



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

SEVENTH REPORT
OF
2012

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon Ian Macdonald (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator R Siewert
Senator the Hon L Thorp

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT OF 2012

The Committee presents its Seventh Report of 2012 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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Marine Safety (Domestic Commercial Vessel) National Law Bill 2012

Introduced into the House of Representatives on 24 May 2012

Portfolio: Infrastructure and Transport

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Minister responded to the Committee's comments in a letter dated on 26 June 2012. A copy of the letter and the attachment is attached to this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill creates a single national maritime regulator and national safety system for domestic commercial vessel safety in Australia.

On 19 August 2011 the Council of Australian Governments (COAG) Inter-Governmental Agreement (IGA) on Commercial Vessel Safety Reforms was signed. The bill replaces eight existing federal, state and territory regulators with one National Marine Safety Regulator, the Australian Maritime Safety Authority.

Delayed Commencement

Clause 2

The substantive provisions in the bill will commence on a day to be proclaimed or after 12 months the Act receives Royal assent. Normally, the Committee prefers to see Acts commence within 6 months of Royal Assent. Although the explanatory memorandum discusses the possibility of commencement by Proclamation, it does not address the reasons for delaying commencement for up to 12 months. Although it is accepted that there are likely to be legitimate reasons for delay in this instance, **the Committee requests the Minister's advice as to the rationale for the proposed approach.**

Minister's response - extract

1. Delayed Commencement Clause 2

The delayed commencement is to accommodate possible delays in the jurisdictions enacting their own legislation to apply the National Law. Despite a commitment to 'best endeavours', the potential for delays in enacting State legislation has been foreshadowed by a number of jurisdictions, with one jurisdiction advising that passage of their application laws will probably not occur before September 2013.

Committee Response

The Committee thanks the Minister for this response and notes that the information would have been useful in the explanatory memorandum.

Alert Digest No. 6 of 2012 - extract

Adequacy of merits review Clause 16

Subclause 16(2) provides that decisions made by the National Regulator in the performance of a function or the exercise of a power conferred by a corresponding State and Territory law may be reviewed by the AAT if (a) the law under which the decision was made provides for AAT review and (b) the decision is declared by the regulations to be a reviewable State-Territory decision for the purposes of this section. The explanatory memorandum discusses the clause, at page 17, but does not give any explanation which would enable the Committee to consider whether decisions that should appropriately be subject to merits review will, in fact, be reviewable decisions. **The Committee therefore requests the Minister's advice and assurance as to whether merits review will be appropriately available.**

Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Minister's response - extract

2. Adequacy of merits review Clause 16

Given the National Law will be applied to the full extent of the constitutional reach of the Commonwealth, there will be very few State and Territory decisions of the kind to which clause 16 refers. While regulations will address the review of these decisions, the practical consequence is that the decisions will occur very infrequently, if at all.

Furthermore, jurisdictions have indicated an intention to provide for the application of Commonwealth 'adjectival laws', including the AAT legislation, in their application laws.

Committee Response

The Committee thanks the Minister for this response and requests that this information is included in the explanatory memorandum.

Alert Digest No. 6 of 2012 - extract

Strict liability Various

The bill contains many strict liability offences. The explanatory memorandum gives a global justification for the approach as follows: 'The application of strict liability to certain offences has been carefully considered during the drafting of the Bill and most strict liability offences are subject to other qualifiers, such as reasonable practicability, due diligence or reasonable care (see page 11). The Bill also makes reference in relevant clauses to section 6.1 of the Criminal Code, which provides further details on strict liability.'

The Committee notes that the penalties associated with the strict liability offences do not exceed 60 penalty units. However, given that proof of fault is one of the most fundamental protections in our system of criminal law the Committee is concerned about an approach that takes a 'blanket' justification of the strict liability offences in the bill. The Committee's view is that it is highly desirable that explanatory memoranda deal with the issue with more detail and specificity. Even if a particular justification for the use of strict liability is

repeated or cross-referenced, dealing with each provision on its own merits (as opposed to offering a global justification) ensures that appropriate consideration has been given to the issues in each instance. **The Committee draws its views on this issue to the Minister's attention and leaves to Senate as a whole the question of whether the proposed approach is appropriate.**

The Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Minister's response - extract

3. Strict liability Various

National Law offences to which strict liability applies are all limited to more 'routine' offences that:

- Have penalties no greater than 60 penalty units;
- Are subject to an infringement notice scheme;
- Only require a physical act or omission to have occurred. A requirement to prove fault would undermine the deterrent effect of the offence; and,
- Are required to ensure the integrity of the regulatory regime.

