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"Fish 'n' Ships: an overview of recent developments in the law and judicial approach to prosecution of foreign nationals fishing in the Australian Fishing zone"

by

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INTRODUCTION

In 1995 a paper entitled "Indonesian Fishermen before the Darwin Courts, Hooked Fine and Sink'er" was presented by Elizabeth Morris of the Northern Territory Legal Aid Commission at the Criminal Lawyers Association of the Northern Territory 5th Biennial Conference. This paper outlined the approach taken by the Darwin Court of Summary Jurisdiction to the prosecution of Indonesian fishermen who were apprehended fishing in the Australian Fishing Zone (AFZ) in contravention of the *Fisheries Management Act* 1991. The background to enforcement in the AFZ, and the changes which have occurred in the last 2 years in the approach taken to both the enforcement of the AFZ and the prosecution of foreign fishermen in the AFZ are the subject of this paper.

BACKGROUND

The Australian Fishing Zone.

The AFZ was first proclaimed in 1979. It is defined in the *Fisheries Management Act* 1991 as:

> (a) the waters adjacent to Australia and having as their inner limits the baselines by reference to which the territorial limits of Australia are defined for the purposes of international law and as their outer limits lines seaward from those inner limits every point on each of which is 200 nautical miles from the point on one of those baselines that is nearest to the first-mentioned point; and
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> (b) the waters adjacent to each external Territory and having as their inner limits the baselines by reference to which the territorial limits of that Territory are defined for the purposes of international law and as their outer limits lines seaward from those inner limits every point on each of which is 200 nautical miles from the point on one of those baselines that is nearest to the first-mentioned point; but does not include:
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> (c) coastal waters of, or waters within the limits of, a State or internal Territory; or
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> (d) waters that are excepted waters; or
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> (e) waters, that under an agreement in force between Australia and another country, are within the fisheries jurisdiction of that other country.

In practical terms the 200 nautical mile AFZ extends, in the waters between Australia and Indonesia to a median line. The Indonesian Exclusive Economic Zone (EEZ), proclaimed on 21 March 1980, extends 200nm from the Indonesian coast. The two Governments have at various times entered agreements in relation to the provisional fisheries boundaries between the two countries in order to minimise the risk of incidents involving enforcement of overlapping zones. Negotiations continue today

between the two Governments in relation to the establishment of a permanent fishing boundary.

At present there are four distinct enforcement areas in the waters above Australia. These are set out diagrammatically in Attachment 1. The agreed Australian-Indonesian Seabed boundary referred to in Attachment 1 equates to the AFZ. Within the AFZ, however, there are areas where Indonesian fishermen may fish under certain conditions. These are referred to colloquially as the MOU area, the PFSEL area, and the Area of Zone of Cooperation.

The Memorandum of Understanding area.

On 7 November 1974 the Australian and Indonesian Governments entered into a Memorandum of Understanding (MOU) regarding the operations of Indonesian traditional fisherman in areas of the Australian Exclusive fishing zone and continental shelf. This agreement applied to the operations by traditional Indonesian fishermen in the exclusive fishing zone and over the continental shelf adjacent to the Australian mainland and offshore islands. "Traditional fishermen" are defined as "the fishermen who have traditionally taken fish and sedentary organisms in Australian waters by methods which have been the tradition over decades of time." [1] The understanding states that the Australian Government will refrain from applying it's laws regarding fisheries to Indonesian traditional fishermen who conduct operations in accordance with the understanding. The areas of agreement comprise the waters around Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef and Browse Islet, and are detailed in the area marked "a" - "g" on Attachment 1. The agreement states that Indonesian fishermen will not be permitted to take turtles in the AFZ. Trochus, Beche de Mer (Trepang), Abalone, Green Snail, sponges and all molluscs can only be taken in the waters detailed in the MOU, and at no other place in the AFZ.

Provisional Fisheries Surveillance and Enforcement Line

The Governments of Indonesia and Australia have met at various times since 1974 in relation to the enforcement of the waters between the two countries. On 29 October 1981 a further agreement was entered into in which the Governments accepted "that a provisional fisheries surveillance and enforcement arrangement should be established in the maritime area lying between Indonesia and Australia, outside the territorial sea of either country where the economic or fishing zone of each country, established in accordance with international law would overlap."[2] This agreement was expressed not to affect traditional fishing by Indonesian traditional fishermen in accordance with the MOU of November 1974, and the practical effect of it was that Australian fishing vessels fishing north of a set line (marked on Attachment 1) would need to be licensed by Indonesia and would be subject to Indonesian surveillance and enforcement procedures. At the same time Indonesian vessels fishing south of the provisional line

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[1] Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia regarding the operations of Indonesian traditional fishermen in areas of the Australian exclusive fishing zone and continental shelf, 7 November 1974.

[2] Memorandum of understanding between the Government of the Republic of Indonesia and the Government of Australia concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement, 29 October 1981

would need to be either licensed by Australian authorities or operating in accordance with the MOU on traditional fishermen, and would be subject to Australian surveillance and enforcement procedures.

