

Transport Operations (Marine Safety) and Other Legislation Amendment Bill 2015

Report No. 12, 55th Parliament

Utilities, Science and Innovation Committee

February 2016

Utilities, Science and Innovation Committee

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Abbreviations

AMSA	Australian Maritime Safety Authority
Application Bill	Transport Operations (Marine Safety-Domestic Commercial Vessel National Law Application) Bill 2015
ATSB	Australian Transport Safety Bureau
the Bill and the National Law Bill	Transport Operations (Marine Safety) and Other Legislation Amendment Bill 2015
COAG	Council of Australian Governments
the Committee	Utilities, Science and Innovation Committee
Cwlth	Commonwealth
the Department	Department of Transport and Main Roads
FLPs	fundamental legislative principles
MSQ	Maritime Safety Queensland
National Law	Marine Safety (Domestic Commercial Vessel) National Law, <i>Marine Safety (Domestic Commercial Vessel) National Law Act 2012</i> , Schedule 1
National Law Act	Cwlth, <i>Marine Safety (Domestic Commercial Vessel) National Law Act 2012</i> (National Law)
National Law Bill	Cwlth, <i>Marine Safety (Domestic Commercial Vessel) National Law Bill 2012</i>
NATSB	National Australian Transport Safety Bureau
OQPC	Office of the Queensland Parliamentary Counsel
SLC	Scrutiny of Legislation Committee (former)
TOMPA	<i>Transport Operations (Marine Pollution) Act 1995</i>
TOMSA	<i>Transport Operations (Marine Safety) Act 1994</i>

Glossary

'constitutional gap' vessel	Queensland ships beyond the constitutional reach of the Commonwealth Government due to the fact that the Commonwealth cannot regulate commercial vessels owned by individuals, sole traders, partnerships and other non-corporate entities operating on inland waters.
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Chair's foreword

This Report presents a summary of the Utilities, Science and Innovation Committee's examination of the Transport Operations (Marine Safety) and Other Legislation Amendment Bill 2015.

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

The Committee has unanimously agreed that the Bill be passed.

On behalf of the Committee, I thank those individuals and organisations who lodged written submissions on the Bill. I also thank the Committee's secretariat and the Department of Transport and Main Roads for their assistance.

I commend this Report to the House.



Mr Shane King MP

Chair

February 2016

Recommendation**Recommendation 1****6**

Committee recommends that the Transport Operations (Marine Safety) and Other Legislation Amendment Bill 2015 be passed.

1. Introduction

1.1 Role of the Committee

The Utilities, Science and Innovation Committee is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.¹

The Committee's primary areas of responsibility include:

- Main Roads, Road Safety and Ports
- Energy and Water Supply
- Housing and Public Works
- Science, Information Technology and Innovation.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles (FLPs)
- for subordinate legislation – its lawfulness.

The Transport Operations (Marine Safety) and Other Legislation Amendment Bill 2015 (the Bill) was introduced into the House and referred to the Committee on 27 October 2015. In accordance with the Standing Orders, the Committee of the Legislative Assembly requires the Committee to report to the Legislative Assembly by 5 February 2016.

1.2 Inquiry process

On 29 October 2015, the Committee wrote to the Department of Transport and Main Roads (the Department) seeking advice on the Bill and invited stakeholders and subscribers to lodge written submissions to its inquiry. One [submission](#) from the Australian Maritime Safety Authority (AMSA) was received and [written advice](#) was received from the Department on 27 November 2015 providing detailed information on the Bill and responding to an issue raised in the AMSA submission.

On 2 December 2015, the Committee held a public briefing with representatives from the Department (see Appendix B for witness details).

The submission, the [transcript](#) of the public briefing, and other inquiry-related documents are available on the [Committee's webpage](#).

1.3 Objectives of the Bill

The Explanatory Notes state that the policy objective of the Bill is to ensure that there is a seamless interaction between the Commonwealth's *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (the National Law) and Queensland legislation for the regulation of 'domestic commercial vessels'. Queensland legislation that seeks to regulate *domestic commercial vessels* in relation to registration, licensing and safety matters that the National Law regulates has been of no effect since 1 July 2013. This is because the Commonwealth Act takes precedence over Queensland legislation.