Committee Response

The Committee thanks the Minister for this additional information. The Committee restates its view is that it is highly desirable that explanatory memoranda deal with the application of strict liability with detail and specificity relating to each instance of its use.

Alert Digest No. 6 of 2012 - extract

Entry Search and Seizure Powers: various issues

The Statement of Compatibility with Human Rights states that the bill has been drafted consistently with the principles set out in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. It is also stated that the enforcement powers are equivalent to those provided in other Commonwealth legislation.

In a number of respects, the approach taken to enforcement is such that the Committee expects strong justification to be given and in general the SOC provides such justification. Nonetheless, a number of issues are noted. **First**, the bill provides for entry and search powers without warrant (Subdivision B of Schedule 1). However, as noted in the SOC, the *Guide* indicates that search and entry powers without warrant may be justifiable in a number of limited circumstances. More particularly, it is noted that such powers may be appropriate where ‘the inherent mobility’ of a particular conveyance means that there may not be time, or it would be impractical to obtain a warrant. As domestic vessels fall into this category and because ‘the nature of commercial activities undertaken by these vessels often means that they do not follow any predictable pattern or timetable’ the SOC argues that the approach is proportionate.

The SOC also points to an exception in relation search and entry powers in relation to licensed premises, where a person who obtains a licence or registration can be taken to accepting entry to their premises for the purposes of ensuring compliance with legislative requirements or registration conditions. (The full arguments are at pages 7 and 8 of the SOC.) The Committee understands the detailed explanation offered for these powers, **but seeks the Minister's advice as to whether consideration has been given to establishing an oral 'authorisation' system similar to the arrangements in the Maritime Powers Bill, including a requirement for 'authorisations' to be recorded as soon as practicable (discussed below in relation to the Maritime Powers Bill).**

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Minister's response - extract

4. Entry Search and Seizure Powers: various issues ***Establishing an oral 'authorisation' system***

As a result of the operating environment and inherent mobility of domestic commercial vessels, monitoring and compliance activities need to be taken as and when the opportunity presents. Accordingly, the inclusion of an oral 'authorisation' system similar to that contained in the Maritime Powers Bill is considered impractical for the exercise of powers in subdivision B of Schedule 1 (powers relating to vessels, exercisable without consent or warrant).

Furthermore, the oral 'authorisation' system in the Maritime Powers Bill applies to the full suite of broad powers in that Bill. This system is not considered appropriate for the subset of monitoring, detention and limited seizure powers contained in subdivision B of Schedule 1 of the National Law Bill for the reasons set out in the explanatory memorandum.

Appropriate safeguards to ensure the lawful and proportionate use of search and entry powers without consent or warrant in limited circumstances is achieved by:

- Satisfactory experience and qualification prerequisites that a marine safety inspector must satisfy prior to being appointed and authorised to exercise the compliance and enforcement powers.
- These qualification and experience standards will be consistent with key elements of Public Sector Training Package (PSP04) that deals with compliance and enforcement, investigation and regulatory control. This training package is the recognised Commonwealth standard for persons exercising such powers and functions.
- Safeguards such as reporting requirements including reasons for the exercise when certain compliance and enforcement powers have been exercised without consent or warrant.

Legislative requirement for the Minister to issue guidelines - clause 91

An Instrument of Delegation is currently under development that will detail the required minimum qualifications and experience levels of persons before they may be appointed marine safety inspectors. Instruments of Delegation will be published on the National Regulator website to promote transparency.

These qualification and experience standards will be consistent with key elements of Public Sector Training Package (PSP04) that deals with compliance and enforcement, investigation and regulatory control. This Training package is the recognised Commonwealth standard for persons exercising such powers and functions.