The two Governments entered a further Treaty on 14 March 1997, which affirmed the previous agreements, stating that they believed that the establishment of comprehensive boundaries in the maritime areas between the two countries will encourage and promote the sustainable development of the marine resources of those areas and enhance the protection and preservation of the marine environment adjacent to the two countries. This treaty sets out an agreed extension of the western boundary of the seabed, the exclusive economic zone for Australia and Indonesia, the boundary between Christmas Island and Java Island. The extension of the boundaries and consolidation of the boundaries is depicted in Attachment 2.

Area of Zone of Cooperation

In this area of the seabed (marked on Attachment 1) at present both Indonesia and Australia assert jurisdiction over sedentary species. This Zone was established by Treaty between the two Governments on 11 December 1989.

Practical effect of the MOU and PFSEL

Traditional Indonesian fishermen may fish in the MOU area, and may take sedentary species from that area. Both traditional and non-traditional Indonesian fishermen may fish in the waters above the PFSEL for non-sedentary species. Neither traditional nor non-traditional vessels from any country other than Australia may fish in the remainder of the AFZ without a license, whether for sedentary or non-sedentary species.

Government Policy

On 14 March 1997 the Australian Government released a paper entitled "Australia's oceans, New Horizons. The Place of the Ocean in the lives of all Australians." This paper states that the Government will be developing the Australian Oceans Policy, and that the Policy is to be finalised by the Commencement of the International year of the Oceans in 1998. The paper notes that as a part to the Law of the Sea Convention Australia has a part to play in the protection of our oceans. It states that the Oceans Policy will cover issues including "the management of the marine environment and steps to promote the growth in value of Australia's fisheries, including through improved fisheries management, monitoring, control and surveillance of remote areas of the EEZ and beyond."[3].

[3] Australia's Oceans, New Horizons, The Place of the Ocean in the lives of all Australians, 13 March 1997.

Types of Foreign Fishing Vessels which frequent the AFZ.

Taiwanese Pair Trawlers

These vessels are owned by Taiwanese fishing companies. Some are licensed by the Indonesian Government to fish in the waters of Indonesia. The Australian Government revoked all licenses for these vessels to fish in the AFZ in 1990. The vessels operate in a pair, as the name suggests, with the first vessel shooting a net from it's deck to the adjacent boat. The vessels then run parallel dragging the net between them, catching anything in the water. The distance between the two boats keeps the net open. Once that net is full the ships close the distance between them, the first ship pulls it on board, and the second ship shoots it's net out, so that while the first vessel is processing it's catch the second is trawling. These vessels are equipped with snap freezers, and normally 8 freezer holds in which they can store up to 150 tonnes of fish. At least one of the vessels is equipped with GPS, depth sounders, charts and other navigational equipment. Both vessels are equipped with radios. The vessels are normally valued, with equipment and fuel, at between $70,000 and $100,000 each. Typical species caught by this type of operation include Red Emperor, Threadfin Bream, Halibut, Shark, Lizard Fish, Squid, and Bugs.

Taiwanese Long Liner

These vessels are also owned by Taiwanese fishing companies and some are licensed to fish in Indonesian waters. These vessels fish by laying out longline, which can stretch for up to 25 nautical miles. Longline consists of a line to which hooks are attached by lines complete with a wire trace. These hooks are baited and the longline fed out, with anchors and floats attached. The lines have light buoys and radio beacons attached. The lines are later retrieved, the fish removed and processed. This method of fishing is targeting shark, in order to obtain the fins. These vessels are equipped with freezer holds, GPS and other sophisticated navigation equipment.

Taiwanese Gillnetters

These vessels are owned by Taiwanese fishing companies and some are licensed to fish in the Indonesian waters. These vessels operate by using a gill net, which is a suspended net made up of meshes from headrope to footrope which causes fish to become entangled. These nets can stretch for up to 10 nm. The nets are either used as a suspended net or a drift net. This type of operation targets shark, and the vessels are again equipped with GPS, navigation equipment, and freezer holds.

Indonesian Gillnetters

These vessels operate in a similar manner to the Taiwanese gillnetters, and are equipped in a similar fashion, although the design of the vessel differs. They are usually between 12 and 22 metres long, of wooden construction, and are targeting shark for fins.

Indonesian Type III

This is an Indonesian motorised vessel, which may target shark, reef fish, trepang, or trochus. They are typically equipped with a magnetic compass and occasionally a chart. If they are targeting shark they are equipped with longline, (although the lines are not as long, nor the arrangements of them as sophisticated as those used by the larger Taiwanese vessels); if reef fish is the target the vessel is equipped with drop lines; and if the vessel is targeting trochus or trepang it is equipped with diving equipment. These vessel are not considered to be traditional vessels for the purposes of the MOU. They are typically valued at between $1,000 and $5,000, and crewed by between 4 and 8 persons. The catch is normally stored by drying (in the case of shark fin and flesh and reef fish) or by salting (trepang and trochus).