¹ *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

The Bill therefore proposes amendments to the *Transport Operations (Marine Safety) Act 1994* (TOMSA) and other Queensland legislation to recognise the transfer of responsibility for these aspects of *domestic commercial vessels* regulation to the National Law² and ensures that marine safety legislation continues to apply to those vessels Queensland still regulates (that is, recreational vessels and vessels operated by community groups, as well as personalised watercraft such as jet skis.³

1.4 Consultation on the Bill

The Explanatory Notes advise that consultation on the national reforms was previously undertaken by AMSA but do not provide any details regarding consultation with key stakeholders on this Bill.⁴

However, the Explanatory Notes to the Transport Operations (Marine Safety–Domestic Commercial Vessel National Law Application) Bill 2015 (Application Bill), which is being considered concurrently with this Bill, advise that:

- the Department has met with key stakeholders to discuss the proposed amendments in this Bill which will primarily impact on safety management systems for the Department of Education and Training and organisations such as Surf Lifesaving Queensland
- these stakeholders acknowledge the nature of the legislative changes and potential impact that these may have on their ships and regulatory frameworks and indicated a willingness to work with the Department through these changes.⁵

1.5 Should the Bill be passed?

Standing Order 132(1) requires the Committee to determine whether or not to recommend the Bill be passed.

After examination of the Bill, including the policy objectives which it will achieve and consideration of the information provided by departments and stakeholders, the Committee is making a recommendation that the Bill be passed.

Recommendation 1

Committee recommends that the Transport Operations (Marine Safety) and Other Legislation Amendment Bill 2015 be passed.

² Explanatory Notes, 2015:2

³ Public briefing transcript, 2 Dec 2015:1-2

⁴ Explanatory Notes, 2015:7

⁵ Explanatory Notes, Application Bill, 2015:11

2. Background

2.1 Regulation of marine matters

Under Australia's constitutional arrangements, the States, the Northern Territory and the Commonwealth have overlapping power to make laws governing Australia's domestic commercial vessels.

Prior to 2013, each Australian jurisdiction regulated the safe operation of vessels in its own waters. There were eight separate marine safety regulators, each with its own system and collectively administering more than 50 pieces of legislation. Queensland has used its power to legislate with respect to maritime safety by enacting TOMSA and the *Maritime Safety Queensland Act 2002* (MSQ Act).

Marine safety regulation across the nation was not uniform, nor consistently legislated or administered. The Department advised that this often resulted in inconsistent application of safety requirements, vessel survey recognition, safety certification and qualifications/certificates of crew, as well as variations in the level and nature of ongoing monitoring and compliance with safety standards.⁶

2.2 National regulation of safety matters for domestic commercial vessels across Australia

2.2.1 Intergovernmental Agreement

In 2011, an Australian Government's Intergovernmental Agreement was signed by the Council of Australian Governments (COAG) that reflected the joint decision of the Commonwealth, States and territories that the Commonwealth take over the safety regulation of *domestic commercial vessels*. The Department advises that the Agreement:

*... recognises the mutual interests in developing a national system for commercial vessel safety and working cooperatively to achieve this outcome. While the reforms seek to provide a simplified administrative process, there is an equally important objective of delivering improved safety outcomes in terms of less fatalities and serious injuries arising from the operations of commercial vessels.*⁷

Under the Agreement, the Queensland Government is bound to undertake certain actions and make financial contributions to support transition to the national system.⁸

2.2.2 Introduction of the National Law

The implementation of the Agreement resulted in the introduction of the National Law which is contained in schedule 1 of the Commonwealth's [Marine Safety \(Domestic Commercial Vessel\) National Law Act 2012](#) and commenced on 1 July 2013. The National Law introduced a national system for regulating domestic commercial vessels, which are defined as vessels 'for use in connection with a commercial, governmental or research activity'.⁹

The Explanatory Notes to the Bill advise that, as a national initiative, the Commonwealth was responsible for the consultation on the national reforms and that consultation on the national reforms previously undertaken by AMSA was generally positively received by the public and marine industry.¹⁰

⁶ Department written brief, 27 Nov 2015:2

⁷ Department written brief, 27 Nov 2015:2

⁸ Department written brief, 27 Nov 2015:2

⁹ The National Law, [Marine Safety \(Domestic Commercial Vessel\) National Law Act 2012](#), schedule 1:section 7

¹⁰ Explanatory Notes, Application Bill, 2015:11

AMSA's public engagement activities included consultation on the Regulatory Plan outlining the proposed elements of the Commonwealth's Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (National Law Bill (Cwth)), a detailed [discussion paper](#)¹¹ providing an overview of the legislation and the [National Law Bill \(Cwth\)](#) itself.