Committee Response

The Committee thanks the Minister for this response and notes the Minister's advice that:

- an 'oral authorisation' scheme is 'not considered appropriate for the subset of monitoring, detention and limited seizure powers';
- appropriate safeguards are in place and these are outlined above; and
- an 'Instrument of Delegation' that will detail the required minimum qualifications and experience, which will be consistent with 'key elements of Public Sector Training Package (PSP04) that deals with compliance and enforcement, investigation and regulatory control, which is the appropriate Commonwealth standard is being developed.

While it remains unclear to the Committee why an 'oral authorisation' scheme could not be implemented, at least in a modified form, in light of the additional information provided by the Minister the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Alert Digest No. 6 of 2012 - extract

Delegation of Legislative Power Clause 162

This clause provides that the regulations may prescribe penalties. Although penalties are limited to not more than 50 penalty units in relation to offences against the regulations, subclause 162(2) enables the regulations to prescribe civil penalties of up to 500 penalty units in the case of a body corporate and 100 penalty units in any other case. Although these higher penalties attach to civil penalty provisions rather than criminal offences, they are significant penalties and as the explanatory memorandum, at page 81, merely restates the effect of the provision, **the Committee seeks the Minister's advice as to the justification for the proposed approach.**

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Minister's response - extract

5. Delegation of Legislative Power Clause 162

The civil penalties included in subclause 162(2) are twice the amount of the penalties applicable as criminal sanctions.

The maximum penalty for a breach of a criminal regulation by a body corporate would be 250 penalty units due to the operation of section 4B of the *Crimes Act* 1914, whereas the civil penalty proposed is 500 penalty units. Likewise, for individuals, the civil penalty proposed is 100 penalty units where the criminal penalty under the regulation is 50 penalty units.

The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers ("the guide") states that the appropriate financial penalty under a civil penalty provision will often be higher than the appropriate maximum fine for a criminal offence. This is because there is no criminal sanction and corresponding stigma attached to a civil penalty offence, it is purely a monetary penalty.

The level of civil penalties provided for in clause 162 of the National Law is considered consistent with the guide.

Committee Response

The Committee thanks the Minister for this response and notes that the information would have been useful in the explanatory memorandum.

Navigation Bill 2012

Introduced into the House of Representatives on 24 May 2012
Portfolio: Infrastructure and Transport

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Minister responded to the Committee's comments in a letter dated on 26 June 2012. A copy of the letter and the attachment is attached to this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill repeals the *Navigation Act 1912* and provides a new legislative framework to regulate international ship and seafarer safety, shipping aspects of protecting the marine environment and the actions of seafarers in Australian waters. The bill also gives effect to the relevant international conventions to which Australia is a signatory.

Broad discretion

Clauses 31, 32 and 44, subclauses 51(4), 100(2) and 132(2)

Clauses 31 and 32 enable AMSA to impose conditions on a seafarer certificate, but no guidance is provided about the nature of, or circumstances in which, conditions may be imposed.

The same issue arises in relation to other instances in which certificates may be issued, that is: clause 44, subclause 51(4), subclause 100(2) and subclause 132(2).

While the Committee notes that the exercise of these powers is subject to review by the Administrative Appeals Tribunal (clause 313), **the Committee requests the Minister's advice as to whether consideration has been given to including statutory criteria to structure the exercise of this broad discretionary power while retaining appropriate flexibility.**

The Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Minister's response - extract

1. Broad discretion to impose conditions

AMSA and issuing bodies require the flexibility to consider all the circumstances relevant to the issue of certificates. In some cases, specific but otherwise unexpected circumstances arise that require a regulatory response in order to ensure safety and protection of the marine environment. The imposition of conditions allows for this.

Examples:

- a seafarer is fit for duty but suffers some disability that needs to be recognised in authorising that person to perform those duties. Eg: A condition that prohibits an asthma sufferer from entering confined spaces using breathing apparatus would be appropriate; and,
- a manning determination may be issued in line with criteria in the Regulations, however the operations of the ship need to be specifically addressed. Eg: An offshore industry vessel may require additional deck watch keepers when diving operations are being performed.