Indonesian Type III - Ice Boats

These boats have been apprehended in the AFZ more frequently in the last 12 months. They are motorised, have more sophisticated navigation equipment, and have 6 - 8 holds in which ice is used to store the catch. They tend to fish in groups of up to 15 vessels at once. These vessels tend to be more substantial and fish to both reef fish and shark using longlines.

Indonesian Type II

This is a sail powered vessel, and is used for either longline or trepang fishing. It is equipped with similar equipment to the Type III and operates in the same way, but the absence of a motor means that it falls within the definition of "traditional fishing vessel" for the purposes of the MOU. If there is a compressor on board to assist with the diving, the vessel is not a traditional vessel despite its lack of motor.

Indonesian Type I

This is an Indonesian sailing vessel with no jib and a laid back mast. It also falls within the definition of a traditional fishing vessel.

Statistics

The apprehension of foreign fishing vessels in the AFZ commenced in 1988. As at 17 June 1997 the number of foreign fishing vessels apprehended in the AFZ could not be ascertained, as many are released after a warning is given. The number of foreign fishing vessels apprehended in the AFZ, where one or more of the persons on board has been prosecuted for offences under the *Fisheries Management Act 1991* in the Darwin Court of Summary Jurisdiction stands at 341.

Fish Market

The current price for dried shark fin paid to fishermen in Indonesia is as follows:

Dobo

Grade	Centimetres	Rupiah per kilo
1	33 and above	170 000
2	25 - 33	125 000
3	25 and below	75 000

Kupang and Saumlaki

Grade	Centimetres	Rupiah per kilo
1	33 and above	150 000
2	25 - 33	125 000
3	25 and below	75 000

Trepang can fetch as much as 100 000 rupiah per kilo, but the market fluctuates more and currently trepang is worth approximately 8 000 rupiah re kilo.

Legislation and Offences

The management of the AFZ is the responsibility of the Australian Fisheries Management Authority (AFMA).

Foreign fishermen apprehended fishing in the AFZ in contravention of the *Fisheries Management Act 1991* are charged with an offence under section 100(1) of the *Fisheries Management Act 1991* if they are crew members, and if they are the master or captain of the vessel they are also charged with an offence under section 101(1) of the *Fisheries Management Act 1991*.

Section 100(1) of the *Fisheries Management Act 1991* states:

> "A person must not, at a place in the AFZ, use a foreign boat for commercial fishing unless:
>
> (a) there is in force a foreign fishing licence authorising the use of the boat at that place; or
>
> (b) if the boat is a Treaty boat - a Treaty licence is in force in respect of the boat authorising the use of the boat at that place."

The penalty for an offence against section 100(1) *Fisheries Management Act 1991* is a fine of $250,000 when dealt with on indictment, or $25,000 when dealt with in a court of summary jurisdiction.

Section 101(1) *Fisheries Management Act 1991* states:

> "A person must not, at a place in the AFZ, have in his or her possession or in his or her charge a foreign boat equipped with nets, traps or other equipment for fishing unless:

(a) the use, or presence, of the boat at that place is authorised by a foreign fishing licence, or a port permit; or

(b) a Treaty licence is in force in respect of the boat; or

(c) the boat's nets, traps or other equipment for fishing are stored and secured and the boat is at that location in accordance with the approval of AFMA given under, and in accordance with, the regulations; or

(d) the boat's nets, traps or other equipment are stored and secured and the boat was travelling through the AFZ from a point outside the AFZ to another point outside the AFZ by the shortest practicable route."

The penalty for an offence against section 101(1) *Fisheries Management Act 1991* is a fine of $250,000 when dealt with on indictment, or $25,000 when dealt with in a court of summary jurisdiction.

Foreign fishermen have also been charged with offences under section 108 of the *Fisheries Management Act 1991* for obstruction of officers. Section 108 *Fisheries Management Act 1991* states:

"A person must not:

(a) fail to facilitate by all reasonable means the boarding of a boat by an officer; or

(b) without reasonable excuse, refuse to allow a search to be made that is authorised by or under this Act; or

(c) without reasonable excuse, refuse or neglect to comply with a requirement made by an officer under section 84[4]; or

(d) when lawfully required to state the person's name and address to an officer, state a false name or address to the officer; or

(e) use abusive or threatening language to an officer; or

(f) assault, resist or obstruct an officer in the exercise of the officer's powers under this Act; or

(g) impersonate an officer."

The penalty for an offence against this section is 12 months imprisonment. Under section 4B of the *Crimes Act* 1914 the court may impose in addition to or instead of this penalty a pecuniary penalty of $6,000.