Comments and feedback from 19 formal public submissions received by AMSA were considered and incorporated into the National Law Bill as appropriate.¹² AMSA released a [consultation feedback report](#) in May 2012 detailing the responses to these submissions.¹³

The Department advises:

- domestic commercial vessels work predominately around the Australian coastline, vary widely in nature and purpose and include vessels such as fishing craft, passenger and trading boats and a wide range of other small and medium sized vessels
- the National Law does not regulate vessels which operate internationally or foreign vessels, as they are regulated under the *Commonwealth Navigation Act 2012* and also does not regulate recreational vessels which continue to be regulated under State legislation.¹⁴

*The overarching policy objective of the National Law is to provide for the consistent regulation of the domestic commercial vessel industry across Australia. This is to ensure that, irrespective of where a commercial vessel is in Australian waters, it is required to meet the same nationally agreed safety standards. This means, for example, that those who design and build commercial vessels in one jurisdiction do not need to have the vessels re-certified for use in another jurisdiction. It also means that companies which operate nationally and have vessels in different jurisdictions do not need to deal with different regulatory requirements to manage their fleet and crew.*¹⁵

Legislation based on the National Law model application provisions has been introduced in New South Wales, Victoria, South Australia, Tasmania and the Northern Territory. The Explanatory Notes explain that the effect of the legislation in all these jurisdictions is to apply the Commonwealth Marine Safety National Law Act as a law of those jurisdictions.¹⁶

2.3 Application of the National Law in Queensland

Pursuant to Australian constitutional practice, once the National Law commenced, it assumed precedence over Queensland's laws to the extent of any inconsistency. Additional Commonwealth laws (for example, those relating to the investigation and prosecution of criminal offences, administrative appeals and Ombudsman complaints/investigations) are applied and displace State based laws.¹⁷

The National Law has therefore regulated safety matters for the vast majority of Queensland's domestic commercial vessel fleet (comprising approximately 5,000 ships) since July 2013 and for those Queensland vessels already covered by the National Law, the passage of Queensland's National Law Application Bill would have no practical effect.

¹¹ AMSA, [Discussion Paper](#): Marine Safety (Domestic Commercial Vessel) National Law Bill 2012, Dec 2011

¹² Explanatory Notes, Application Bill, 2015:11

¹³ AMSA, [Consultation Feedback Report](#), May 2012 [accessed 20 Jan 2016]

¹⁴ Explanatory Notes, 2015:1

¹⁵ Explanatory Notes, 2015:1

¹⁶ Explanatory Notes, Application Bill, 2015:11

¹⁷ Department written brief, 27 Nov 2015:2

However, there are a small number of ships beyond the constitutional reach of the Commonwealth (approximately 5% of Queensland's commercial fleet)¹⁸ due to the fact that the Commonwealth cannot regulate commercial vessels owned by individuals, sole traders, partnerships and other non-corporate entities operating on inland waters. Therefore, these 'constitutional gap' vessels are currently still regulated under Queensland legislation. Examples of 'constitutional gap' vessels are sightseeing ferries operating on an inland lake, or fishing vessels that operate exclusively on inland waterways such as eel fishers or seafood harvesting vessels. There are nine commercial vessels, and six operators, that currently fall within this category.¹⁹

The intent of the Intergovernmental Agreement was for all commercial vessels to be regulated by the Commonwealth under the National Law and therefore the Agreement provides that each jurisdiction is to apply the National Law within its jurisdiction. The Department advises that to maintain separate State-based regulatory schemes for such a small percentage of the commercial vessel fleet would require an unnecessary duplication of administration and legislation and could result in confusion for ship owners and operators and for enforcement officers. The passage of this Bill will ensure that the National Law regulates all *domestic commercial vessels* that operate in Queensland.²⁰

The principal objective of the Application Bill, which is being considered by the Queensland Parliament concurrently with this Bill, is to apply the National Law as a law of this State to transfer the regulation of Queensland's 'constitutional gap' vessels to the Commonwealth. The Committee's report on the Application Bill can be found on the Committee's website.

2.3.1 Interaction between Commonwealth and Queensland legislation

There are some vessels that the Commonwealth has deliberately excluded from the National Law that will continue to be regulated under existing State maritime legislation. These include vessels associated with marine studies in schools and surf lifesaving vessels, as well as some vessels associated with organisations that do not meet the Commonwealth's definition of a trading entity. In addition, the National Law explicitly states that particular marine matters for domestic commercial vessels will remain with the State jurisdiction to regulate such as the transportation of dangerous goods, marine pollution, and waterways management.²¹

TOMSA, as Queensland's primary maritime statute, will therefore continue to govern some aspects of maritime operations relating to domestic commercial vessels and all aspects relating to recreational vessels.

