entitled to cause that modification or impairment.

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

Subdivision E—Retaining identifying information

58 Identifying information may be indefinitely retained

Identifying information may be indefinitely retained.

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

Part 6—Disclosure of detainees' personal information

59 Disclosure of detainees' personal information

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

- (3) In this clause:

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

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

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

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

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

14 Transitional—persons detained just before commencement

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

Torres Strait Fisheries Act 1984

15 Subsection 3(1)

Insert:

Australian resident means:

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

16 At the end of subsection 42(1)

Add:

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

17 After subsection 42(6)

Insert:

- (6AA) An officer, or a person assisting an officer in the exercise of powers under this Act or the regulations, is not liable to an action, suit or proceeding for or in respect of anything done in good faith or omitted to be done in good faith in the exercise or purported exercise of any power conferred by this Act or the regulations.
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18 At the end of Part VI

Add:

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

54A Provisions relating to detention of suspected illegal foreign fishers

Schedule 2 has effect.

19 Schedule (heading)

Repeal the heading, substitute:

Schedule 1—Torres Strait Treaty

20 At the end of the Act

Add:

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

Note: See section 54A.

Part 1—Preliminary

Division 1—Objects of this Schedule

1 Main objects of this Schedule

- (1) This Schedule has 3 main objects.
- (2) The first main object is to provide for the detention (*fisheries detention*) in Australia or a Territory of persons who:
 - (a) are reasonably suspected by an officer of having committed an offence involving the use of a foreign boat or a Papua New Guinea boat; and
 - (b) are not Australian citizens or Australian residents;for a limited period for the purposes of determining whether to charge them with the offence.

- (3) The second main object is to provide for persons in fisheries detention to be searched, screened, given access to facilities for obtaining legal advice, and identified.
- (4) The third main object is to facilitate the transition of persons from fisheries detention to immigration detention under the *Migration Act 1958*:
 - (a) by providing for the things mentioned in subclause (3) to be done in a way corresponding to the way that Act provides for those things to be done to persons in immigration detention; and
 - (b) by authorising the disclosure of personal information about individuals who are or have been in fisheries detention to persons, agencies and organisations responsible for holding the individuals in immigration detention, for the purpose of the immigration detention and welfare of the individuals.

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

Division 2—Definitions

2 Definitions

In this Schedule, unless the contrary intention appears:

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

detainee means a person detained under Part 2.

detention means detention under Part 2.

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

Division 3—Appointment etc. of detention officers

3 Minister may appoint persons to be detention officers

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

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

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

4 Detention officers subject to directions

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

5 Detention officer etc. not liable to certain actions

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

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

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

Division 4—Authorisation of officers and detention officers

6 AFMA may authorise officers and detention officers

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

Schedule, from among officers and/or detention officers who have successfully completed minimum training prescribed by a legislative instrument.

- (2) An instrument authorising officers and/or detention officers:
- (a) may identify them by reference to a class; and
 - (b) may provide for them to be authorised when they become members of the class at or after a time specified in the instrument.

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

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

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

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
14	Subsection 261AK(1) (except paragraph (a))	Subclause 38(1) (except paragraph (a))
15	Subsection 261AK(3)	Subclause 38(3)

Limits on authorisation

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

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

Persons specified by AFMA not authorised

- (3) AFMA may, by instrument, specify that the person is not taken to be authorised:
- (a) for the purposes of the provision of this Schedule; or
 - (b) for the purposes of carrying out under this Schedule identification tests of a type specified under section 5D of the *Migration Act 1958* in relation to the person.

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

- (4) An instrument under subclause (3) may specify one or more persons by reference to their being members of a specified class at or after a time specified in the instrument.
- (5) An instrument made under subclause (3) is not a legislative instrument.

Part 2—Detaining suspected illegal foreign fishers

Division 1—Initial detention by an officer

8 Power to detain

- (1) An officer may detain a person in Australia or a Territory for the purposes of investigating and determining, during the period of

detention, whether or not the person committed an offence against section 45, 48, 49 or 51 or an offence against section 6 of the *Crimes Act 1914* relating to such an offence, if the officer has reasonable grounds to believe that the person:

- (a) is not an Australian citizen or an Australian resident; and
 - (b) was on a foreign boat, or a Papua New Guinea boat, when it was used in the commission of such an offence.
- (2) Subclause (1) does not authorise an officer to use more force in detaining a person than is reasonably necessary.