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[4] Section 84 sets out a number of requirements, including at (k) " require the master of a boat that the officer has reasonable grounds to believe has been used, is being used or is intended to be used in contravention of this Act to bring the boat to a place in Australia or a Territory, or to a place at sea, specified by the officer and to remain in control of the boat at that place until an officer permits the master to depart from that place;

Section 106 of the *Fisheries Management Act 1991* provides for the forfeiture of the vessels, catch and equipment used in the commission of the offences. Section 106 states

> (1) Where a court convicts a person of an offence against section 95 (not being an offence against that section mentioned in subsection (2)), 99 or 100 the court may order the forfeiture of:
>
> (a) a boat, net, trap or equipment used in the commission of the offence; or
>
> (b) fish on board such a boat at the time of the offence; or
>
> (c) the proceeds of the sale of any such fish.
>
> (2) Where a court convicts a person of an offence against section 95, being an offence arising out of the person having in his or her possession or in his or her charge a boat for taking fish, or of an offence against section 101, 102, 103 or 104, the court may order the forfeiture of all or any of the following:
>
> (a) the boat in relation to which the offence is committed;
>
> (b) a net, trap or equipment on board that boat at the time of the
>
> offence;
>
> (c) fish on board that boat at that time or in relation to which the
>
> offence is committed;
>
> (d) fish landed in contravention of section 103;
>
> (e) the proceeds of the sale of any such fish.
>
> (3) Any boat or other property (including fish) ordered by a court to be forfeited becomes the property of the Commonwealth and must be dealt with or disposed of in accordance with the directions of the Minister.

Under section 88 of the *Fisheries Management Act 1991* the masters of the vessels may deposit security for the release of their vessels. Section 88 states:

> "(1) Where any property is under the control of an officer because of the exercise by an officer of powers under section 84, AFMA may direct that the property be released:
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> (a) in the case of a boat - to the owner or the master of the boat; and
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> (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 for payment of the value of the property if it is forfeited and 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) 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.

This is a discretionary power vested in the AFMA. The usual practise is that once a vessel has been valued the master is provided with a figure which takes into account the valuation, provision for the payment of a fine, and the provisioning of the vessel for its return journey. The masters are then allowed 10 business days to raise the security for their vessel.

Who is prosecuted

It has been the past practise to prosecute the Master of the vessel when it is apprehended in the AFZ, while fishing for swimming species. When the vessel is targeting sedentary organisms such as Trepang and Trochus the whole crew is charged, on the rationale that it is a more co-operative venture. Now we are starting to see more crew on the "shark" boats who are returning to fish the same areas for the third and fourth time. As a result the present practice is that a crew member who is on board a vessel which is apprehended fishing in the AFZ who has been apprehended previously will be prosecuted for an offence under section 100(1) *Fisheries Management Act 1991*, if to do so is consistent with the Prosecution Policy of the Commonwealth.

Previous Court Procedure for Prosecution of Foreign Fishermen in Darwin

Until January 1996 the procedure for prosecuting foreign fishermen who were apprehended fishing in the AFZ was that they were summonsed and brought before the Court of Summary Jurisdiction, where they were represented by a Legal Aid or, in the case of the less impecunious, a private solicitor, and they consented to the matters being heard in a court of summary jurisdiction pursuant to section 100(3) and 101(3) of the *Fisheries Management Act 1991*. The matter was then adjourned for a period of 2 weeks to allow them to raise security for the release of their vessel. In the event that security was raised and lodged the vessels were provisioned and allowed to depart. When the matter came back before the court the charges were dealt with *ex parte* under section 62 of the *Justices Act* (NT). In those cases the penalty imposed was a fine, with various lengths of time allowed to pay, and the forfeiture of the vessel was ordered. If the defendant had been unable to raise security for the release of his vessel he appeared before the court in person, entered a plea and upon conviction received a good behaviour bond under section 20(1)(a) of the *Crimes Act* 1914, and his vessel was forfeited. The defendant was returned to Indonesia by the Department of Immigration, and the vessel disposed of by AFMA.

LEGAL DEVELOPMENTS BETWEEN 1995 AND 1997

In December 1995 an Indonesian fisherman, Andi, was apprehended and escorted to Darwin. He had been convicted *ex parte* on an earlier occasion and fined $2,000. The time to pay the fine had expired and a warrant of commitment was issued. He was arrested and taken to Berrimah Prison to cut out his fines. The Northern Territory Legal Aid Commission represented Andi and successfully appealed the sentence under section 63A of the *Justices Act*. As a result of this case Legal Aid solicitors began to appear in the "*ex parte*" matters (i.e. in matters where the defendant had departed the jurisdiction prior to his adjourned court date) not to enter a plea but to provide the court with information about the defendant's capacity to pay a fine, and his background. In January 1996 the Court held that if the defendant was not present and Legal Aid had no instructions to enter a plea the matter should be set for hearing. This particular incident involved the charges against the masters and crew of two vessels, 'Sadar Jaya' and 'Sumarni Indah', who had been apprehended fishing for trepang in the MOU. As a result of this decision, on the hearing date a solicitor from the Legal Aid Commission appeared *amicus curiae* and argued that in fact the court had no jurisdiction to hear these charges in the absence of the defendants due to section 29 of the *Justices Act* (NT)[5]. Mr Wallace SM found that the matters couldn't proceed in the absence of the defendants as these were indictable matters. As a result a case was stated to the Supreme Court of the Northern Territory in relation to Agus, the master of the vessel 'Sadar Jaya' on the question:

> "Whether on a true construction of the *Justices Act* a Court of Summary Jurisdiction may hear and determine ex parte a charge laid pursuant to s100(1) or s101(1) of the *Fisheries Management Act 1991* (Commonwealth) in circumstances where the defendant and prosecution have consented to the charge being heard and determined by a Court of Summary Jurisdiction."

