Maritime Powers Bill 2012

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Maritime Powers Bill 2012

Date introduced: 30 May 2012
House: House of Representatives
Portfolio: Attorney-General

Commencement: The substantive clauses of the Bill (clauses 3 to 122) commence on a day to be fixed by Proclamation or twelve months and one day from Royal Assent, whichever is earlier.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Bill is to consolidate and harmonise the Commonwealth’s maritime enforcement regime by bringing powers currently available under a number of separate Acts together in a single Act.

The Maritime Powers (Consequential Amendments) Bill 2012 (Consequential Amendments Bill), introduced at the same time, will repeal powers in several other Acts that overlap with those in the Bill.

Background

Australia’s maritime security arrangements are not straightforward. The complexity of the arrangements is evident in the 192-page Guide to Australian Maritime Security Arrangements (GAMSA), which was first published in 2009 to ‘provide a common reference point on the arrangements to enhance the management of security in Australia’s maritime domain.’ The Bill represents the latest step towards rationalising those arrangements at a Commonwealth level.

Australia’s primary maritime law enforcement organisation, Border Protection Command (BPC, then Joint Offshore Protection Command) was established in 2005 in response to a recommendation of

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the Taskforce on Offshore Maritime Security.² The Taskforce recognised that both the Australian Customs and Border Protection Service (Customs) and the Australian Defence Force (ADF) have significant offshore maritime patrol, response and interdiction capabilities and recommended that a coordinated Australian Government agency take responsibility for offshore maritime security.³ BPC is staffed by personnel from Customs, the ADF, the Australian Fisheries Management Authority (AFMA) and the Australian Quarantine and Inspection Service and utilises Customs and ADF assets.⁴

The Australian Labor Party (ALP) went to the 2007 election with a policy of establishing a Department of Homeland Security and, within it, an Australian Coastguard responsible for a broad range of maritime responsibilities, including law enforcement, coastal surveillance and intelligence gathering operations.⁵ The establishment of an Australian Coastguard was also supported by the Australian Greens at the time, in particular to replace military personnel and equipment in coastal policing.⁶ That policy was set aside following the outcomes of the 2008 Review of Homeland and Border Security conducted by Mr Ric Smith (the Smith Review). The report concluded that while the Government could choose to re-badge BPC as a coastguard, ‘the current substantive arrangements should be retained and built upon rather than revamped.’⁷

The Smith Review found that while the existing arrangements for maritime enforcement were generally working well, there was room for improvement in a number of areas, including ‘scope to streamline the legal framework for maritime enforcement activity.’⁸

**Basis of policy commitment**

The Government announced the development of reforms to provide ‘a unified and comprehensive suite of powers’ for maritime law enforcement on 15 September 2009.⁹ The Bill is consistent with the Labor Government’s ‘all-hazards approach’ to national security and its deregulation agenda.

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⁸ Ibid.
⁹ R McClelland (Attorney-General) and B O’Connor (Minister for Home Affairs), Reform of maritime enforcement legislation, media release, 15 September 2009, viewed 18 June 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1024541%22

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Committee consideration

The Bill has been referred to the House of Representatives Standing Committee on Social Policy and Legal Affairs for inquiry and report by 21 September 2012. Details of the inquiry are at:


It has also been referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 20 August 2012. Details of the inquiry are at:


The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has examined the Bill according to its terms of reference and made several comments in its Alert Digest No. 6 of 2012. These comments are referred to at relevant points throughout this Bills Digest.

Financial implications

The Explanatory Memorandum states that the financial implications of implementing the Bill, specifically the development of new operational guidelines and training, will be absorbed within existing resources. 10

Main issues

The reader is also referred to the Key provisions section of this Bills Digest for additional analysis of issues raised by certain parts of the Bill.

