

## **Explanatory Statement**

### **Select Legislative Instrument 2005 No. 295**

#### ***Torres Strait Fisheries Amendment Regulations 2005 (No. 1)***

Issued by the Authority of the Minister for Agriculture, Fisheries and Forestry

*Torres Strait Fisheries Act 1984*

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Subsection 60(1) of the *Torres Strait Fisheries Act 1984* (the Act) provides in part that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

The *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005* (the Amendment Act) amended the Act, the *Fisheries Management Act 1991*, and the *Migration Act 1958* to ensure that breaches of illegal foreign fishing offences can be managed with greater efficiency.

The Amendment Act inserted a new Schedule 2 into the Act which contains provisions relating to the detention of foreign fishers suspected of offences under the Act. Schedule 2 is almost identical to a new Schedule 1A inserted in the *Fisheries Management Act 1991* and mirrors the provisions contained in the *Migration Act 1958* in respect of unlawful non-citizens. The powers and duties contained in Schedule 2 cover a range of situations including the detention of people suspected of committing an illegal foreign fishing offence, the searching and screening of detainees and the carrying out of identification tests on detainees. This framework will provide a seamless transition between fisheries detention under either the Act or the *Fisheries Management Act 1991* and subsequent detention and repatriation under the *Migration Act 1958*.

The purpose of the Regulations is to amend the *Torres Strait Fisheries Regulations 1985* (the Principal Regulations) to provide consistency in the management of fisheries offences and ensure that the same powers and rules apply whether a detainee is detained under the Act or the *Fisheries Management Act 1991* or as an unlawful non-citizen under the *Migration Act 1958*.

The Regulations provide for:

- the minimum training requirements for officers and detention officers who will exercise the new powers conferred by the Amendment Act;

- the personal identifiers which may be obtained from non-citizens for the purposes of Part 5 of Schedule 2 in addition to those listed in Schedule 2 itself;
- the types of personal identifiers that can be obtained from non-citizens in detention in addition to those listed in Schedule 2 itself;
- the information that must be provided to non-citizens before an identification test is carried out for the purpose of obtaining a personal identifier;
- the types of personal identifier which may not be provided by providing a video recording of an identification test;
- the provision of video recordings to the Human Rights and Equal Opportunity Commission to enable that body to inquire into the operation of provisions of the Act relating to the carrying out of identification tests;
- the Australian Government bodies which may be authorised by AFMA to disclose identifying information to certain foreign countries, certain bodies of those countries and certain international organisations.
- bodies of foreign countries, of the Commonwealth and of the States and Territories and international organisations to which disclosures of identifying information may be authorised.

Details of the Regulations are set out in the Attachment.

Subclause 26(2) of Schedule 2 to the Act requires that, before Regulations may be made to prescribe that additional personal identifiers may be made, 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*;
- 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 in subclause 26(3) of Schedule 2 which 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.

The Minister is so satisfied.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the day on the day of registration.

The Regulations were drafted following consultation with the Department of Agriculture, Fishing and Forestry, the Department of Immigration, Multicultural and Indigenous Affairs and the Attorney General's Department in accordance with section 4 of the *Legislative Instruments Act 2003*.

Statutory Rule Draft No.....

## Attachment

**Regulation 1** provides for the Regulations to be named the *Torres Strait Fisheries Amendment Regulations 2005 (No. 1)*.

**Regulation 2** provides for the Regulations to commence on registration.

**Regulation 3** provides for Schedule 1 to amend the Principal Regulations.

**Schedule 1 Item 1** inserts the heading “Part 1 Preliminary” at the beginning of the Principal Regulations.

**Schedule 1 Item 2** inserts the heading “Part 2 Regulation of Fishing” after Regulation 2.

**Schedule 1 Item 3** inserts a new part, “Part 3 Detention of suspected illegal foreign fishers etc” after Regulation 14. Part 3 includes new regulations 15 to 25.