¹⁸ Explanatory Notes, Application Bill, 2015:3

¹⁹ Public briefing transcript, 2 Dec 2015:3

²⁰ Explanatory Notes, Application Bill, 2015:1-2

²¹ Department written brief, 27 Nov 2015:1

3. Examination of the Bill

3.1 Introduction

The policy objective of this Bill is to ensure that there is a seamless interaction between Commonwealth and Queensland legislation for the regulation of domestic commercial vessels. It proposes to amend existing State legislation so there is no overlap in the regulation of the same matters the National Law governs for domestic commercial vessels and removes redundant legislation no longer required due to the enactment of the National Law for domestic commercial vessels (such as licensing and registration of commercial vessels and fishing ships).²²

The Bill also proposes to make consequential amendments to ensure Queensland's marine safety legislation continues to apply to all Queensland recreational vessels and those vessels explicitly excluded under the National Law, and make minor amendments to ensure the correct interaction between the national and State legislation.²³

3.2 Proposed amendments to TOMSA

3.2.1 Exclusion of commercial ships regulated under the National Law

The Bill incorporates a general provision which states that the provisions in TOMSA do not apply to a domestic commercial vessel to the extent that the National Law applies to that vessel (new section 14 as inserted by clause 8). This provision reflects the constitutional principle that Commonwealth legislation takes precedence over State legislation to the extent of any inconsistency.²⁴

Clause 4 amends section 3 (Objectives of the Act) to reflect that certain provisions of the Act will no longer apply to commercial ships and will only apply to ships used only for private recreation and other ship specifically excluded from the National Law.

3.2.2 New term - Queensland regulated ship

Clause 7 incorporates a new defined term, *Queensland regulated ship*, which includes recreational ships and *other Queensland regulated ship*, which includes those ships that have been excluded from the definition of domestic commercial vessel under the National Law. The most common examples of ships that fall into the second category are surf lifesaving vessels and those owned by schools. The reason that the National Law does not regulate these vessels is that they are generally considered to be of a lower safety risk due to the type and area of their operations.²⁵

At the public briefing the Department explained that school vessels are considered a special class because of the safety issues with school children and also because they are operated by a State government department and that Surf Life Saving Queensland also faces similar safety issues:

Our advice to government was that they are a higher risk than a normal recreational vessel. So we have created the class of vessel called the Queensland registered vessel [Queensland regulated ship]. They will still be coming under a recreational banner, but we can require under the registration requirements a higher level of safety management system to ensure that for the parents of the kids on those boats there is an extra layer of safety above and beyond the recreational boat level.²⁶

²² Department written brief, 27 Nov 2015:1

²³ Department written brief, 27 Nov 2015:6

²⁴ Explanatory Notes, 2015:3

²⁵ Explanatory Notes, 2015:3

²⁶ Public briefing transcript, 2 Dec 2015:4

The Department has met with the Department of Education and Training and organisations such as Surf Lifesaving Queensland to discuss the proposed safety management systems for their recreational vessels and advises that these stakeholders acknowledge the nature of the legislative changes and potential impact that these may have on their ships and regulatory frameworks and have indicated a willingness to work with the Department through these changes.²⁷

The Department advises that these amendments will clarify that the provisions within the TOMSA that deal with registration, licensing and general safety obligations only apply to Queensland regulated ships. Provisions that are to continue to have broad application to all ships, including domestic commercial vessels, will continue to use the existing generic term, ship.²⁸

3.2.3 Transitional provisions

Clause 60 proposes to insert a new part 19, division 7 which contains transitional provisions which cater for:

- the reclassification of commercial ships excluded from the operation of the National Law to being other Queensland regulated ships under the Act
- the fact that matters in relation to the operation of these vessels, that are currently dealt with by specific regulatory provisions, will be reflected by means of a deemed condition of their existing registration.