Rationalisation of existing powers

Commonwealth responsibility for Australia’s maritime domain has increased substantially since 1967, when it commenced coastal civil surveillance in the newly declared 12 nautical mile fishing zone. 11 Commonwealth agencies are now responsible for the enforcement of a broad range of laws in the maritime domain, including but not limited to illegal fishing, customs, migration, quarantine,


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environmental protection and trafficking of illicit goods. However, legislation governing enforcement has tended to be agency or issue-specific, despite similarities in the powers required. The Bill seeks to rationalise the Commonwealth’s maritime enforcement regime by providing a single set of powers that can be used by a range of agencies to enforce both Australia’s maritime laws and international agreements with a maritime aspect. The powers will be exercisable by members of the ADF, Customs officers, members and special members of the Australian Federal Police (AFP) and others appointed as maritime officers.\footnote{A special member of the AFP is someone appointed as such by the Commissioner of the AFP under section 40E of the Australian Federal Police Act 1979 (AFP Act). Special members are not AFP employees. A person appointed as a special member has all the powers and duties conferred or imposed on special members by the AFP Act or another Act or specified in the instrument of appointment}

Announcing the development of this Bill in 2009, the then Attorney-General, Robert McClelland, explained that operational agencies were currently using maritime powers spread across at least 35 separate Commonwealth Acts.\footnote{Ibid.} He stated that the differences in the types of powers in each Act, the form of those powers and the associated procedures had the potential to create:

- operational problems for agencies operating in the maritime environment
- legal uncertainty if the exercise of powers is challenged in court and
- policy difficulties in making sure enforcement remains up to date and consistent.\footnote{Ibid.}

The Attorney-General, Nicola Roxon, reiterated the difficulties associated with powers being spread across so many Acts in her second reading speech for this Bill.\footnote{N Roxon (Attorney-General), ‘Second reading speech: Maritime Powers Bill 2002’, House of Representatives, Debates, 30 May 2012, pp. 8–9, viewed 20 June 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F4a17e30d-c43b-48b9-83ed-4280fc00314c%2F0028%22} However, the accompanying Consequential Amendments Bill amends only five of those Acts as a result of this Bill. Four of the five, in particular the Customs Act 1901, the Environmental Protection and Biodiversity Conservation Act 1999, the Fisheries Management Act 1991 and the Migration Act 1958, are among the six Acts listed in the GAMSA as the ‘principal Commonwealth offshore enforcement provisions’.\footnote{BPC, Guide to Australian maritime security arrangements, op. cit., p. 10.} No amendments will be made to the remaining two Acts listed in the GAMSA, the Quarantine Act 1908 and the Defence Act 1903 (Offshore Division, Part IIIAAA), or the many other Acts (on the basis of the Attorney-General’s speech, at least 30) containing maritime enforcement powers. The Government has not given any indication in the material accompanying the Bill that there are plans for further consolidation of laws governing maritime enforcement.

Authorisation of coercive powers

The Scrutiny of Bills Committee has produced two significant reports on entry, search and seizure powers, the first in 2000 and another in 2006. In its 2006 report, the Committee recommended that:
Entry and search without a warrant should only be authorised in very exceptional circumstances and only after avenues for obtaining a warrant by telephone or electronic means have proved absolutely impractical in the particular circumstances. In such circumstances, senior executive authorisation for the exercise of such powers should be required together with appropriate reporting requirements. The Guide [to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers] should be amended to reflect this.17

The Government accepted this recommendation in part, stating that it considered there are circumstances in which it is necessary for entry and search powers to be exercised without a warrant. It agreed that in those circumstances, appropriate safeguards should be in place to ensure sufficient accountability.18

The powers available in Part 3 of the Bill, including boarding, search and seizure provisions, are exercisable without warrant under an authorisation made under Part 2.19 Under clause 16, authorisations under Division 2 of Part 2 may be given by:

- the most senior maritime officer who is in a position to exercise any of the maritime powers in person
- the most senior member or special member of the AFP who is in a position to exercise any of the maritime powers in person
- the most senior maritime officer on duty in a duly established operations room
- the person in command of a Commonwealth ship or Commonwealth aircraft from which the exercise of powers is to be directed or coordinated or
- a person appointed in writing by the Minister (or delegate).