### Division 1 - Training for officers

**New regulation 15** provides for the minimum training requirement for officers and detention officers for the purposes of subclause 6(1) of Schedule 2 to the Act. New regulation 15 will ensure control is maintained over the training of officers authorised to use certain powers contained in the new Schedule 2.

All officers and detention officers will receive extensive training in their powers and responsibilities under the *Fisheries Management Act 1991* (the FMA) and the *Torres Strait Fisheries Act 1984* (the TSFA). Authorised officers are a class of officers and detention officers who have powers and responsibilities over and above those of officers and detention officers. Authorised officers have the power to:

- search a detainee (without a warrant) under clause 15;
- retain things found in a search under subclause 15(3);
- conduct a screening procedure (without a warrant) under clause 16;
- apply for further authorisation so as to conduct a strip search (without a warrant) under clause 17;
- retain things found in a screening procedure or a strip search under clause 19,
- apply to a magistrate to retain for a further period a thing found in a screening or a strip search under clause 20;
- under clause 23, request that a person about to enter premises where a detainee is held to:

- allow the inspection of things in their possession;
  - remove their outer clothing such as a jacket;
  - remove items from their pockets, open a thing in their possession;
  - remove the contents of the things and allow the inspection of the things and their contents; and
  - leave a thing in a specified place (and collect it when they leave the premises);
- require and carry out an identification test under clauses 28 and 29;
  - apply for further authorisation so as to use reasonable force in carrying out identification tests under clause 32;
  - request assistance from another authorised officer or officer or detention officer to carry out an identification test under clause 34; and
  - conduct a retest of an identification test under clause 38.

AFMA has designed additional training specifically for authorised officers in their powers and responsibilities under the FMA and the TSFA. The first three modules prescribed in the training course known as Authorised Officer Training are extracted from the Certificate III in Corrections, accredited by the Australian National Training Authority (ANTA) and adopted by the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) for the training of detention officers. The fourth module provides training specific to AFMA and fisheries detention under the FMA and the TSFA. The course is expected to take four days.

Authorised Officer Training includes training on each of the powers of authorised officers under the new Schedule 2. The module “Conducting Searches” provides specific training in the use of hand held metal detectors; physical and dynamic security; conducting area searches, property searches and pat down searches and the grounds, preconditions and procedures for conducting a strip search.

The module “Maintaining the Health, Safety and Welfare of Detainees” trains officers and detention officers in communication, cultural awareness, race relations, maintaining control whilst respecting beliefs and the management of special needs.

The module “Controlling Persons by the Use of Empty-Hand Techniques” trains officers and detention officers to avoid physical confrontation, raise an alarm and restrain a detainee without the use of weapons. The module also trains officers and detention officers in the appropriate use of force.

The module “The Use of Authorised Officers’ Powers under the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984*” trains officers and detention officers who are to be authorised officers in their duties and responsibilities

under the Act, for example, the rules for using certain powers, the appropriate use and storage of information, reporting procedures and the penalties and offences related to the potential misuse of their powers.

### Division 2 - Identifying detainees

**New regulation 16** sets out additional personal identifiers for the purposes of the definition of ‘personal identifier’ in subclause 26(1) of Schedule 2. These are a sample of a person’s handwriting and a photograph of a tattoo, scar or other identifying mark of a person but only if obtaining the photograph does not involve removing any of the person’s clothing or carrying out an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*. The note to the regulation defines “intimate forensic procedures”.

The Australian Government’s strong stance on foreign illegal fishing is widely known amongst foreign illegal fishers who have been detained. In the past, fishers have purposely misled AFMA officials about their identity and their age. It is vital that AFMA is able to adequately identify offenders to ensure that foreign illegal fishing can be deterred.

Under international law, a person must not be imprisoned for a foreign fishing offence, however recidivists (repeat offenders) can be sentenced to a jail term as a result of breaching a good behaviour bond or defaulting on a fine imposed in a previous prosecution for foreign illegal fishing offences under the FMA and the TSFA.