The case was heard before his Honour Mr Justice Angel in the Supreme Court of the Northern Territory on 23 September 1996. On 31 October 1996 his Honour handed down a decision in the matter of *Agus v Munn* in which he held that the Court of Summary Jurisdiction in fact had no jurisdiction to hear charges under section 100 and 101 of the *Fisheries Management Act 1991*. Both sections state at sub-section (3) that "An offence against this section is an indictable offence but may be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction." There is no definition of "court of summary jurisdiction" contained in the *Fisheries Management Act 1991*. The definition of "court of summary jurisdiction" in section 26 of the *Acts Interpretation Act* 1901 *(Cth)* states

> "court of summary jurisdiction shall mean any justice or justices of the peace or other magistrate of the Commonwealth or part of the Commonwealth, or of a State or part of a State, or of an external Territory sitting as a court for the making of summary orders or the

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[5] s.29 Justices Act states

"Every party to any proceeding before Justices shall be at liberty to conduct his case or to make his application or his full answer to the charge or complaint (as the case may be) and to have the witnesses examined and cross-examined, by a legal practitioner: Provided that nothing herein contained shall be deemed -

(a) to dispense with the personal attendance before the Justices of any defendant who is charged with an indictable offence; or

(b) to authorise Justices to proceed to hear or to hear and determine any charge of an indictable offence in the absence of the defendant."

> summary punishment of offences under the law of the Commonwealth or part of the Commonwealth or under the law of the State or external Territory or by virtue of his or their commission or commissions or any Imperial Act."

The Northern Territory and the Australian Capital Territory are internal Territories under section 17(pe) of the *Acts Interpretation Act 1901*. As a result Angel J held that the Darwin Court of Summary Jurisdiction had no jurisdiction to deal with these indictable offences.

An appeal was lodged with the Court of Appeal in relation to this decision. In the meantime all foreign fishermen apprehended and charged with offences under sections 100 and 101 of the *Fisheries Management Act 1991* were dealt with on indictment in the Supreme Court of the Northern Territory.[6]

On 17 January 1997 Martin CJ, Kearney and Priestly JJ, sitting as the Court of Appeal of the Northern Territory delivered their judgement in the Appeal. The Court traced the circumstances in which the *Acts Interpretation Act* 1901 became law, and came to the view that

> "in the original form of s.26(d) [of the *Acts Interpretation Act*], the drafter intended to achieve and did achieve the result that when a Court of Summary Jurisdiction was mentioned in subsequent Commonwealth statutes it would be clear that any Court of Summary jurisdiction in the Commonwealth would be within the meaning of that term in the Commonwealth Act. We do not see that anything that has happened since has diminished the application of the defined term to Courts of Summary Jurisdiction with the States of Australia and Territories within Australia."

The Court went on to trace the formation of the Northern Territory as a body politic in its own right, and concluded that "Northern Territory Courts of Summary Jurisdiction fall within the definition contained in the current provision in s26(d) of the *Acts Interpretation Act*." The appeal was upheld and the question in the Special Case stated remitted for further consideration at first instance.

On 10 June 1997 his Honour Mr Justice Angel delivered his judgement on the question in the Special Case stated, and held that the Court of Summary Jurisdiction has no jurisdiction to deal with charges under sections 100 and 101 of the *Fisheries Management Act 1991* in the absence of the defendant.

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[6] This decision also affected indictable charges under other Commonwealth legislation including the *Crimes Act* 1914, the *Quarantine Act* 1901, the *Customs Act* 1901, and the *Social Security Act* 1991.

Current Court Procedure for Prosecution of Foreign Fishermen in Darwin

The procedure which has been adopted since January 1996 for dealing with these cases before the Darwin Court of Summary Jurisdiction is that the defendants do not depart the jurisdiction without either completing their cases, or without cash bail being lodged. The defendants are still given the opportunity to lodge security for the release of their vessels. If they have been able to raise the money for the requested security for the release of the vessel, upon the forfeiture of the vessel AFMA allows the defendants to depart the jurisdiction with their vessels.

Sentencing

The standard sentencing practise when these cases were dealt with on an *ex parte* basis was that the defendant would receive a fine in the order of $1,000 - $3,000 if they were the master of a Type III vessel and a greater fine if they were involved in a more sophisticated operation. When the masters of the smaller vessels appeared for sentencing they were released without sentence upon their entering into a recognisance under section 20(1)(a) of the *Crimes Act 1914* on the first occasion.

With the changes of the last two years this pattern has been altered somewhat. A defendant who appears for the first time is still likely to receive a good behaviour bond under section 20(1)(a) *Crimes Act 1914* . If they have a previous conviction, then a fine is imposed. If the second offence is in breach of a recognisance, then a fine is also imposed. The fines tend to be in the range $1,000 - $5,000.

The masters of the "Ice Boats", being involved in a more sophisticated and larger scale operation receive fines in the order of $5,000 for the first offence.