The Explanatory Notes provide:

*This will enable these ships to be regulated according to the same operating requirements until the ships' respective registrations cease. At such time, relevant matters will be considered prior to issuing a new registration as a Queensland regulated ship under the amended legislation.*²⁹

3.2.4 Marine safety strategies

Clause 11 proposes to omit part 2 (Marine safety strategies) which deals with the development and approval of marine safety strategies. The Explanatory Notes state that:

*As the chief executive is committed to developing and publishing marine safety strategies, it is unnecessary to impose a legislative obligation and, as a result, part 2 is being omitted.*³⁰

The Department further advises that the removal of these provisions is similar to the removal of Maritime Safety Queensland's (MSQ) previous legislative requirement to develop and publish a strategic plan, which was removed from legislation in 2010 as part of MSQ's further integration into TMR and that the existing provision stems from a time when MSQ operated as a statutory body.³¹

3.2.5 Boards of inquiry

Clause 45 of the Bill proposes to remove part 12 of the Act (Boards of inquiry) which contains provisions that deal with the establishment, role and management of boards of inquiry. This part enables the minister to convene an independent board to conduct a review into serious marine incidents and examine the likely causal factors leading to the incident. Any board of inquiry into a marine incident is in addition to an investigation by MSQ. MSQ as the State marine safety regulator, is charged with the power and function to handle all investigations in relation to incidents and safety matters. The national Australian Transport Safety Bureau (ATSB) may also choose to conduct an investigation.

²⁷ Explanatory Notes, Application Bill, 2015:11

²⁸ Explanatory Notes, 2015:3

²⁹ Explanatory Notes, 2015:18

³⁰ Explanatory Notes, 2015:10

³¹ Department written brief, 27 Nov 2015:7

Since the commencement of the National Law, incidents involving commercial vessels are being investigated by AMSA, as the national regulator for domestic commercial vessels. ATSB may also decide to launch its own, separate and independent investigation.

In addition to MSQ's regulatory powers to investigate, provision in the *Transport Operations (Marine Pollution) Act 1995* (TOMPA) also provide shipping inspectors with investigate powers, similarly, Queensland's workplace health and safety legislation confers powers on shipping inspectors to investigate contraventions under the *Work Health and Safety Act 2011*. Those marine incidents involving a 'reportable death' may be investigated by the Coroner under the *Coroner's Act 2003* and investigations may also be undertaken by the Queensland Police Service into the circumstances surrounding a marine incident.³²

The Department advises that the provisions relating to boards of inquiry are being removed as there are multiple alternative avenues available for investigation and that:

*In practice, MSA works collaboratively with other state and national agencies to ensure wherever possible areas identified for improvement and/or recommendations from safety investigations can be implemented to improve marine safety outcomes.*³³

3.2.6 Other amendments to TOMSA

The Bill also deletes provisions from the TOMSA that only had effect for domestic commercial vessels and have no further ongoing application to Queensland regulated ships and clarifies certain provisions, for example, proposed new section 3(4) clarifies that certificates of survey will no longer be relevant to Queensland regulated ships. It also makes other general consequential amendments.

3.3 Proposed amendments to other legislation

The Bill contains consequential amendments to the marine pollution law TOMPA, the *Maritime Safety Queensland Act 2002*, the *Criminal Confiscation Act 2002* and the *Transport Operations (Road Use Management) Act 1995*. For example, while the definition of a declared ship in TOMPA remains the same whether it is a domestic commercial vessel or regulated under Queensland law³⁴, Clause 71 of the Bill amends section 49 of TOMPA to reflect the fact that the maximum number of persons a domestic commercial vessel is permitted to carry is provided for under the National Law.³⁵

³² Department written brief, 27 Nov 2015:7

³³ Department written brief, 27 Nov 2015:7

³⁴ Department, Public briefing transcript, 2 Dec 2015:3

³⁵ Explanatory Notes, 2015:20

4. Compliance with the *Legislative Standards Act 1992*

4.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The Committee has reviewed potential FLP issues in clauses 7, 20, 25, 26, 32, 47, 49, 55, 60 and 72.

4.1.1 Rights and liberties of individuals

Rights and liberties of individuals - Section 4(2)(a) Legislative Standards Act 1992

Abrogation of statutory rights

Under the existing TOMSA (Part 5, Division 4) people can be accredited to act as ship designers, ship builders and marine surveyors to issue certificates of compliance. As certificates of compliance were only in relation to ships that are now *domestic commercial vessels* under the National Law, Queensland ceased issuing these accreditations from July 2013 when the regulation of matters relating to *domestic commercial vessels* was moved to the National Law. Accordingly, clause 32 removes these provisions from the Act.

There is a potential FLP issues as the Office of the Queensland Parliamentary Counsel (OQPC) states the principle that:

*A change to legislation that adversely affect rights and liberties previously granted under legislation needs to be justified.*³⁶

The Explanatory Notes state that:

At the time the National Law commenced, transitional provisions in the National Law enabled Queensland accredited ship designers, builders and marine surveyors to be automatically recognised as personnel able to perform survey-type functions under the National Law. These personnel will have until January 2016 to become formally appointed as marine surveyors under the National Law in order to continue performing the functions that they have been able to perform under the national transitional provisions since 1 July 2013.

