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Senate Standing Committees on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au; cc:

Dear Secretary

Responses to questions on notice – Inquiry into the Maritime Powers Bill 2012 and the Maritime Powers (Consequential Amendments) Bill 2012

I refer to Christopher Sautelle's email dated 27 July 2012, providing questions on notice for the Department in relation to the Committee's inquiry into the Maritime Powers Bill 2012 and the Maritime Powers Bill (Consequential Amendments) Bill 2012. The questions are answered below.

Definition and appointment of maritime officers

1. **Under paragraph 104(1)(d) of the Maritime Powers Bill, the Minister may appoint persons as maritime officers to exercise enforcement powers. The Parliamentary Library's Bills Digest on the Maritime Powers Bill (Bills Digest) noted that this paragraph does not place any limitations on who may be appointed as a maritime officer by the Minister, and that, for example, private contractors could be appointed as maritime officers under this provision.**
 - **Is it the intention of the Bill that individuals who are not Commonwealth employees could be appointed as maritime officers?**
 - **Should there be explicit provisions providing limits to the types of people the Minister can appoint as maritime officers (e.g. only Commonwealth employees)?**

As noted in the Explanatory Memorandum, it is proposed that the types of maritime officers that may be appointed would be similar to existing classes of officers under current maritime enforcement legislation. This would include appointing individuals who are not Commonwealth officers to exercise maritime powers. This could include appointing State or Territory officers as maritime officers, where there is agreement between the Commonwealth and the relevant State or Territory for cooperation in maritime enforcement. This may also include officers of other countries in relation to international agreements and decisions, where appropriate. A very limited number of private contractors are currently authorised to exercise maritime powers. This comprises commanders of contracted aircraft, who are currently authorised to exercise powers under the *Customs Act 1901*. It is understood that this practice

will continue while the Government contracts private aviation services for maritime enforcement.

Importantly, paragraph 104(2) limits the power of the Minister in making appointments under paragraph 104(1)(d) to appointments under a specified law or specified international decision or agreement. It also allows other conditions to be placed on the appointment. Paragraph 104(3) allows limitations to be placed on the exercise of powers by officers appointed under 104(1)(d). The Government does not consider that further limitations are necessary.

2. **It has also been noted that ministerial appointments of maritime officers will not have to be made public, as they would if the appointments were made through regulations.**

- **Would a requirement for these appointments to be made public be appropriate?**

It is most important to be able to ascertain the identity of the maritime officer when the officer exercises a maritime power. At that time, the officer must show an identity card, unless he or she is in uniform. Additionally, maritime officers can only exercise those powers where authorised to do so. The power to authorise use of those powers is limited, and subject to a range of appropriate safeguards.

The Government does not consider that there would be a discernible benefit from making public the ministerial appointment of maritime officers.

Delegation clause

3. **Under clause 121 of the Maritime Powers Bill, the Minister may delegate all of his or her functions under the Bill to certain specified officials, including any SES employee with a classification not below Senior Executive Band 1 or equivalent.**

- **Is it appropriate that all of the Minister's powers can be delegated to SES employees, including powers to appoint maritime officers, approve the exercise of powers in relation to aircraft under clause 10 of the Bill, and approve the exercise of powers in relation to vessels, installations and aircraft under an international agreement or decision under clause 12 of the Bill?**

Provisions enabling delegation of a Minister's powers to Commonwealth officers are extremely common under Australian laws, including to SES officers. Delegations in an operational context such as this are necessary, to cater, for example, for situations where the Minister is not available, given authorisations can be required at short notice. The Australian Defence Force officers to whom delegation is available under paragraph 121 are also comparable to SES officers. Moreover, the Minister can limit any delegation, and would remain responsible, including to the Parliament, for delegations under this paragraph.

Identifying maritime officers

4. **Under subclauses 52(4) and 56(4) of the Maritime Powers Bill, the requirement for maritime officers to produce identification cards when boarding a vessel does not apply if the officer is a uniformed ADF or Customs officer, or a member or special member of the AFP in uniform. The Bills Digest noted that these exceptions to the requirement to produce identification: are a departure from the approach taken in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement***

Powers; are inconsistent with similar exceptions found in section 185A of the Customs Act 1901, which apply only to members of the ADF.