The shipping industry are well acquainted with the international standards and systems by which conditions (both permanent and temporary) are applied, so are in a position to know and understand what the requirement will be and how the condition will operate.

Committee Response

The Committee thanks the Minister for this detailed response and notes that the information would have been useful in the explanatory memorandum.

Alert Digest No. 6 of 2012 - extract

Delegation of legislative power Subclause 51(2)

This provision provides that when making a determination declaring the skill levels and numbers of seafarers on vessels the AMSA must have regard to the matters prescribed by the regulations. As the Committee usually prefers that important matters are included in primary legislation when appropriate and as the explanatory memorandum does not indicate why these matters cannot be included in the primary legislation **the Committee seeks the Minister's advice as to the justification for the proposed approach.**

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Minister's response - extract

2. Delegation of legislative power - Manning determinations

The approach to manning determinations reflects that taken in the current legislation. The matters that will be covered in Regulations will reflect international convention requirements, which are changed from time to time via a tacit amendment process. As a result, setting the requirements as they exist at one point in time in the primary legislation would require legislative amendment to update those requirements.

The shipping industry are well acquainted with the international manning standards that are applied by AMSA in the Regulations, so are in a position to know and understand what the requirement will be.

Example:

The current international standard is contained in International Maritime Organization Assembly Resolution A.890(21).

Committee Response

The Committee thanks the Minister for this detailed response and notes that the information would have been useful in the explanatory memorandum.

Alert Digest No. 6 of 2012 - extract

Delegation of legislative power Subclauses 84(1) and 85(1)

The bill creates a strict liability offence if alcohol is detected above acceptable levels or if prescribed drugs are present in the blood of a person. However, the unacceptable blood alcohol level or prescribed drugs are to be set in regulations. In general, the Committee prefers the content of an offence to be contained in primary legislation. Although there are legitimate exceptions to this approach, the Committee expects that the issue should be explicitly addressed in the explanatory memorandum, especially when, as in this case, the offence is one of strict liability. As the explanatory memorandum does not deal with the need to use regulations **the Committee seeks the Minister's advice as to the justification for the proposed approach.**

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Minister's response - extract

3. Delegation of legislative power - Drug and Alcohol Regulations

The matters that will be covered in Regulations will reflect international convention requirements, which are changed from time to time via a tacit amendment process. As a result, setting the requirements as they exist at one point in time in the primary legislation would require legislative amendment to update those requirements.

In addition, different limits apply to different crew members at different times, and different requirements exist for drugs and for alcohol. This results in the need to detail an overall framework which is necessarily more complex than the statement of a single limit.

The shipping industry establishes their shipboard operating procedures based on company policy, which is often stricter than the international requirement, and this approach is to be encouraged.

Example:

The current international standard is contained in the Convention on the Standards for Training, Certification and Watchkeeping.

Committee Response

The Committee thanks the Minister for this detailed response and notes that the information would have been useful in the explanatory memorandum.

Alert Digest No. 6 of 2012 - extract

Delegation of legislative power

Various

The bill provides for various matters to be dealt with in the regulations. For example:

- Clause 57 provides that the regulations make provision in relation to keeping, retaining and producing records of service of seafarers;
- Clause 59 provides a regulation making power in relation to the hours of work and hours of rest of seafarers;
- Clause 61 provides that the regulations may make provision in relation to the provision of food and drinking water on board vessels;
- Clause 65 provides that the regulations make provision in relation to the health of seafarers;
- Clause 74 provides that the regulations make provision in relation to accommodation to be provided for seafarers;
- Clause 76 provides that the regulations make provision in relation to repatriation;
- Clause 76 provides that the regulations make provision in relation to complaints about employment;

- Clause 87 provides that the regulations make provision in relation to the authorisation of persons to conduct alcohol and drug tests, to operate equipment for that purpose, and practices and procedures relating to such testing (discussed further below);
- Clause 91 provides that the regulations make provision in relation to how to deal with the property of a deceased seafarer;
- Clause 112 provides that the regulations make provision in relation passenger and cargo operation;
- Clause 113 provides that the regulations make provision relating to overloading;
- Clause 125 provides that the regulations make provision in relation musters, drills and tests;
- Clause 163 provides that the regulations make provision in relation to compulsory pilotage; clause 164 is a regulation power relating to pilots and pilotage generally;
- Clause 188 provides that the regulations make provision in relation to aids to navigation; and
- Clause 213 provides that the regulations make provision in relation to vessel traffic services.