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

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

Division 2—Continued detention by a detention officer

10 Detention officer may detain person already detained by officer

- (1) For the purposes of facilitating an officer investigating and determining whether or not a person committed an offence against section 45, 48, 49 or 51 or an offence against section 6 of the *Crimes Act 1914* relating to such an offence, a detention officer may detain the person in Australia or a Territory if the detention officer has reasonable grounds to believe that the person:
 - (a) has been detained by an officer under Division 1; and
 - (b) has been presented, while detained by that officer, to a detention officer for detention by a detention officer.
- (2) However, the detention officer may not detain the person if the detention officer has reasonable grounds to believe that the person has ceased to be in detention since the last time the person was detained by an officer under Division 1.

Division 3—Detention on behalf of an officer or detention officer

11 Detention on behalf of an officer or detention officer

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

Division 4—Moving detainees

12 Power to move detainees

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

- (b) the welfare of the detainee.

Division 5—End of detention

13 End of detention

Detainee who was on a foreign boat

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

Detainee who was on a Papua New Guinea boat

- (2) A detainee who was detained under subclause 8(1) because the officer mentioned in that subclause had reasonable grounds to believe that the detainee was on a Papua New Guinea boat must be released from detention:
- (a) as soon as an officer or detention officer knows or reasonably believes that the detainee is an Australian citizen or an Australian resident; or
 - (b) as soon as an officer believes that the detainee did not commit an offence described in that subclause; or
 - (c) as soon as an officer finishes investigating whether the detainee committed an offence described in that subclause; or
 - (d) at the end of 72 hours after the detention began;
- whichever occurs first.

Papua New Guineans on foreign boats

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

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

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

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

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

Division 6—Offence of escaping from detention

14 Escape from detention

- (1) A person commits an offence if:
- (a) the person is in detention; and
 - (b) the person escapes from that detention.

- (2) The offence is punishable on conviction by imprisonment for up to 2 years.

Part 3—Searching and screening detainees and screening their visitors

Division 1—Searches of detainees

15 Searches of detainees

- (1) For the purposes set out in subclause (2), a detainee, and the detainee's clothing and any property under the immediate control of the detainee, may, without warrant, be searched.
- (2) The purposes for which a detainee, and the detainee's clothing and any property under the immediate control of the detainee, may be searched under this clause are as follows:
- (a) to find out whether there is hidden on the detainee's person, in the clothing or in the property, a weapon or other thing capable of being used to inflict bodily injury or to help the detainee to escape from detention;
 - (b) to find out whether there is hidden on the detainee's person, in the clothing or in the property, a document or other thing that is, or may be, evidence of:
 - (i) an offence against section 45, 48, 49 or 51; or
 - (ii) an offence against section 6 of the *Crimes Act 1914* relating to an offence described in subparagraph (i).
- (3) If, in the course of a search under this clause, a weapon or other thing referred to in paragraph (2)(a), or a document or other thing referred to in paragraph (2)(b), is found, an authorised officer:
- (a) may take possession of the weapon, document or other thing; and
 - (b) may retain the weapon, document or other thing for such time as he or she thinks necessary for the purposes of this Act or the *Migration Act 1958*.
- (4) This clause does not authorise an authorised officer, or another person conducting a search under subclause (5), to remove any of the detainee's clothing, or to require a detainee to remove any of his or her clothing.

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Part 2 Provisions relating to detention of suspected illegal foreign fishers

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

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

Division 2—Screening of detainees

16 Power to conduct a screening procedure

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

- (3) This clause does not authorise an authorised officer to remove any of the detainee's clothing, or to require a detainee to remove any of his or her clothing.
- (4) To avoid doubt, a screening procedure may be conducted in relation to a detainee under this clause irrespective of whether a search of the detainee is conducted under clause 15 or 17.
- (5) In this clause:

conducting a screening procedure, in relation to a detainee, means:

- (a) causing the detainee to walk, or to be moved, through screening equipment; or
- (b) passing hand-held screening equipment over or around the detainee or around things in the detainee's possession; or
- (c) passing things in the detainee's possession through screening equipment or examining such things by X-ray.

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

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

Division 3—Strip searches of detainees

17 Power to conduct a strip search

- (1) A strip search of a detainee, other than a detainee to whom clause 22 applies, may be conducted by an authorised officer, without warrant, to find out whether there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon, or other thing, capable of being used:
 - (a) to inflict bodily injury; or
 - (b) to help the detainee, or any other detainee, to escape from detention.