Identifying foreign fishers who do not carry documentation and do not want to be identified is difficult. The proposed Regulations will enable AFMA to use the technology and processes that have been conferred upon other border protection enforcement agencies, particularly DIMIA and Customs.

In an operational context it is necessary to have a range of personal identifiers to positively identify detainees. In many situations, a combination of one or more identifiers is needed.

As ships masters are often charged with summary or indictable offences, it is not uncommon for a master to obscure his identity and ask another to step forward in his place. In that instance, a sample of a person’s handwriting can be compared to a ship’s log in seeking to positively identify the master.

A photograph of a tattoo, scar or other identifying is particularly useful as these markings are common amongst fisheries detainees, distinctive in location and pattern and not easily removed. A photograph of a tattoo or scar would usefully replace fingerprints which cannot positively identify a detainee owing to calluses, scars or other deterioration of the skin.

**New regulation 17** sets out the types of personal identifier a detainee must provide for identification purposes under paragraph 28(2)(e) of Schedule 2. These are an iris scan of the detainee’s eyes, a sample of the detainee’s handwriting, a photograph of a

tattoo, scar or other identifying mark of the detainee (but only if obtaining the photograph does not involve removing any of the detainee's clothing or carrying out an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*) and an audio or videorecording of the detainee (other than a videorecording under clause 37 of Schedule 2).

When it is not possible to identify the master of a ship, the whole crew must be interviewed. In these circumstances, an audio or video recording is particularly useful as it allows AFMA officers to review and compare crew statements and identification information. An audio or video recording of a detainee (other than a video recording under clause 37 of Schedule 2 to the Act) will also assist AFMA in meeting its obligation to identify persons under the Part 1C of the *Crimes Act 1914*. In that instance an audio or video recording of an interview with each crew member will assist in positively identifying detainees and ascertaining the true identity of the master.

The Australian Government's strong stance on foreign illegal fishing is widely known amongst foreign illegal fishers who have been detained. In the past, fishers have purposely misled AFMA officials about their identity and their age. It is vital that AFMA is able to adequately identify offenders to ensure that foreign illegal fishing can be deterred.

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Identifying foreign fishers who do not carry documentation and do not want to be identified is difficult. The proposed Regulations will enable AFMA to use the technology and processes that have been conferred upon other border protection enforcement agencies, particularly DIMIA and Customs.

In an operational context it is necessary to have a range of personal identifiers to positively identify detainees. In many situations, a combination of one or more identifiers is needed.

An iris scan of a non citizen's eyes may be necessary where finger prints cannot be taken. Iris scanning technology provides a unique, reliable and portable personal identifier particularly useful for identifying detainees on ships and in remote locations around the Australian coast.

As ships masters are often charged with summary or indictable offences, it is not uncommon for a master to obscure his identity and ask another to step forward in his place. In that instance, a sample of a person's handwriting can be compared to a ship's log in seeking to positively identify the master.

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**New regulation 18** specifies the personal identifiers which non-citizens must provide through one or more identification tests conducted under paragraph 29(1)(a) of Schedule 2. The list includes the same restriction on photographs of scars and other identifying marks as applies under regulations 16 and 17.

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Identifying foreign fishers who do not carry documentation and do not want to be identified is difficult. The proposed Regulations will enable AFMA to use the technology and processes that have been conferred upon other border protection enforcement agencies, particularly DIMIA and Customs.

In an operational context it is necessary to have a range of personal identifiers to positively identify detainees. In many situations, a combination of one or more identifiers is needed.