...

*It is believed the 2.5 year transitional period, aimed at assisting these accredited personnel to continue performing functions they previously performed under Queensland legislation, adequately takes into account the rights and liberties of these people.*³⁷

Committee comment

The Committee notes the advice from the Department of Transport and Main Roads that the transitional provisions in the National Law have provided an adequate transitional period for the accreditation of ship designers, ship builders and marine surveyors previously approved under TOMSA. It therefore considers, that on balance, the removal of the accreditation provisions from TOMSA has sufficient regard to rights and liberties of businesses and individuals.

³⁶ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*:106

³⁷ Explanatory Notes, 2015:5

Power of shipping inspectors

Currently, TOMSA provides shipping inspectors with a range of powers necessary to regulate and enforce the requirements of the Act. For example, section 175 of the Act currently provides the power for a shipping inspector to require a person to produce a document that must be kept by the person under the Act.

The Department advises that with the commencement of the National Law, documentation relating to registration, licensing and other general safety matters for *domestic commercial vessels* is no longer required to be kept under TOMSA. Relevant documentation is now dealt with under the National Law. Accordingly, there will be occasions when a shipping inspector needs to inspect a document issued under National Law for the purpose of monitoring compliance with matters that continue to be regulated under Queensland legislation. For example, pilotage matters in relation to *domestic commercial vessels* continue to be regulated under Queensland legislation. A pilotage exemption may be granted conditional upon a person holding the relevant master's certificate. Such a certificate is issued under the National Law, rather than under Queensland legislation. Clauses 55 and 72 are therefore making amendments to allow a shipping inspector to require a person to produce a document required to be kept by the person under the National Law. This is only if that document is relevant to a shipping inspector's function under the Queensland legislation.³⁸

The Explanatory Notes state:

*It is believed that sufficient regard has been given to an individual's rights and liberties as the requirement to produce documents only relates to those that are issued as part of a regulatory scheme. These documents are necessary to ensure compliance with legislative requirements. A person will still have recourse to the existing section 175(2) of the Transport Operations (Marine Safety) Act 1994 and 89(2) of the Transport Operations (Marine Pollution) Act 1995 which provide that a person does not need to produce the requested document if that person has a reasonable excuse for not producing it. Prior to the commencement of the National Law, all relevant documentation relating to the regulation of domestic commercial vessels was able to be requested under the Queensland Acts. The amendment simply reflects the fact that matters relating to the regulation of safety for domestic commercial vessels are now under the National Law.*³⁹

There is also an extension of the powers of inspectors under other proposed provisions of the Bill, namely clauses 47 and 49.

The Explanatory Notes state:

*Similarly, clause 47 amends section 155 of the Transport Operations (Marine Safety) Act 1994 to extend the powers under part 13 of the Act to places of business mentioned in a document issued by the National Regulator. Clause 49 amends section 162 of the Act to allow the power to enter, without consent or warrant, places mentioned in a document issued by the National Regulator. These amendments of shipping inspectors' powers are purely consequential changes to reflect that the documents that were previously issued under the Transport Operations (Marine Safety) Act 1994 are now issued under the National Law.*⁴⁰

Committee comment

The Committee notes the advice from the Department of Transport and Main Roads regarding clauses 47, 49, 55 and 57 in relation to the powers of shipping inspectors, and considers that, on balance, the provisions have sufficient regard to the rights and liberties of businesses and individuals.

³⁸ Explanatory Notes, 2015:5

³⁹ Explanatory Notes, 2015:6

⁴⁰ Explanatory Notes, 2015:6

Penalties

The OCPC provides that a penalty should be proportionate to the offence. The OQPC Notebook states, “Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other”.⁴¹

Clause 20 of the Bill provides that it is an offence for a competent person to issue a survey report about a ship’s seaworthiness that is not correct in every material particular. The offence provision carries a maximum penalty of 500 penalty units or imprisonment for 1 year. The offence provision replaces the current offence provision in section 40 which is aimed at preventing accredited ship designers, builders or marine surveyors from making a declaration in a certificate of compliance that is not correct in every particular.

The Explanatory Notes state:

*The level of the penalty for the revised offence is the same as the existing offence. It is believed that it is proportionate to the seriousness of the offence and is consistent with other comparable offences...*⁴²

Clause 25 reinserts the offence currently contained in section 43 into a new section 45 following a restructure of the Act. The offence is for a pilot who has the conduct of a ship causing it to be operated unsafely. The maximum penalty is 500 penalty units or imprisonment for 1 year. Clause 26 reinserts the offences relating to contravention of registration obligations into section 57. The maximum penalty for these offences is 200 penalty units.