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

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- (2) A *strip search* of a detainee means a search of the detainee, of his or her clothing or of a thing in his or her possession. It may include:
- (a) requiring the detainee to remove some or all of his or her clothing; and
 - (b) an examination of that clothing and of the detainee's body (but not of the detainee's body cavities).
- (3) A strip search of a detainee may be conducted by an authorised officer only if:
- (a) an officer or detention officer suspects on reasonable grounds that there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon or other thing described in subclause (1); and
 - (b) the officer, or detention officer, referred to in paragraph (a) suspects on reasonable grounds that it is necessary to conduct a strip search of the detainee to recover that weapon or other thing; and
 - (c) the strip search is authorised as follows:
 - (i) if the detainee is at least 18—the Managing Director of AFMA, the Secretary of the Department, or an SES Band 3 employee in the Department (who is not the officer referred to in paragraphs (a) and (b) nor the authorised officer conducting the strip search), authorises the strip search because he or she is satisfied that there are reasonable grounds for those suspicions;
 - (ii) if the detainee is at least 10 but under 18—a magistrate orders the strip search because he or she is satisfied that there are reasonable grounds for those suspicions.
- (4) An officer or detention officer may form a suspicion on reasonable grounds for the purposes of paragraph (3)(a) on the basis of:
- (a) a search conducted under clause 15 (whether by that officer or detention officer or by another officer or detention officer); or
 - (b) a screening procedure conducted under clause 16 (whether by that officer or detention officer or by another officer or detention officer); or
 - (c) any other information that is available to the officer or detention officer.
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- (5) An authorisation of a strip search given for the purposes of paragraph (3)(c):
 - (a) may be given by telephone, fax or other electronic means;
and
 - (b) must be recorded in writing, and signed by the person giving the authorisation, within one business day after it is given.
- (6) A record made under paragraph (5)(b) is not a legislative instrument.
- (7) A failure to comply with paragraph (5)(b) does not affect the validity of a strip search conducted on the basis of that authorisation.
- (8) The power to authorise a strip search under paragraph (3)(c) cannot be delegated to any other person.
- (9) A power conferred on a magistrate by this clause is conferred on the magistrate in a personal capacity and not as a court or a member of a court.
- (10) The magistrate need not accept the power conferred.
- (11) A magistrate exercising a power under this clause has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the magistrate is a member.
- (12) To avoid doubt, a strip search of a detainee may be conducted under this clause irrespective of whether a search of the detainee is conducted under clause 15 or a screening procedure is conducted in relation to the detainee under clause 16.
- (13) In this clause:

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

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

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

18 Rules for conducting a strip search

- (1) A strip search of a detainee under clause 17:
- (a) must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search; and
 - (b) must be conducted in a private area; and
 - (c) must be conducted by an authorised officer of the same sex as the detainee; and
 - (d) subject to subclauses (2), (3) and (5), must not be conducted in the presence or view of a person who is of the opposite sex to the detainee; and
 - (e) subject to subclauses (2), (3) and (5), must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the strip search; and
 - (f) must not be conducted on a detainee who is under 10; and
 - (g) if the detainee is at least 10 but under 18, or is incapable of managing his or her affairs—must be conducted in the presence of:
 - (i) the detainee’s parent or guardian if that person is in detention with the detainee and is readily available at the same place; or
 - (ii) if that is not acceptable to the detainee or subparagraph (i) does not apply—another person (other than an authorised officer) who is capable of representing the detainee’s interests and who, as far as is practicable in the circumstances, is acceptable to the detainee; and
 - (h) subject to subclause (4), if the detainee is at least 18, and is not incapable of managing his or her affairs—must be conducted in the presence of another person (if any) nominated by the detainee, if that other person is readily available at the same place as the detainee, and willing to attend the strip search within a reasonable time; and
 - (i) must not involve a search of the detainee’s body cavities; and
 - (j) must not involve the removal of more items of clothing, or more visual inspection, than the authorised officer conducting the search believes on reasonable grounds to be necessary to determine whether there is hidden on the detainee, in his or her clothing or in a thing in his or her

possession a weapon or other thing described in subclause 17(1); and

- (k) must not be conducted with greater force than is reasonably necessary to conduct the strip search.
- (2) Paragraphs (1)(d) and (e) do not apply to a parent or guardian, or a person present because of subparagraph (1)(g)(ii), if the detainee has no objection to that person being present.
- (3) Paragraphs (1)(d) and (e) do not apply to a person nominated by the detainee under paragraph (1)(h) to attend the strip search.
- (4) Neither:
 - (a) a detainee's refusal or failure to nominate a person under paragraph (1)(h) within a reasonable time; nor
 - (b) a detainee's inability to nominate a person under that paragraph who is readily available at the same place as the detainee and willing to attend the strip search within a reasonable time;prevents a strip search being conducted.
- (5) A strip search of a detainee may be conducted with the assistance of another person if the authorised officer conducting the strip search considers that to be necessary for the purposes of conducting it. That person must not be of the opposite sex to the detainee unless:
 - (a) the person is a medical practitioner; and
 - (b) a medical practitioner of the same sex as the detainee is not available within a reasonable time.
- (6) An action or proceeding, whether civil or criminal, does not lie against a person who, at the request of an authorised officer, assists in conducting a strip search if the person acts in good faith and does not contravene this clause.
- (7) A detainee must be provided with adequate clothing if during or as a result of a strip search any of his or her clothing is:
 - (a) damaged or destroyed; or
 - (b) retained under clause 19.