The New regulation prescribes commonly used personal identifiers such as fingerprints or hand prints of the non-citizen, a measurement of the non citizen's height and weight and a photograph or other image of the non citizen's face and shoulders and the non citizen's signature. New regulation 19D also prescribes an iris scan of the detainee's eyes, a sample of the detainee's handwriting, a photograph of a tattoo, scar or other identifying mark of the detainee (but only if obtaining the photograph does not involve removing any of the detainee's clothing or carrying out an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*) and an audio or videorecording of the detainee (other than a videorecording under clause 37 of Schedule 2).

An iris scan of a non citizen's eyes may be necessary where finger prints cannot be taken. Iris scanning technology provides a unique, reliable and portable personal identifier particularly useful for identifying detainees on ships and in remote locations around the Australian coast.

**New subregulation 19(1)** specifies the matters about which the authorised officer must inform non-citizens under paragraph 30(1)(b) of Schedule 2 before carrying out an identification test on the non-citizen. The matters are why a personal identifier is

required, how it may be collected, how it may be used and, if the non-citizen is a minor or an incapable person, how the personal identifier is to be obtained from the minor.

New subregulation 19(1) closely corresponds with regulation 5.34D of the *Migration Regulations 1994* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

**New subregulation 19(2)** requires the authorised officer to also inform the non-citizen that the personal identifier may be produced in evidence in a court or tribunal in relation to the non-citizen, that the *Privacy Act 1988* applies to their personal identifiers and that they may access certain information and documents under the *Freedom of Information Act 1982*.

**New subregulation 19(3)** provides that where the information required to be given to a non-citizen is provided by giving the non-citizen a form under subclause 30(3) of Schedule 2, the form must be given at a time that gives the non-citizen enough time to read and understand the form before the identification test is conducted.

**New regulation 20** lists the types of personal identifier to which access may not be authorised for the purposes of subclause 41(3) of Schedule 2 to the Act. New regulation 20 places a further restriction on an authorisation made under subsection 41(1) regarding a prescribed type of personal identifier. AFMA must not authorise access if the purpose of that access would involve the purpose of investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully) or prosecuting a person for such an offence.

**New regulation 21** provides permits the disclosure of video recordings to the Human Rights and Equal Opportunity Commission for the purpose of inquiring into the provisions of the Act relating to the carrying out of identification tests.

**New regulation 22** specifies the types of personal identifier in relation to which the provision of a video recording is not a permitted provision for the purposes of paragraph 42(3)(a) of Schedule 2. The provision of a video tape is not a permitted provision if it constitutes a disclosure of a prescribed type of personal identifier and the provision is for the purposes of either investigating an offence against a law of the Commonwealth or of a State or Territory (other than on offence involving whether an identification test was carried out lawfully) or prosecuting a person for such an offence.

### Division 3 - Disclosure of identifying information

**New regulation 23** sets out the types of personal identifier to which access may not be authorised for the purposes of subclause 52(3) of Schedule 2. Where the

identifying information in question relates to a personal identifier of a prescribed type, an authorising purpose under new subsection 52(2) must not include or involve the purposes of investigating an offence or prosecuting a person for such an offence.

**New regulation 24** sets out the Commonwealth agencies which may be authorised to disclose identifying information for the purposes of subclause 54(1) to the Schedule 2. The Department of Foreign Affairs and Trade (DFAT) is a prescribed agency for the transmission of certain information to the governments of foreign countries using diplomatic channels. The Australian Customs Service (Customs) is also a prescribed agency for the transmission of certain information to enable Customs to perform the function of detaining and transporting detainees. New regulation 24 will not allow DFAT or Customs to control the information for their own purposes.

**New regulation 25** lists the Commonwealth, State and Territory bodies to which a disclosure of identifying information may be authorised under paragraph 54(1)(d) of Schedule 2. This New regulation corresponds closely to regulation 5.34D of the *Migration Regulations 1994* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.

The Australian Government's strong stance on foreign illegal fishing is widely known amongst foreign illegal fishers who have been detained. In the past, fishers have purposely misled AFMA officials about their identity and their age. It is vital that AFMA is able to adequately identify offenders to ensure that foreign illegal fishing can be deterred.