The Explanatory Notes state:

*It is believed that the penalties are proportionate to the seriousness of the offences and are consistent with the penalties for similar offences within the Act. As noted in section 34(j) of the Act, the maximum penalties are substantial if a person is found contravening the Act. This is due to the seriousness of the offences contained within the Act.*⁴³

Clause 55 amends the offence in section 175(2) of the Act to clarify the time within which a person is required to produce a document to a shipping inspector who has boarded a ship under the Act.

The Explanatory Notes state:

*It is believed that the rights and liberties of individuals are adequately taken into account, as only documents that are required under the Act to be kept on a ship must be produced to the inspector at the time that the request to produce is made by the shipping inspector. In all other instances, documents required to be kept under the Act which are requested may be produced at a ‘reasonable time and place nominated by the shipping inspector’. The maximum penalty for failure to comply with the provision is 40 penalty units which is proportionate to the seriousness of the offence.*⁴⁴

Committee comment

The Committee notes the advice from the Department and considers that, on balance, the offences and associated penalties in the Bill are proportionate to the seriousness of the offences and are consistent with other offences in the Act.

⁴¹ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*:120

⁴² Explanatory Notes, 2015:6

⁴³ Explanatory Notes, 2015:6

⁴⁴ Explanatory Notes, 2015:6-7

4.1.2 Institution of Parliament

Amendment of an Act only by another Act – Section 4(4)(c) Legislative Standards Act 1992

Clause 60 of the Bill inserts a transitional regulating-making power (new section 256) to allow or facilitate the change from the operation of TOMSA as it exists immediately prior to commencement of the amendments in this Bill to the operation of the Act following the commencement of the amendments.

Clause 7 of the Bill defines a recreational ship to be a ship that is used only for private recreation or a tender to such a ship. The clause also provides that a regulation may prescribe circumstances in which a ship can be taken to be used only for private recreation. The provision potentially allows the Act's application to be varied by regulation.

There is a potential FLP issue as it is considered that a Bill should only authorise the amendment of an Act by another Act.⁴⁵ A clause in an Act, which enables the Act to be expressly or impliedly amended by subordinate legislation or executive action is defined as a Henry VIII clause. The former SLC's approach to Henry VIII clauses was that if an Act was purported to be amended by a statutory instrument (other than an Act) in circumstances that were not justified, the former Scrutiny of Legislation Committee (SLC) would voice its opposition by requesting that Parliament disallow the part of the instrument that breached the FLP requiring legislation to have sufficient regard for the institution of Parliament.⁴⁶ The SLC considered the possible use of Henry VIII clauses in the following limited circumstances:

- to facilitate immediate executive action
- to facilitate the effective application of innovative legislation
- to facilitate transitional arrangements
- to facilitate the application of national scheme legislation.⁴⁷

The OQPC Notebook explains that the existence of these circumstances does not automatically justify the use of Henry VIII clauses, and, if the Henry VIII clause does not fall within any of the above situations, the SLC classified the clause as 'generally objectionable'.⁴⁸

The Explanatory Notes state (in relation to clause 60):

The consequential amendments required to the Transport Operations (Marine Safety) Act 1994 as a result of the introduction of the National Law are complex....It is essential that the amendments clarify which provisions within the Transport Operations (Marine Safety) Act 1994 apply to all ships connected to Queensland including domestic commercial vessels, and which apply only to ships that are regulated only in Queensland.

It should be noted that the Transport Operations (Marine Safety) Regulation 2004, which is a significant component of maritime regulation in Queensland, is currently under review and, due to its staged expiry under the Statutory Instruments Act 1992, is currently being rewritten.

Given the complexity of the legislative task...it is appropriate to include a transitional regulation-making power. This will ensure that any additional matters that may arise can be dealt with in a timely manner.⁴⁹

⁴⁵ *Legislative Standards Act 1992*, section 4(4)(c).

⁴⁶ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*:159

⁴⁷ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*:159

⁴⁸ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*:159; Alert Digest 2006/10,:6, paras 21-24; Alert Digest 2001/8:28, para 31

⁴⁹ Explanatory Notes, 2015:4

In this case, the scope of the power is limited to making regulations that are of a transitional or savings nature, where they are necessary to facilitate the transition from the unamended Act to the operation of the amended Act. The transitional regulation must also declare that it is a transitional regulation, and it must expire 1 year after commencement.