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

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

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

- (1) An authorised officer may take possession of and retain a thing found in the course of conducting a screening procedure under clause 16 or conducting a strip search under clause 17 if the thing:
 - (a) might provide evidence of the commission of an offence against this Act; or
 - (b) is forfeited or forfeitable to the Commonwealth.
- (2) A weapon or other thing described in subclause 16(1) or 17(1) that is found in the course of conducting a screening procedure under clause 16 or a strip search under clause 17 is forfeited to the Commonwealth.
- (3) An authorised officer must not return a thing that is forfeited or forfeitable to the Commonwealth. Instead, the authorised officer must, as soon as practicable, give a thing that is forfeited under subclause (2) to a constable (within the meaning of the *Crimes Act 1914*).

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

- (4) An authorised officer must take reasonable steps to return anything that is not forfeited or forfeitable but is retained under subclause (1) to the person from whom it was taken, or to the owner if that person is not entitled to possess it, if one of the following happens:
 - (a) it is decided that the thing is not to be used in evidence;
 - (b) the period of 60 days after the authorised officer takes possession of the thing ends.
- (5) However, the authorised officer does not have to take those steps if:
 - (a) in a paragraph (4)(b) case:
 - (i) proceedings in respect of which the thing might provide evidence have been instituted before the end of the 60

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

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

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

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

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

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

21 Magistrate may order that thing be retained

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

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

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

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

22 Detainees held in State or Territory prisons or remand centres

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

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

Division 6—Screening detainees’ visitors

23 Powers concerning entry to premises where detainee is detained

- (1) An officer or detention officer may request that a person about to enter premises where a detainee is in detention do one or more of the following:
 - (a) walk through screening equipment;
 - (b) allow an officer or detention officer to pass hand-held screening equipment over or around the person or around things in the person’s possession;
 - (c) allow things in the person’s possession to pass through screening equipment or to be examined by X-ray.
- (2) **Screening equipment** means a metal detector or similar device for detecting objects or particular substances.
- (3) If an authorised officer suspects on reasonable grounds that a person about to enter premises where a detainee is in detention has in the person’s possession a thing that might:
 - (a) endanger the safety of the detainees, staff or other persons on the premises; or
 - (b) disrupt the order or security arrangements on the premises;the authorised officer may request that the person do some or all of the things in subclause (4) for the purpose of finding out whether the person has such a thing. A request may be made whether or not a request is also made to the person under subclause (1).
- (4) An authorised officer may request that the person do one or more of the following:
 - (a) allow the authorised officer to inspect the things in the person’s possession;
 - (b) remove some or all of the person’s outer clothing such as a coat, jacket or similar item;
 - (c) remove items from the pockets of the person’s clothing;
 - (d) open a thing in the person’s possession, or remove the thing’s contents, to allow the authorised officer to inspect the thing or its contents;
 - (e) leave a thing in the person’s possession, or some or all of its contents, in a place specified by the authorised officer if he or

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she suspects on reasonable grounds that the thing or its contents are capable of concealing something that might:

- (i) endanger the safety of the detainees, staff or other persons on the premises; or
 - (ii) disrupt the order or security arrangements on the premises.
- (5) A person who leaves a thing (including any of its contents) in a place specified by an authorised officer is entitled to its return when the person leaves the premises.
- (6) However, if possession of the thing, or any of those contents, by the person is unlawful under a Commonwealth, State or Territory law applying to the premises:
- (a) the thing or the contents must not be returned to the person; and
 - (b) an authorised officer must, as soon as practicable, give the thing or the contents to a constable (within the meaning of the *Crimes Act 1914*).
- (7) A person who is about to enter premises where a detainee is detained may be refused entry if the person does not comply with a request under this clause.

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

- (8) In this clause:

premises includes a place, a vessel, a vehicle and an aircraft.

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

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

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

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

Part 5—Identifying detainees

Division 1—Preliminary

25 Definitions

In this Part, unless the contrary intention appears:

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

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

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

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

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

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

personal identifier has the meaning given by clause 26.