The explanatory memorandum merely restates the effect of such provisions. In a number of instances there is a regulation-making power which is clearly intended to give effect to an international agreement or standard, though the powers are stated in terms that go beyond this purpose. As the Committee expects that delegated legislation is used appropriately, it prefers that a justification is provided for its use in each instance to ensure that appropriate thought has gone into the proposed approach.

In particular, given the sensitive issues involved in clause 87 (which relates to conducting alcohol and drug tests), the Committee is particularly concerned to ensure that this delegation of power is appropriate and, if it is retained, that sufficient legislative safeguards for its use are in place. **The Committee therefore seeks the Minister's advice as to the justification for the proposed approach in relation to these delegations of power, and particularly in relation to clause 87.**

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Minister's response - extract

4. Delegation of legislative powers - the making of Regulations in general, and in relation to Drug and Alcohol tests

The Committee is concerned to ensure that delegation of power is appropriate and that there are legislative safeguards in place.

Response

The regulation making provisions about which the Committee is concerned deal with operational aspects of the maritime industry. Many will be used to give effect to international conventions, which, as noted above, change from time to time in order to offer the highest degree of safety, efficiency and protection of the marine environment.

AMSA is the agency of the Commonwealth that is delegated the role of the Administration in relation to these conventions, and as part of its statutory function, is required to give effect to Australia's international convention obligations (see AMSA Act s 7). Ensuring that it does so is monitored through an international audit regime, and by internal review processes. In addition, in making subordinate legislation AMSA is required to give effect to the *Legislative Instruments Act*, and as a result, all Regulations (and Marine Orders) are subject to Parliamentary scrutiny.

Further, all Regulations are subject to a process of industry consultation, and are considered by the Office of Best Practice Regulation for compliance with cost efficiency and consultation requirements.

In regard to s87 specifically, these matters are left to Regulation as, being an international industry, the range of persons approved to conduct tests, operate equipment and analyse results is necessarily complicated by industry standards, location and interaction with State and Territory laws and processes. The processes outlined above will ensure that appropriate scrutiny is applied.

Committee Response

The Committee thanks the Minister for this response and notes that the information would have been useful in the explanatory memorandum. The Committee also notes that it is highly desirable that explanatory memoranda comment on the use of delegated legislation with detail and specificity relating to each instance of its use.

Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Bill 2012

Introduced into the House of Representatives on 23 May 2012

Portfolio: Sustainability, Environment, Water, Population and Communities

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2012*. The Minister responded to the Committee's comments in a letter dated on 25 June 2012. A copy of the letter and the attachment is attached to this report.

Alert Digest No. 6 of 2012 - extract

Background

This bill amends the *Water Efficiency Labelling and Standards Act 2005* (the Act). The bill implements the response of the Standing Council on Environment and Water to the 2010 review of the Water Efficiency Labelling and Standards scheme.

The bill amends the Act to:

- allow the Commonwealth Minister to determine more details of the WELS scheme, particularly those relating to registration of products, through a disallowable legislative instrument;
- introduce additional compliance and enforcement options; and
- provide for orders to be given to persons that they remedy their non-compliance with the Act.

Delegation of Legislative power

Item 25, proposed subsection 40(1A)

This item enables the regulations to provide for an infringement notice scheme, whereby a person who is alleged to have contravened a civil penalty may pay a penalty as an alternative to proceedings in relation to the civil penalty. **The Committee seeks the Minister's advice as to whether consideration has been given to limiting the amounts payable under such a scheme in line with the approach recommended in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.**

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Minister's response - extract

I understand that the Committee is seeking advice as to whether consideration has been given to limiting the amounts payable under the civil penalty infringement notice scheme in line with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* ("the Guide").