- **In light of these inconsistencies, what is the justification for the approach taken in the Bill in relation to these exemptions?**

As set out in the question, the exception to the obligation to produce an identification card when boarding a vessel would only apply to uniformed officers. Those officers would also typically board from a marked Government vessel such as a naval or Customs vessel. The official capacity of the officer would therefore be clear. The person in charge of the vessel is also entitled to request production of any officers' identification card; the relevant officer must comply or leave the vessel.

This provision has been tailored to the unique aspects of the maritime environment. Boarding of vessels on the high seas often requires officers to operate in a difficult, dangerous and quickly changing maritime environment. Boarding a vessel also regularly presents risks—often unknown—to the maritime officer. In these circumstances, it is impractical to require clearly identifiable enforcement officers to produce identification in the manner that usually occurs in relation to law enforcement officers on land.

Protection from suit

5. **Clause 107 provides that maritime officers and other associated persons are not liable to any action, suit or proceedings in relation to their actions performed in good faith under the Bill. Shipping Australia has argued that there 'must be an avenue for recourse if it can be proved that such officers were corrupt or acted maliciously'.**

- **What is your response to these concerns? Are there any grounds under which an individual could pursue recourse for actions undertaken by a maritime officer which they deemed to be inappropriate?**
- **What recourse does an affected individual have in the event that maritime officers breach the human rights safeguards found in clause 37 and clause 95 if the Maritime Powers Bill?**

Provisions limiting or immunising the liability of Commonwealth officers are very common, including in the current regime of maritime powers.¹ Clause 107 would only render a Commonwealth officer not liable to suit where their actions are taken in good faith, and in the performance or purported performance of their duties.

In any event, this provision only provides protection from suit to authorising officers, persons assisting and other persons acting under the direction of a maritime officer. The provision would therefore not limit the ability of an individual to pursue recourse against the Commonwealth in relation to a maritime officers' conduct. It also would not limit the ability of an individual to pursue recourse against an officer where the officer's actions were not taken in good faith, or were not taken in the performance of their duties. Whether against the Commonwealth, the officer or both, the provision therefore would not limit the ability of an

¹ This includes s. 56 and clause 5 of Schedule 1A of the *Fisheries Management Act 1991*; clause 5 of Schedule 1 of the *Environment Protection Biodiversity and Conservation Act 1999*; s. 332E of the *Migration Act 1958*; and s. 220 of the *Customs Act 1901*.

individual to seek recourse in situations where an officer acted in breach of the protections in clauses 37 and 95.

Compensation claims

- 6. Shipping Australia have argued that, in addition to access to compensation for damages to property, documents, and equipment (under clauses 117-120 of the Maritime Powers Bill), 'there must be an avenue to claim for other damages such as delays to vessel and other expenses resulting from unlawful or wrongful actions taken by Maritime Officers'.**

- What is your response to this argument? Why should delays to vessels and other expenses in addition to physical damages not be compensable if they were a result of insufficient care or wrongful actions?**

The Bill would not exclude Commonwealth liability for conduct attracting civil liability. In addition to the remedies in clauses 117-120, the Bill would not limit the ability to seek recourse in a civil claim against the Commonwealth.

- 7. Shipping Australia also argued that the 'Commonwealth must have in place adequate provision to provide for compensation to any person involved in an accident whilst boarding a vessel, as it would be unreasonable to expect the ship's insurance to provide cover in such circumstances'.**

- Can you explain how insurance arrangements are proposed to work in the kinds of situations raised by Shipping Australia? Would a ship's insurance provider be liable in such circumstances?**

In this situation, even if the ship owner's insurance provider were contractually obliged to compensate the ship owner, the Bill would not limit the right of an insurance provider to seek recourse against the Commonwealth. The Bill also does not limit the right of a Commonwealth officer to workplace injury compensation.