Under international law, a person must not be imprisoned for a foreign fishing offence, however recidivists (repeat offenders) can be sentenced to a jail term as a result of breaching a good behaviour bond or defaulting on a fine imposed in a previous prosecution for foreign illegal fishing offences under the FMA and the TSFA.

Identifying foreign fishers who do not carry documentation and do not want to be identified is difficult. The proposed Regulations will enable AFMA to use the technology and processes that have been conferred upon other border protection enforcement agencies, particularly DIMIA and Customs.

AFMA apprehends foreign illegal fishers throughout the Australian Fishing Zone (AFZ) with concentrations of apprehension in northern waters and the Southern Ocean. If a detainee has previously been prosecuted for fisheries offences in state or territory, the States or the Territories will hold identifying information which may assist in positively identifying the detainee. If the detainee is identified as a recidivist, charges can then be laid under the FMA and the TSFA.

Under new regulation 25, AFMA will disclose only those personal identifiers reasonably necessary to identify an individual. AFMA will disclose identifying information only to a body or bodies which might reasonably assist in identifying a detainee. New regulation 25 will not allow any of the agencies prescribed to control the information for their own purposes.

Commonwealth agencies to which AFMA may wish to disclose identifying information are subject to the *Privacy Act 1988* and its restrictions on the use of personal information. AFMA will attach a caveat to all transmissions on the use of identifying information to state and territory bodies named in new regulation 25, prohibiting them from using the identifying information for any purpose other than the purpose for which the information is provided.

**New regulation 26** lists the international organisations to which a disclosure of identifying information may be authorised under paragraph 54(1)(e) of Schedule 2. The New regulation allows AFMA to authorise a specified officer or detention officer, or any officer or detention officer included in a specified class of officers or detention officers, or an agency prescribed in the regulations, to disclose certain identifying information to the specified international organisations, namely Interpol, the United Nations or an Intergovernmental Organisation known as a Regional Fisheries Bodies (RFBs).

The Australian Government's strong stance on foreign illegal fishing is widely known amongst foreign illegal fishers that have been detained. In the past, fishers have purposely misled AFMA officials about their identity and even their age. It is vital that AFMA is able to adequately identify offenders to ensure that foreign illegal fishing can be deterred.

Under international law, a person must not be imprisoned for a foreign fishing offence; however, recidivists (repeat offenders) can be sentenced to a jail term if it is as a result of breaching a good behaviour bond or defaulting on a fine imposed in a previous prosecution for foreign illegal offences under the *FMA* or the *TSFA*.

AFMA must have the ability to identify recidivist offenders. Identifying foreign fishers who do not carry documentation and do not want to be identified is no easy task. The proposed regulation will enable AFMA to use the technology and processes that have been conferred upon other border protection enforcement agencies, particularly the Department of Immigration and Multicultural and Indigenous Affairs and the Australian Customs Service.

AFMA apprehends foreign illegal fishers throughout the Australian Fishing Zone (AFZ), with concentrations of apprehension in northern waters and the Southern Ocean. Fisheries detainees are of diverse nationalities from all over the world. RFBs, representing fisheries all over the world, have established black lists, data bases and intelligence on illegal, unreported and unregulated (IUU) fishing. New regulation 26 will allow AFMA to disclose identifying information to one or more of the intergovernmental agencies prescribed to assist in positively identifying detainees and recidivist offenders.

AFMA will disclose only those personal identifiers reasonably necessary to identify an individual. AFMA will disclose identifying information only to a body or bodies which might reasonably assist in identifying a detainee. New regulation 26 will not allow any of the agencies prescribed to control the information for their own purposes.

AFMA will attach a caveat to all transmissions on the use of identifying information to the intergovernmental organisations named in new regulation 26, prohibiting them from using the identifying information for purposes other than the purpose for which the information is provided.