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

26 Meaning of *personal identifier*

- (1) In this Part:

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

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

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- (d) an audio or a video recording of a person (other than a video recording under clause 37);
 - (e) an iris scan;
 - (f) a person's signature;
 - (g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*.
- (2) Before the Governor-General makes regulations for the purposes of paragraph (1)(g) prescribing an identifier, the Minister must be satisfied that:
- (a) obtaining the identifier would not involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*; and
 - (b) the identifier is an image of, or a measurement or recording of, an external part of the body; and
 - (c) obtaining the identifier will promote one or more of the purposes referred to in subclause (3).
- (3) The purposes are:
- (a) to assist in the identification of, and to authenticate the identity of, any non-citizen who can be required under this Act to provide a personal identifier; and
 - (b) to assist in identifying, in the future, any such non-citizen; and
 - (c) to enhance AFMA's ability to identify non-citizens who have a criminal history relating to fisheries; and
 - (d) to combat document and identity fraud in fisheries matters; and
 - (e) to complement anti-people smuggling measures; and
 - (f) to inform the governments of foreign countries of the identity of non-citizens who have been detained under, or charged with offences against, this Act; and
 - (g) to facilitate international cooperation to combat fishing activities that involve a breach of the laws of Australia or of a foreign country.

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

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

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

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

Division 2—Identification of detainees

Subdivision A—Provision of personal identifiers

28 Detainees must provide personal identifiers

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

Note: A person who is an Australian citizen, or is a non-citizen but an Australian resident, may be in detention but must be released as soon as an officer or detention officer knows or reasonably believes the person is an Australian citizen or resident.
- (2) An authorised officer must not require, for the purposes of subclause (1), a detainee to provide a personal identifier other than any of the following (including any of the following in digital form):
 - (a) fingerprints or handprints of the detainee (including those taken using paper and ink or digital liveness technologies);
 - (b) a measurement of the detainee's height and weight;
 - (c) a photograph or other image of the detainee's face and shoulders;
 - (d) the detainee's signature;
 - (e) any other personal identifier of a type prescribed for the purposes of this paragraph.

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

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

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

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

29 Authorised officers must require and carry out identification tests

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

- (2) However:

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

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

- (3) If:

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

30 Information to be provided before carrying out identification tests

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

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

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

Subdivision B—How identification tests are carried out

31 General rules for carrying out identification tests

An identification test under this Division:

- (a) must be carried out in circumstances affording reasonable privacy to the non-citizen; and
- (b) if the non-citizen so requests and it is practicable to comply with the request—must not be carried out in the presence or

view of a person who is of the opposite sex to the non-citizen; and

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

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

32 Use of force in carrying out identification tests

When use of force is permitted

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

Applications for authorisation to use force

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

Authorisation to use force

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

Definition

- (9) In this clause:

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

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

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

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

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

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

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

34 Authorised officer may get help to carry out identification tests

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

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

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

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

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

36 Independent person to be present

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

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

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

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

37 Recording of identification tests

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

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

38 Retesting

When retesting is permitted

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

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

Applications for authorisation to retest

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

Authorisation to retest

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

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

Use of force

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

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

Effect of refusing to authorise retesting

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

Definitions

- (11) In this clause:

senior authorising officer means an officer, or detention officer, who:

- (a) has been authorised, or is included in a class of officers or detention officers who have been authorised, by AFMA to perform the functions of a senior authorising officer under this clause; and
- (b) is not the Managing Director of AFMA, the Secretary of the Department or an SES Band 3 employee in the Department.

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

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

Subdivision C—Obligations relating to video recordings of identification tests

39 Definitions

In this Subdivision, unless the contrary intention appears:

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

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

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

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

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

40 Accessing video recordings

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

Penalty: Imprisonment for 2 years.

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

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

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

41 Authorising access to video recordings

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

- (2) AFMA must specify in an authorisation under this clause, as the purpose or purposes for which access is authorised, one or more of the following purposes:
- (a) providing a video recording to another person in accordance with this Subdivision;
 - (b) administering or managing the storage of video recordings;
 - (c) making a video recording available to the person to whom it relates;
 - (d) modifying related documents in order to correct errors or ensure compliance with appropriate standards;
 - (e) any purpose connected with determining whether a civil or criminal liability has arisen from a person carrying out or helping to carry out an identification test under this Act;
 - (f) complying with laws of the Commonwealth or the States or Territories;
 - (g) disclosing personal information under clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).
- (3) However, AFMA must not specify as a purpose for which access is authorised a purpose that will include or involve the purpose of:
- (a) investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully); or
 - (b) prosecuting a person for such an offence;
- if the identifying information in question relates to a personal identifier of a prescribed type.

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

42 Providing video recordings

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

Penalty: Imprisonment for 2 years.