The question facing the courts dealing with an increasing number of second offences, is what effect a defendant's capacity to pay a fine should have on the penalty imposed and the conditions which attach to that penalty. The issue was argued before his Honour Mr Justice Angel in the Supreme Court in the case of *Sabrudin* on 7 February 1997. During this case a number of issues were ventilated.

Reference was made to the decisions in the Supreme Court of Western Australia in the matters of *La Ode Arifin & ors v Colin William Ostel & Ors* (18 June 1991 unreported decision, Pigeon, Franklin and Walsh JJ), and *Akimin & Ors v Darren Leigh Cooper* (24 February 1995 unreported decision Heenan J). Those were cases in which fines had been imposed in relation to persistent offenders under the same legislation, with in default periods of imprisonment and no time allowed to pay the fines[7].

Reference was also made to Article 73 of the United Nations Convention on the Law of the Sea (UNCLOS). That convention is included in the *Maritime Legislation Amendment Act 1994*, which amends the *Seas and Submerged Lands Act*. The only reference to UNCLOS in the amended Act is in the preamble to the Act, so although Australia is a party to UNCLOS, UNCLOS is not law in Australia. Article 73 states

> 1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the

[7] These cases were discussed in some detail in the paper "*Indonesian Fishermen before the Darwin Courts, Hooked Fine and Sink'er*" by Elizabeth Morris, 1995.

> exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
>
> 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
>
> 3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
>
> 4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

Clause 3 limits the penalties for offences under section 100 and 101 of the *Fisheries Management Act 1991* to fines. Defence lawyers argue that this clause means that the court is prohibited from imposing fines with an 'in default imprisonment' condition attached, when the defendant is impecunious.

In *Sabrudin* Angel J stated "That clause, it seems to me, deals with penalties for violations of fishery laws. The penalty of gaol where there is a default period fixed in respect of a fine is a penalty for failure to pay the fine, not a penalty for violation of a fishery law."

There is apparently no bar to the imposition of fines on impecunious defendants on the basis of UNCLOS. Section 16 C of the *Crimes Act 1914* states that

> (1) Subject to subsection (2), before imposing a fine on a person for a federal offence, a court must take into account the financial circumstances of the person, in addition to any other matters that the court is required or permitted to take into account.
>
> (2) Nothing in subsection (1) prevents a court from imposing a fine on a person because the financial circumstances of the offender cannot be ascertained by the court.

This provision does not prevent the imposition of a fine where the defendant is impecunious, but simply states that it is a factor which must be taken into account.

The penalties imposed since that time, where the court has deemed a fine to be an appropriate penalty have been in the order of $1,000 - $2,000. The periods of imprisonment in default have varied between 14 and 80 days in total.

Although it has been suggested at various times that a more appropriate sentence would be a period of community service, this is not available as a sentencing option. Foreign nationals who are apprehended in the AFZ and brought to Australia for prosecution are unlawful non-citizens under the *Migration Act 1958*. Under section 198 of the Migration Act 1958 the Immigration Department is required to remove unlawful non-citizens as soon as reasonably practicable. As such they can stay in Australia until the completion of their prosecution and any sentence of imprisonment which is imposed, whether by the court or in default. Once that period has expired the

Immigration Department is required to deport unlawful non-citizens. As a result unlawful non-citizens cannot participate in community service schemes which require them to stay in Australia after the completion of their court case.

Western Australia

Not all of the persons apprehended in the AFZ are prosecuted in Darwin. Some are taken to Broome in Western Australia, where they are charged and dealt with. Many of the fishing vessels which are apprehended in that region are in fact fishing for trochus and trepang. As these ventures tend to be of a more cooperative nature, the practise is to prosecute the master and the crew. The penalties which are imposed tend to follow the same pattern as those imposed in Darwin. First offenders generally receive a good behaviour bond, while repeat offenders are fined. There was some confusion following amendments to the WA *Sentencing Act* about whether the court could impose no time to pay in respect of fines. That has been clarified with an amendment to the WA *Criminal Code*. The practise in Broome is now to impose no time to pay when the defendant is impecunious. AFMA tends to exercise its discretion not to accept security for the release of vessels under section 88 of the *Fisheries Management Act* 1991, and when the vessels are forfeited they are then disposed of by AFMA. It is the policy of the Commonwealth Director of Public Prosecutions that matters under the same legislation should be dealt with nationally on a uniform basis, and every effort is made to ensure that similar penalties are imposed for similar offences.