I can confirm that the Guide has been taken into account. The Guide provides that:

*Infringement notice provisions should generally ensure that the amount payable under a notice for a **natural person** is 1/5th of the maximum penalty that a court could impose on the person under the relevant offence provision, but not more than 12 penalty units.*

*Infringement notice provisions should generally ensure that the amount payable under a notice for a **body corporate** is 1/5th of the maximum penalty that a court could impose on a body corporate under the offence provision, but not more than 60 penalty units.*

Consistent with the Guide, the amount payable for an infringement notice is limited to one fifth of the maximum that could be imposed for a contravention of a civil penalty provision. This is the effect of the proposed amendment to subsection 40(2) contained in item 26 of the Bill. The amendment ensures that subsection 40(2) applies to contraventions of civil penalty provisions as well as criminal offences.

Again consistent with the Guide, infringement notices for a natural person or body corporate will not exceed 12 penalty units and 60 penalty units respectively. This is the combined effect of subsection 40(2) and the various civil penalty provisions, which at most set a maximum civil penalty of 60 penalty units for a natural person and 300 penalty units for a body corporate. I trust this information assists your consideration of the Bill.

Committee Response

The Committee thanks the Minister for this detailed response.

Senator the Hon Ian Macdonald
Chair



The Hon Anthony Albanese MP

Minister for Infrastructure and Transport
Leader of the House

Reference: 03265-2012

Senator the Hon Ian McDonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

26 JUN 2012

Dear Senator McDonald

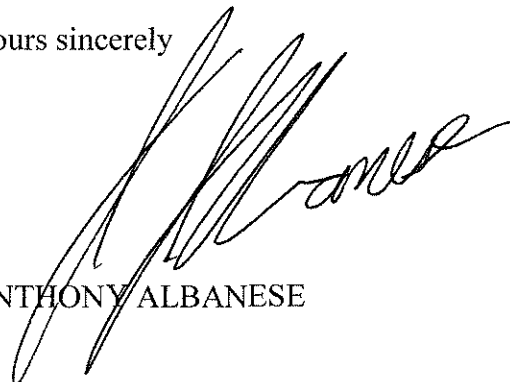
Thank you for correspondence dated 21 June 2012, concerning the Senate Standing Committee for the Scrutiny of Bills Alert Digest No.6 of 2012 (20 June 2012) comments on the Navigation Bill 2012, and the Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (the National Law Bill 2012).

I have provided responses to the matters you have sought my advice on for the National Law Bill 2012 at Attachment A of this letter. The matters you have sought my advice on in relation to the Navigation Bill 2012 are detailed at Attachment B.

A copy of responses will be emailed to the Committee Secretariat at <scrutiny.sen@aph.gov.au> as requested.

I trust this information will address the Committee's concerns.

Yours sincerely



ANTHONY ALBANESE

Senate Standing Committee for the Scrutiny of Bills Alert Digest No.6 of 2012

Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (“National Law”)

1. Delayed Commencement

Clause 2

The delayed commencement is to accommodate possible delays in the jurisdictions enacting their own legislation to apply the National Law. Despite a commitment to ‘best endeavours’, the potential for delays in enacting State legislation has been foreshadowed by a number of jurisdictions, with one jurisdiction advising that passage of their application laws will probably not occur before September 2013.

2. Adequacy of merits review

Clause 16

Given the National Law will be applied to the full extent of the constitutional reach of the Commonwealth, there will be very few State and Territory decisions of the kind to which clause 16 refers. While regulations will address the review of these decisions, the practical consequence is that the decisions will occur very infrequently, if at all.

Furthermore, jurisdictions have indicated an intention to provide for the application of Commonwealth ‘adjectival laws’, including the AAT legislation, in their application laws.

3. Strict liability

Various

National Law offences to which strict liability applies are all limited to more ‘routine’ offences that:

- Have penalties no greater than 60 penalty units;
- Are subject to an infringement notice scheme;
- Only require a physical act or omission to have occurred. A requirement to prove fault would undermine the deterrent effect of the offence; and,
- Are required to ensure the integrity of the regulatory regime.

4. Entry Search and Seizure Powers: various issues

Establishing an oral ‘authorisation’ system

As a result of the operating environment and inherent mobility of domestic commercial vessels, monitoring and compliance activities need to be taken as and when the opportunity presents. Accordingly, the inclusion of an oral ‘authorisation’ system similar to that contained in the Maritime Powers Bill is considered impractical for the exercise of powers in subdivision B of Schedule 1 (powers relating to vessels, exercisable without consent or warrant).