- (2) A *permitted provision* of a video recording is a provision of the recording that:
- (a) is for the purpose of administering or managing the storage of video recordings; or
 - (b) is for the purpose of making the video recording in question available to the non-citizen to whom it relates; or
 - (c) is for the purpose of a proceeding, before a court or tribunal, relating to the non-citizen to whom the video recording in question relates; or
 - (d) is for any purpose connected with determining whether a civil or criminal liability has arisen from a person carrying out or helping to carry out an identification test under this Act; or
 - (e) is for the purpose of an investigation by the Privacy Commissioner or the Ombudsman relating to carrying out an identification test; or
 - (f) is made to a prescribed body or agency for the purpose of the body or agency inquiring into the operation of provisions of this Act relating to carrying out an identification test; or
 - (g) takes place with the written consent of the non-citizen to whom the video recording in question relates; or
 - (h) is a disclosure authorised by clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).
- (3) However, a provision of a video recording is not a permitted provision of the recording if:
- (a) it constitutes a disclosure of identifying information relating to a personal identifier of a prescribed type; and
 - (b) it is for the purpose of:
 - (i) investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully); or
 - (ii) prosecuting a person for such an offence.

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

43 Unauthorised modification of video recordings

A person commits an offence if:

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

Penalty: Imprisonment for 2 years.

44 Unauthorised impairment of video recordings

A person commits an offence if:

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

Penalty: Imprisonment for 2 years.

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

(1) In this Subdivision:

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

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

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

- (3) For the purposes of an offence under this Subdivision, a person causes any such unauthorised modification or impairment if the person's conduct substantially contributes to it.
- (4) For the purposes of subclause (1), if:
- (a) a person causes any modification or impairment of a kind mentioned in that subclause; and
 - (b) the person does so under a warrant issued under the law of the Commonwealth, a State or a Territory;
- the person is entitled to cause that modification or impairment.

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

46 Destroying video recordings

A person commits an offence if:

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

Penalty: Imprisonment for 2 years.

Division 3—Identification of minors and incapable persons

47 Minors

Minors less than 15 years old

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

Persons present while identification test is carried out

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

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

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

48 Incapable persons

Incapable persons

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

Persons present while identification test is carried out

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

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

Division 4—Obligations relating to detainees' identifying information

Subdivision A—Preliminary

49 Definitions

In this Division:

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

identifying information means the following:

- (a) any personal identifier;
- (b) any meaningful identifier derived from any personal identifier;
- (c) any record of a result of analysing any personal identifier or any meaningful identifier derived from any personal identifier;
- (d) any other information, derived from any personal identifier, from any meaningful identifier derived from any personal identifier or from any record of a kind referred to in paragraph (c), that could be used to discover a particular person's identity or to get information about a particular person.

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

unauthorised impairment has the meaning given by clause 57.

unauthorised modification has the meaning given by clause 57.

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

50 Application

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

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

Subdivision B—Accessing identifying information

51 Accessing identifying information

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

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

Penalty: Imprisonment for 2 years.

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

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

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

52 Authorising access to identifying information

- (1) AFMA may, in writing, authorise a specified person, or any person included in a specified class of persons, to access identifying information of the kind specified in the authorisation.
- (2) AFMA must specify in an authorisation under this clause, as the purpose or purposes for which access is authorised, one or more of the following purposes:
 - (a) one or more of the purposes set out in subclause 26(3);
 - (b) disclosing identifying information in accordance with this Division;
 - (c) administering or managing the storage of identifying information;
 - (d) making identifying information available to the person to whom it relates;
 - (e) modifying identifying information to enable it to be matched with other identifying information;
 - (f) modifying identifying information in order to correct errors or ensure compliance with appropriate standards;
 - (g) making decisions under this Act;
 - (h) complying with laws of the Commonwealth or the States or Territories;
 - (i) disclosing personal information under clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).

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

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

Subdivision C—Disclosing identifying information

53 Disclosing identifying information

- (1) A person commits an offence if:
- (a) the person's conduct causes disclosure of identifying information; and
 - (b) the disclosure is not a permitted disclosure.
- Penalty: Imprisonment for 2 years.
- (2) A *permitted disclosure* is a disclosure that:
- (a) is for the purpose of data-matching in order to:
 - (i) identify, or authenticate the identity of, a non-citizen; or
 - (ii) facilitate the processing of non-citizens entering or departing from Australia; or
 - (iii) identify non-citizens who have a criminal history, who are of character concern (as defined in the *Migration Act 1958*) or who are of national security concern; or
 - (iv) combat document and identity fraud in immigration matters; or
 - (v) ascertain whether an applicant for a protection visa had sufficient opportunity to avail himself or herself of protection before arriving in Australia; or
 - (vi) inform the governments of foreign countries of the identity of non-citizens who are, or are to be, removed from Australia; or
 - (b) is for the purpose of administering or managing the storage of identifying information; or