THE FUTURE

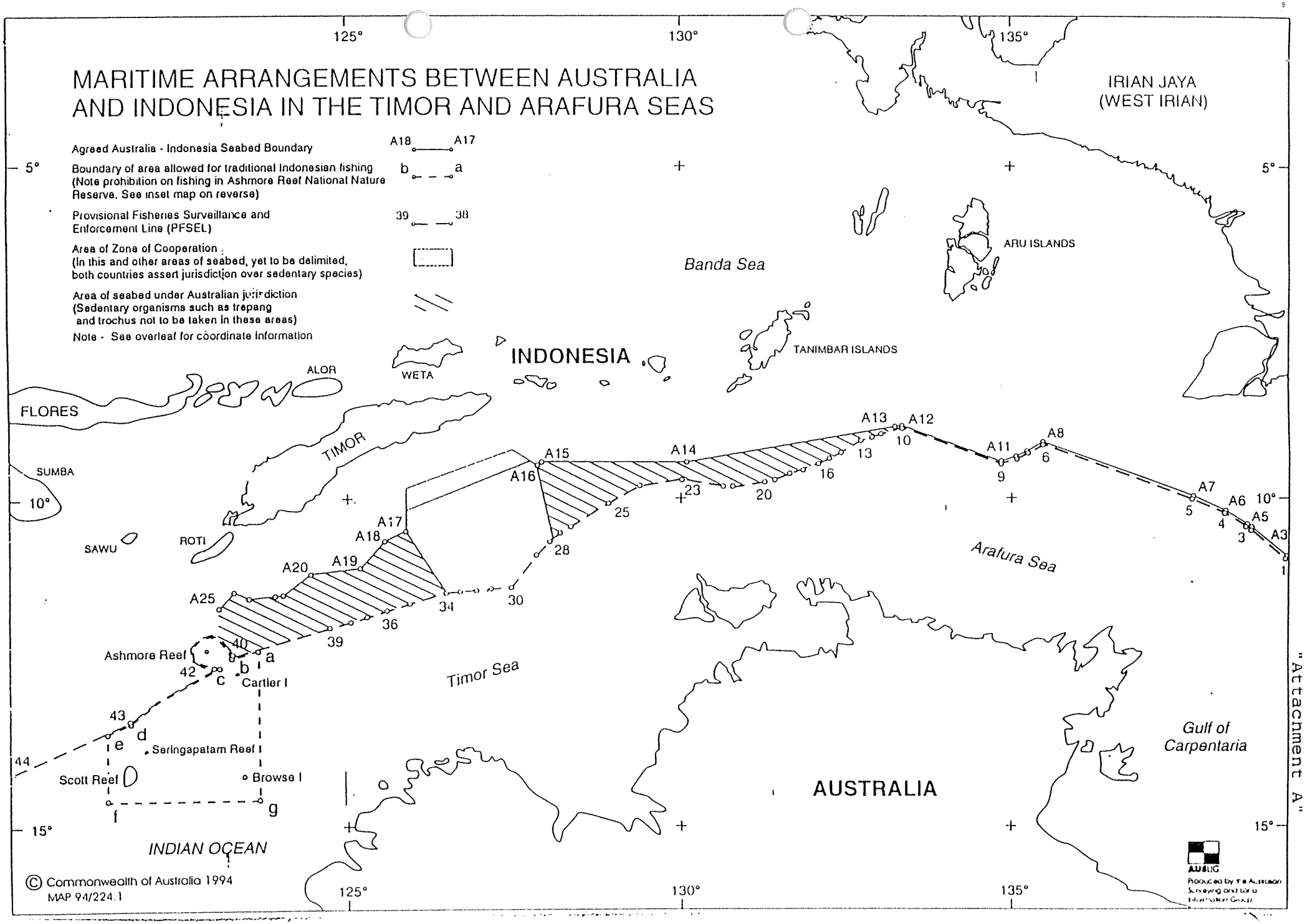
There seems to be no end in sight to the numbers of foreign fishing vessels being observed and apprehended in the AFZ all year round. These continue to be predominantly vessels with crews of Indonesian origin, but the Taiwanese based vessels have a steady presence in the region. The options for sentencing remain fairly limited. When sentencing these offenders the court has the option of imposing a fine, a good behaviour bond, or recording no conviction, and forfeiting their vessels. While imprisonment in default for non-payment of fines has been increasingly utilised by the courts in the last 18 months we have yet to see what deterrent effect, if any, this will have. Sabrudin, whose case was referred to earlier in this paper, was apprehended three times in the five months commencing December 1996. On the first occasion he was released without sentence on a good behaviour bond. On the second occasion he was imprisoned for 14 days in default of payment of fines totalling $2,000. When he returned to Australia 6 weeks later he stated to the Immigration officials that he was happy to go back to jail because he had earned $35 during his last stay. If his case is anything to go by this practise may have the opposite effect to that intended.

The fishing resources in Australian waters are limited. Despite having the third largest exclusive economic zone in the world, we rank outside the world's top 50 fishing nations. This is largely due to the fact that our waters are generally less productive than most. To preserve our resources we need to continue to control the number of fish being taken from our waters, to ensure that our resources are sustainable. Licensing commercial fishermen and placing restrictions on the numbers and type of fish which can be taken is one step in this direction. The enforcement of the AFZ to