Furthermore, the oral ‘authorisation’ system in the Maritime Powers Bill applies to the full suite of broad powers in that Bill. This system is not considered appropriate for the subset of monitoring, detention and limited seizure powers contained in subdivision B of Schedule 1 of the National Law Bill for the reasons set out in the explanatory memorandum.

Appropriate safeguards to ensure the lawful and proportionate use of search and entry powers without consent or warrant in limited circumstances is achieved by:

- Satisfactory experience and qualification prerequisites that a marine safety inspector must satisfy prior to being appointed and authorised to exercise the compliance and enforcement powers.
- These qualification and experience standards will be consistent with key elements of Public Sector Training Package (PSP04) that deals with compliance and enforcement, investigation and regulatory control. This training package is the recognised Commonwealth standard for persons exercising such powers and functions.
- Safeguards such as reporting requirements including reasons for the exercise when certain compliance and enforcement powers have been exercised without consent or warrant.

Legislative requirement for the Minister to issue guidelines – clause 91

An Instrument of Delegation is currently under development that will detail the required minimum qualifications and experience levels of persons before they may be appointed marine safety inspectors. Instruments of Delegation will be published on the National Regulator website to promote transparency.

These qualification and experience standards will be consistent with key elements of Public Sector Training Package (PSP04) that deals with compliance and enforcement, investigation and regulatory control. This Training package is the recognised Commonwealth standard for persons exercising such powers and functions

5. Delegation of Legislative Power

Clause 162

The civil penalties included in subclause 162(2) are twice the amount of the penalties applicable as criminal sanctions.

The maximum penalty for a breach of a criminal regulation by a body corporate would be 250 penalty units due to the operation of section 4B of the *Crimes Act 1914*, whereas the civil penalty proposed is 500 penalty units. Likewise, for individuals, the civil penalty proposed is 100 penalty units where the criminal penalty under the regulation is 50 penalty units.

The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (“the guide”) states that the appropriate financial penalty under a civil penalty provision will often be higher than the appropriate maximum fine for a criminal offence. This is because there is no criminal sanction and corresponding stigma attached to a civil penalty offence, it is purely a monetary penalty.

The level of civil penalties provided for in clause 162 of the National Law is considered consistent with the guide.

Senate Standing Committee for the Scrutiny of Bills Alert Digest No.6 of 2012

Navigation Bill 2012

1. Broad discretion to impose conditions

AMSA and issuing bodies require the flexibility to consider all the circumstances relevant to the issue of certificates. In some cases, specific but otherwise unexpected circumstances arise that require a regulatory response in order to ensure safety and protection of the marine environment. The imposition of conditions allows for this.

Examples:

- a seafarer is fit for duty but suffers some disability that needs to be recognised in authorising that person to perform those duties. Eg: A condition that prohibits an asthma sufferer from entering confined spaces using breathing apparatus would be appropriate; and,
- a manning determination may be issued in line with criteria in the Regulations, however the operations of the ship need to be specifically addressed. Eg: An offshore industry vessel may require additional deck watch keepers when diving operations are being performed.

The shipping industry are well acquainted with the international standards and systems by which conditions (both permanent and temporary) are applied, so are in a position to know and understand what the requirement will be and how the condition will operate.

2. Delegation of legislative power – Manning determinations

The approach to manning determinations reflects that taken in the current legislation. The matters that will be covered in Regulations will reflect international convention requirements, which are changed from time to time via a tacit amendment process. As a result, setting the requirements as they exist at one point in time in the primary legislation would require legislative amendment to update those requirements.

The shipping industry are well acquainted with the international manning standards that are applied by AMSA in the Regulations, so are in a position to know and understand what the requirement will be.

Example:

The current international standard is contained in International Maritime Organization Assembly Resolution A.890(21).

3. Delegation of legislative power – Drug and Alcohol Regulations

The matters that will be covered in Regulations will reflect international convention requirements, which are changed from time to time via a tacit amendment process. As a result, setting the requirements as they exist at one point in time in the primary legislation would require legislative amendment to update those requirements.