Detention of persons under other detention provisions

- 8. Clause 73 of the Maritime Powers Bill allows maritime officers to detain persons under detention provisions in other specified Commonwealth legislation, as if they were officers authorised under those provisions. However, clause 98 of the Bill specifies that any detention period served before the maritime officer transfers the individual into custody will not count towards the maximum detention times which apply under those other provisions (under the detention provisions of the Acts listed in the Bill, a maximum detention period of one week applies).**

- Why is it appropriate that persons detained under the other provisions listed in clause 73 could now be held for a longer period than originally provided for under those Acts?**

These provisions have been drafted to deal with the situation where a person is detained at sea, and where continued detention on land is reasonably to be expected. In this situation, the person could be detained under paragraph 73, in order to transfer the person into the custody of a relevant officer when on land, where the relevant detention period would commence. It is important to note that it is difficult to prescribe a defined period of detention. This is because

the time taken to return to port varies significantly, depending on where the relevant operation occurred. However, the transfer must occur as soon as practicable. Paragraphs 73 and 98 thereby enable an individual to be detained on the high seas, to be transferred to custody on land under a relevant detention provision, such as in relation to illegal fishing offences, in the manner envisaged under the relevant detention regime.

Giving notice of things seized, detained or retained

9. Under clause 80 of the Maritime Powers Bill, written notice must be given to the owner of a thing which has been seized or detained by a maritime officer, stating that the thing has been seized and including information about its return. However, subclause 80(2) states that if an officer cannot conveniently give the notice in person, the officer may give the notice 'by fixing the notice to a prominent part of the thing'.

The Bills Digest suggested that 'giving notice' by affixing a letter of notice to a thing which has been seized or detained, and which may no longer be physically accessible to its prior owner, is of little practical value in informing the owner that the thing has been detained.

- Do you agree that affixing a letter of notice to a thing will be of little practical value in informing the thing's prior owner of its whereabouts?
- Would making such notices publically available, for example by listing them through an agency website, be a better way of ensuring appropriate notice is given in cases where it cannot be given in person?

Notice provisions of this kind are relatively common in the current regime of maritime powers, such as s. 106C(1)(a) of the *Fisheries Management Act 1991*. The power has been framed based on the practice of giving notice for detention of arrested ships, where notices are fixed to the mast. The provision is permissive rather than mandatory, and it is envisaged that it would be used in relation to property such as ships, rather than for giving notice in relation to other items, such as highly portable property like ship log books. Where those items are retained, either the owner of the item or the person in possession of it would almost always be present when it was seized, so that notice can conveniently be given in person. In the rare circumstance where this was not the case, such as in the case of a ship abandoned on the high seas, it is unlikely that providing notice for these items on an agency website would offer any appreciable utility.

Coverage of Consequential Amendments Bill

10. In the second reading speech to the Maritime Powers Bill, the Attorney-General stated that operational agencies currently use maritime enforcement powers contained in at least 35 separate Commonwealth acts.
- Why does the Maritime Powers (Consequential Amendments) Bill 2012 only amend five of these 35 acts?
 - Are there any additional amendments required to other Commonwealth legislation to complete the process of harmonising and streamlining Australia's maritime enforcement laws?

The current consolidation initiative has been designed to identify and consolidate the main maritime powers; predominantly those in the migration, fisheries and customs regimes. Powers that were not readily transferable into the current regime have not been included at this time. However, it is envisaged that the proposed regime would provide a framework for consolidating maritime powers, so that over time, further maritime powers could be incorporated, as appropriate.

Drafting inconsistencies

11. Clauses 69-70 provide that maritime officers may exercise powers to detain a vessel, aircraft, vehicle or any other conveyance. However, clauses 80 and 87, which deal with written notices regarding detained things and the return of detained things, mention only vessels and aircrafts, and do not mention vehicles or other conveyances.

- **Is it the intention that vehicles and other conveyances detained under the Bill will still be subject to the requirements of clauses 80 and 87, or is there a reason they are not covered in these clauses?**

Clause 69(1) enables a maritime officer to detain a vessel or aircraft. Clause 69(2) then enables a maritime officer to take control of it. Clause 70 only allows an officer to detain a vehicle or other conveyance on land; it does not provide the additional power to take control of the vehicle or other conveyance, such as by moving it to another place. For that reason, the notification and return requirements in clauses 80 and 87 are not applicable to vehicles and other conveyances.

12. There also appear to be several numbering errors in the Explanatory Memorandum to the Maritime Powers (Consequential Amendments) Bill, whereby several items in the Bill seem incorrectly numbered when they are referenced in the EM (specifically, items referred to on pages 8, 13-14 and 17-18 of the EM appear to be misnumbered).

This is an unfortunate oversight. The Department is currently taking the necessary steps to correct the Explanatory Memorandum, and thanks the Committee for drawing its attention to this error.

The action officer for this matter is

who can be contacted on

Yours sincerely

/Greg Manning