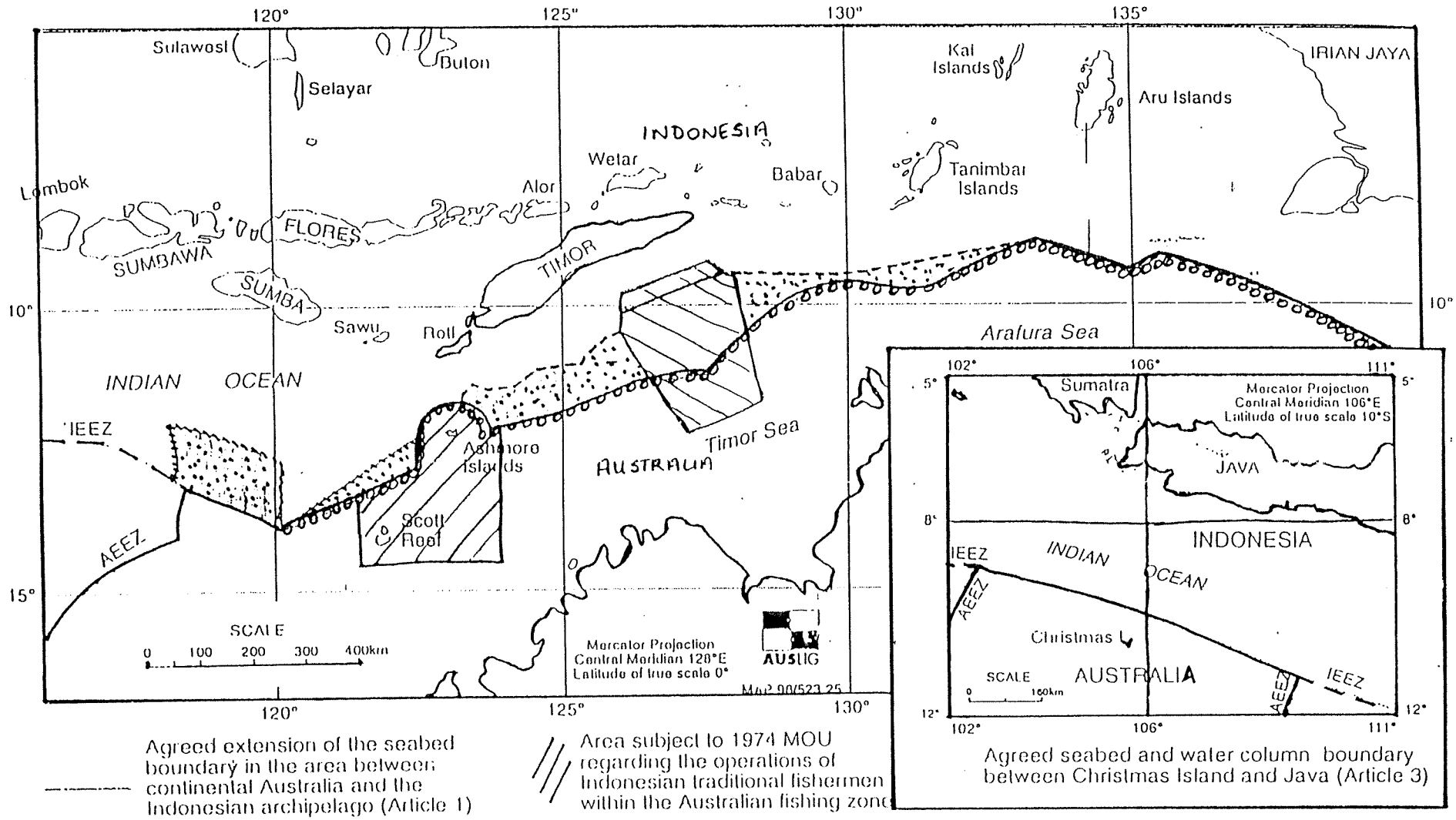
ensure that unlicensed, and thus uncontrolled, fishing doesn't occur is another. The question which remains to be addressed is how to most effectively achieve this end.

The options which we have at present are education; the continued apprehension and prosecution of unlicensed fishermen, including those on foreign fishing vessels; and an increased surveillance presence in the AFZ. These are all options which require Government funds, at a time when budgets are being cut in every department. It appears that despite the development of the Ocean Policy, we can expect little change. It will probably continue to fall to the courts, and in particular the Darwin Court of Summary Jurisdiction, to impose sentences which are of sufficient severity to have a deterrent impact - both specifically and generally.

Theresa van Gessel
17 June 1997



"Attachment A"



Agreed seabed and water column boundary between Christmas Island and Java (Article 3)

Agreed extension of the seabed boundary in the area between continental Australia and the Indonesian archipelago (Article 1)

Area subject to 1974 MOU regarding the operations of Indonesian traditional fishermen within the Australian fishing zone

Agreed exclusive economic zone (water column) boundary in the area between continental Australia and the Indonesian archipelago (Article 2)

Zone of Co-operation (Timor Gap Treaty)

Area of overlap between Australian seabed jurisdiction and Indonesian exclusive economic zone (water column) jurisdiction.

Indonesian exclusive economic zone boundary

Previously agreed seabed boundaries (1971 and 1972)

Australian exclusive economic zone boundary

Provisional Fisheries Surveillance & Enforcement Line

Consolidated depiction of all Australian-Indonesian maritime boundaries after entry into force of treaty (1997)

"Attachment B"