In addition, different limits apply to different crew members at different times, and different requirements exist for drugs and for alcohol. This results in the need to detail an overall framework which is necessarily more complex than the statement of a single limit.

The shipping industry establishes their shipboard operating procedures based on company policy, which is often stricter than the international requirement, and this approach is to be encouraged.

Example:

The current international standard is contained in the Convention on the Standards for Training, Certification and Watchkeeping.

4. Delegation of legislative powers – the making of Regulations in general, and in relation to Drug and Alcohol tests

The Committee is concerned to ensure that delegation of power is appropriate and that there are legislative safeguards in place.

Response

The regulation making provisions about which the Committee is concerned deal with operational aspects of the maritime industry. Many will be used to give effect to international conventions, which, as noted above, change from time to time in order to offer the highest degree of safety, efficiency and protection of the marine environment.

AMSA is the agency of the Commonwealth that is delegated the role of the Administration in relation to these conventions, and as part of its statutory function, is required to give effect to Australia's international convention obligations (see AMSA Act s 7). Ensuring that it does so is monitored through an international audit regime, and by internal review processes. In addition, in making subordinate legislation AMSA is required to give effect to the *Legislative Instruments Act*, and as a result, all Regulations (and Marine Orders) are subject to Parliamentary scrutiny.

Further, all Regulations are subject to a process of industry consultation, and are considered by the Office of Best Practice Regulation for compliance with cost efficiency and consultation requirements.

In regard to s87 specifically, these matters are left to Regulation as, being an international industry, the range of persons approved to conduct tests, operate equipment and analyse results is necessarily complicated by industry standards, location and interaction with State and Territory laws and processes. The processes outlined above will ensure that appropriate scrutiny is applied.



25 JUN 2012

Senator the Hon Don Farrell

Parliamentary Secretary for Sustainability and Urban Water

C12/8381

Senator the Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

RECEIVED

25 JUN 2012

Senate Standing C'ttee
for the Scrutiny
of Bills

Dear Senator Macdonald

Thank you for the letter of 21 June 2012 from the Standing Committee for the Scrutiny of Bills to the Senior Adviser of the Minister for Sustainability, Water, Population and Communities in relation to the Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Bill 2012. The Minister has asked me to reply to your letter as the Bill falls within my portfolio responsibilities.

I understand that the Committee is seeking advice as to whether consideration has been given to limiting the amounts payable under the civil penalty infringement notice scheme in line with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* ("the Guide").

I can confirm that the Guide has been taken into account. The Guide provides that:

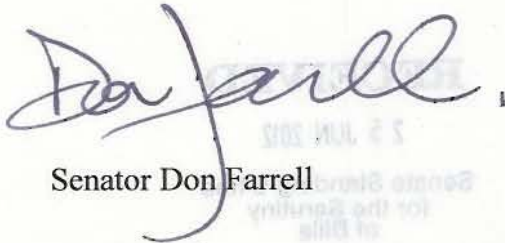
*Infringement notice provisions should generally ensure that the amount payable under a notice for a **natural person** is 1/5th of the maximum penalty that a court could impose on the person under the relevant offence provision, but not more than 12 penalty units.*

*Infringement notice provisions should generally ensure that the amount payable under a notice for a **body corporate** is 1/5th of the maximum penalty that a court could impose on a body corporate under the offence provision, but not more than 60 penalty units.*

Consistent with the Guide, the amount payable for an infringement notice is limited to one fifth of the maximum that could be imposed for a contravention of a civil penalty provision. This is the effect of the proposed amendment to subsection 40(2) contained in item 26 of the Bill. The amendment ensures that subsection 40(2) applies to contraventions of civil penalty provisions as well as criminal offences.

Again consistent with the Guide, infringement notices for a natural person or body corporate will not exceed 12 penalty units and 60 penalty units respectively. This is the combined effect of subsection 40(2) and the various civil penalty provisions, which at most set a maximum civil penalty of 60 penalty units for a natural person and 300 penalty units for a body corporate. I trust this information assists your consideration of the Bill.

Yours sincerely



Senator Don Farrell