In relation to clause 7, the Explanatory Notes state:

Given the significant number of activities in which marine vessels can be engaged...it is important to ensure the legislation provides a flexible approach. The regulation-making power will allow the boundaries of what constitutes private recreation to be clarified and developed in a timely manner. In addition, when determining whether a ship is a recreational ship, it may be appropriate to disregard some temporary or very limited non-recreational usage and the regulation can provide for this.⁵⁰

In relation to regulation-making powers in the Bill arising out of the re-insertion of sections 56, 60 and 126(3)(b) of TOMSA, the Explanatory Notes state:

As a result of the National Law, these provisions [in the Transport Operations (Marine Safety) Act 1994] must be updated....The re-insertion of these provisions, amended to reflect the changes arising from the National Law, is simply a legislative process and does not raise any new issues relating to the fundamental legislative principles.⁵¹

Committee comment

Notwithstanding the former SLC’s objections to the use of Henry VIII clauses, the Committee considers that the limited scope of the regulation making power, and subsequent disallowance powers in clauses 7 and 60 of this Bill, provide sufficient regard to the institution of Parliament.

4.2 Table of proposed new or amended offence provisions

Clause	Offence	Proposed maximum penalty
20	Amendment of s40(1) Failure of a competent person who issues a survey report for a ship to ensure that each statement made in the report about the ship’s seaworthiness is correct in every material particular.	500 penalty units or imprisonment for 1 year
25	New s45(1) Unsafe operation of a ship by the ship’s pilot.	500 penalty units or imprisonment for 1 year
	New s45(3) Contravention of subsection (1) [unsafe operation of a ship] causing the death of, or grievous bodily harm to, a person [here the pilot commits an indictable offence and is liable to a maximum penalty of 5,000 penalty units or imprisonment for 2 years].	5,000 penalty units or imprisonment for 2 years

⁵⁰ Explanatory Notes, 2015:4

⁵¹ Explanatory Notes, 2015:4

26	Replacement of s57(1) The owner or master of a ship must not operate the ship if the ship is required to be registered, but is not registered.	200 penalty units
	Replacement of s57(2) If a ship is registered as a recreational ship, the ship's owner or master must not operate the ship other than as a recreational ship or as otherwise provided for under a regulation.	200 penalty units
	Replacement of s57(3) If a ship is registered as another Queensland regulated ship, the ship's owner or master must not operate the ship for private recreation other than as provided for under a regulation.	200 penalty units
	Replacement of s57(4) If a ship is registered on conditions, the owner or master must not operate it in contravention of the conditions.	200 penalty units
29	Amendment of s61(1) Operating as a ship's master without the appropriate licence.	40 penalty units
	Amendment of s61(2) Acting as a crew member of a ship without the appropriate licence. [Penalty change]	
30	New s61C Conduct of a ship as the ship's pilot without the appropriate licence.	40 penalty units
55	Amendment of s175(2) The person must, unless the person has a reasonable excuse, produce the document— (a) if the shipping inspector has boarded a ship under section 165(1) and the document is required to be kept on the ship under this Act, an exemption given under section 18A or the national law—immediately after the shipping inspector makes the requirement; or (b) otherwise—at a reasonable time and place nominated by the shipping inspector when making the requirement.	40 penalty units

4.3 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* relates to Explanatory Notes. It requires that an Explanatory Note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an Explanatory Note should contain.

Committee comment

The Committee has reviewed the Explanatory Notes tabled with the introduction of the Bill and considers the Notes are fairly detailed and contain the information required by Part 4 of the *Legislative Standards Act 1992* and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins with the following exception.

The Committee suggests that the Consultation section on page 7 should have included the results of consultation with key stakeholders (Department of Education and Training and Surf Lifesaving Queensland) which was provided in the Consultation section of the Explanatory Notes to the Transport Operations (Marine Safety – Domestic Commercial Vessel National Law Application) Bill 2015 and in the Department's written brief.⁵²

⁵² Explanatory Notes, Application Bill, 2015:1; Department written brief, 27 Nov 2015:7

Appendix A – Submission

Sub #	Submitter
001	Australian Maritime Safety Authority

Appendix B – Department public briefing list of witnesses

Name	Title
Dr Graham Fraine	Deputy Director-General, Customer Services, Safety and Regulation, Department of Transport and Main Roads
Mr Patrick Quirk	General Manager, Maritime Safety Queensland, Department of Transport and Main Roads