- (c) is authorised under clause 54 and is for the purpose, or one or more of the purposes, for which the disclosure is authorised; or
 - or
 - (d) is for the purpose of making the identifying information in question available to the non-citizen to whom it relates; or
 - (e) takes place under an arrangement entered into with an agency of the Commonwealth, or with a State or Territory or an agency of a State or Territory, for the exchange of identifying information; or
 - (f) is for the purpose of a proceeding, before a court or tribunal, relating to the non-citizen to whom the identifying information in question relates; or
 - (g) is for the purpose of an investigation by the Privacy Commissioner or the Ombudsman relating to:
 - (i) carrying out an identification test; or
 - (ii) requiring the provision of a personal identifier; or
 - (h) is made to a prescribed body or agency for the purpose of the body or agency inquiring into the operation of provisions of this Act relating to:
 - (i) carrying out an identification test; or
 - (ii) requiring the provision of a personal identifier; or
 - (i) takes place with the written consent of the non-citizen to whom the identifying information in question relates; or
 - (j) is a disclosure authorised by clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).
- (3) However, a disclosure is not a permitted disclosure if:
- (a) it is a disclosure of identifying information relating to a personal identifier of a prescribed type; and
 - (b) it is for the purpose of:
 - (i) investigating an offence against a law of the Commonwealth or a State or Territory; or
 - (ii) prosecuting a person for such an offence.

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

54 Authorising disclosure of identifying information to foreign countries etc.

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

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

Subdivision D—Modifying and impairing identifying information

55 Unauthorised modification of identifying information

A person commits an offence if:

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

Penalty: Imprisonment for 2 years.

56 Unauthorised impairment of identifying information

A person commits an offence if:

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

Penalty: Imprisonment for 2 years.

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

- (1) In this Division:
 - (a) modification of identifying information; or
 - (b) impairment of the reliability of identifying information; or
 - (c) impairment of the security of the storage of identifying information; or
 - (d) impairment of the operation of a system by which identifying information is stored;by a person is unauthorised if the person is not entitled to cause that modification or impairment.
- (2) Any such modification or impairment caused by the person is not unauthorised merely because he or she has an ulterior purpose for causing it.
- (3) For the purposes of an offence under this Division, a person causes any such unauthorised modification or impairment if the person's conduct substantially contributes to it.
- (4) For the purposes of subclause (1), if:
 - (a) a person causes any modification or impairment of a kind mentioned in that subclause; and
 - (b) the person does so under a warrant issued under the law of the Commonwealth, a State or a Territory;the person is entitled to cause that modification or impairment.

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

Subdivision E—Retaining identifying information

58 Identifying information may be indefinitely retained

Identifying information may be indefinitely retained.

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

Part 6—Disclosure of detainees' personal information

59 Disclosure of detainees' personal information

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

- (3) In this clause:

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

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

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

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

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

Part 3—Searching persons on boats suspected of illegal fishing

Division 1—Main amendments

Fisheries Management Act 1991

21 After paragraph 84(1)(a)

Insert:

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

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

(ii) the person's clothing;

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

(iii) a weapon; or

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

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

22 Paragraph 84(1)(c)

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

23 After section 84

Insert:

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

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

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

24 Subsection 87A(1)

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

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

Insert:

- | | | |
|----|-------------------------|---|
| 2A | Paragraph
84(1)(aaa) | Applies as if:
(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 |
|----|-------------------------|---|

26 After subsection 87H(2)

Insert:

Searching persons for weapons

- (2A) An officer who has boarded the boat may search without warrant a person on the boat and the person’s clothing to find out whether there is hidden on the person or in the clothing a weapon or a thing capable of being used to inflict bodily injury on another person.
- (2B) Section 84AA:
- (a) applies in relation to the search, and weapons and other things found in the search, in the same way as that section applies in relation to a search under paragraph 84(1)(aaa) and weapons and things found in a search under that paragraph; and
 - (b) applies in relation to subsection (2A) of this section in the same way as it applies in relation to paragraph 84(1)(aaa).

Torres Strait Fisheries Act 1984

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

Add “and”.

28 After paragraph 42(1)(a)

Insert:

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

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

(ii) the person's clothing;

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

(iii) a weapon; or

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

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

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

Add "and".

30 Paragraph 42(1)(c)

Repeal the paragraph, substitute:

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

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

Add "and".

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

Add "and".

33 After section 42

Insert:

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

(1) A search under paragraph 42(1)(aa) of a person (the *subject*) may 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

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

Division 2—Amendment contingent on detention power

Torres Strait Fisheries Act 1984

34 At the end of section 42A

Add:

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

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

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

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

Division 1—Main amendments

Torres Strait Fisheries Act 1984

35 After paragraph 42(1)(e)

Insert:

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

36 After section 52

Insert:

Subdivision B—Automatic forfeiture of things used in offences

52A Forfeiture of things used in certain offences

The following things are forfeited to the Commonwealth:

- (a) a foreign boat used in an offence against:
 - (i) subsection 45(2); or
 - (ii) section 48; or
 - (iii) section 49; or
 - (iv) section 51;
 - (b) a net or trap, or equipment, that:
 - (i) was on a boat described in paragraph (a) at the time of the offence mentioned in that paragraph; or
 - (ii) was used in the commission of an offence against subsection 45(2) or section 48, 49 or 51;
 - (c) fish:
 - (i) on a boat described in paragraph (a) at the time of the offence mentioned in that paragraph; or
-

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

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

Subdivision C—Dealing with things seized as automatically forfeited

52B Application of this Subdivision

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

- (a) the thing is forfeited under section 52A because:
 - (i) it was, or was on, a boat described in that section at the time of an offence described in that section; or
 - (ii) it was used or involved in the commission of an offence described in that section and involving a boat; or
- (b) the officer has reasonable grounds to believe the thing is forfeited under section 52A because the officer has reasonable grounds to believe the thing:
 - (i) was, or was on, a boat described in that section at the time of an offence described in that section; or
 - (ii) was used or involved in the commission of an offence described in that section and involving a boat.

52C Notice of seizure

Giving notice

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

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

Content of notice

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

Note: Section 52E condemns the thing if it is not claimed within 30 days.
Section 52G condemns the thing if it is claimed but the claimant does not get a court order supporting the claim.

Status of notice

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

52D Dealing with thing before it is condemned

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

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

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.

- (2) The Managing Director of AFMA may give the notice to the claimant by posting it prepaid as a letter to the last address of the claimant that is known to the Managing Director. If the Managing Director does so, the letter is taken to be properly addressed for the purposes of section 29 of the *Acts Interpretation Act 1901*.
- (3) Subsection (2) does not limit the ways in which the notice may be given.

Note: Sections 28A and 29 of the *Acts Interpretation Act 1901* explain how a notice can be given, and when it is taken to be given.
- (4) To avoid doubt, the Managing Director of AFMA may give the notice even if the thing has been released under section 52I.
- (5) A notice under paragraph (1)(b) is not a legislative instrument.

52G Condemnation of thing if it is claimed

Application

- (1) This section applies if the Managing Director of AFMA gives the claimant a notice under section 52F about instituting proceedings:
 - (a) to recover the thing; or
 - (b) for a declaration that the thing is not forfeited.

Condemnation if proceedings not started within 2 months

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

Condemnation at end of proceedings started within 2 months

- (3) By force of this subsection, the thing is condemned as forfeited to the Commonwealth at the end of the proceedings that are instituted by the claimant against the Commonwealth within 2 months of the claimant being given the notice if, at the end of the proceedings, there is not:
 - (a) an order for the claimant to recover the thing; or
 - (b) an order for the Commonwealth to pay the claimant the proceeds of the sale of the thing if it has been sold before the end of the proceedings; or

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

End of proceedings that go to judgment

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

Proceedings relating to thing that has been disposed of

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

Order for payment if thing has been disposed of or destroyed

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

52H Dealing with thing after it is condemned

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

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

52I Release of property that has been seized etc.

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

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

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

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

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

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

(2) If:

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

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

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

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

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

(3) For the purposes of this section:

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

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

52J Seizure or forfeiture has effect despite admiralty proceedings

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

Division 2—Related amendments

Torres Strait Fisheries Act 1984

37 Before section 42

Insert:

Division 1—Officers' powers

38 Before section 44

Insert:

Division 2—Offences

39 Before section 52

Insert:

Division 3—Forfeiture for offences

Subdivision A—Forfeiture by court order

40 Before section 53

Insert:

Schedule 1 Fisheries amendments

Part 4 Forfeiture etc. of things involved in illegal fishing

Division 5—Ancillary offences and provisions

41 Before section 54

Insert:

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

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

Fisheries Management Act 1991

42 Paragraph 108(1)(e)

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

43 Paragraph 108(1)(f)

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”.

Torres Strait Fisheries Act 1984

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

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

45 After paragraph 43(1)(e)

Insert:

; 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.

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)

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

7 Subsection 164B(1) (note 2)

Repeal the note, substitute:

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

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

8 Subsections 164B(3) and (4)

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

9 Saving of enforcement visas

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

Part 2—Amendments relating to new fisheries detention provisions

Migration Act 1958

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

Repeal the definition, substitute:

fisheries detention means detention under:

- (a) Schedule 1A to the *Fisheries Management Act 1991*; or
- (b) Schedule 2 to the *Torres Strait Fisheries Act 1984*.

11 Subsection 164B(2)

Omit “paragraph 84(1)(ia) of the *Fisheries Management Act 1991*”, substitute “Schedule 1A to the *Fisheries Management Act 1991* or Schedule 2 to the *Torres Strait Fisheries Act 1984*”.

12 Saving of enforcement visas

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

[*Minister’s second reading speech made in—
House of Representatives on 17 February 2005
Senate on 11 May 2005*]

(16/05)