The purposes for which the exercise of powers may be authorised are set out in clauses 17–22.

There is no requirement for an authorising officer to attempt to obtain a warrant by telephone or other electronic means before making an authorisation.

The Explanatory Memorandum notes the usual requirements for powers to be exercised under a warrant, but argues that a departure is reasonably justified under the Bill on the basis that:

- warrants are not required for the exercise of maritime enforcement powers under existing legislation being replaced by the Bill and

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19. They may also be exercised without an authorisation under the two exceptions provided for in clauses 28 and 29.

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• maritime enforcement operations frequently take place in remote locations, without the support available to land based operations and constrained by the practicalities of operating at sea, meaning it will not be feasible in many situations to obtain a warrant from a Magistrate.\(^{20}\)

As noted by the Scrutiny of Bills Committee, the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) notes that among the limited circumstances in which the Commonwealth Parliament has previously accepted entry powers without consent or judicial warrant are searches of conveyances. These have been accepted where the inherent mobility of the conveyance means that there may not be time, or that it would be impractical, to obtain a warrant.\(^{21}\) This is likely to be the case in many instances in which the exercise of powers would be authorised under the Bill. The Scrutiny of Bills Committee therefore resolved to leave the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.\(^{22}\)

**Clause 25** provides that an authorisation need not be in writing. The Explanatory Memorandum states that authorisations may need to be made urgently in the maritime context and without the requirement for a written form. It states that oral authorisations are currently used in the maritime environment, and that as with those arrangements, the Bill provides that an authorising officer may be required to give evidence about an oral authorisation for the purposes of the prosecution of an offence that was enforced under the Bill.\(^{23}\) The Scrutiny of Bills Committee has suggested that it may be desirable for written records to be kept soon after authorisations are made to facilitate accountability. It has sought the Attorney-General’s advice on whether consideration has been given to the inclusion of such provisions.\(^{24}\) An example of such a system is the issuing and recording of urgent authorities for the conduct of controlled operations under Division 2, Part 1AB of the *Crimes Act 1914*; Section 15GL of that Act requires a written record to be made of an urgent authority within seven days of it being granted.

**Enforcement of international agreements**

The 2009 media release announcing the development of the Bill foreshadowed that it would involve ‘creating a mechanism to implement and enforce international agreements that have a maritime aspect.’\(^{25}\) This implies that such a mechanism would be something new. The powers available under the Bill to enforce international agreements, arrangements and decisions are not highlighted

\(^{20}\) Explanatory Memorandum, p. 35.

\(^{21}\) Attorney-General’s Department (AGD), *A Guide to framing Commonwealth offences, infringement notices and enforcement powers*, September 2011 edition, AGD, pp. 83–84, viewed 20 June 2012,


\(^{22}\) Scrutiny of Bills Committee, *Alert Digest*, no. 6, 2012, p. 55, viewed 20 June 2012,


\(^{23}\) Explanatory Memorandum, p. 31.

\(^{24}\) Scrutiny of Bills Committee, *Alert Digest*, no. 6, 2012, p. 56.

\(^{25}\) *Reform of maritime enforcement legislation*, op. cit.

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in the explanatory material accompanying the Bill as new. However, no information is provided on any existing basis for such powers. It is therefore unclear the extent to which this component of the Bill provides new powers as opposed to consolidating existing ones.

**Key provisions**

The Bill is set out in seven Parts:

- **Part 1** is an introduction that sets out preliminary matters and provides a guide to the Act, definitions and provisions concerning international agreements, arrangements and decisions.
- **Part 2** provides a framework for the exercise of maritime powers and powers specified in international agreements, arrangements and decisions. This includes the purposes for which the use of powers may be authorised, their scope, and geographical and other limitations that apply to the exercise of those powers.
- **Part 3** sets out the powers that may be exercised in accordance with Part 2, including boarding and entry, search and seizure, information gathering and arrest and detention powers.
- **Part 4** sets out processes for dealing with things seized, retained or detained in the exercise of powers provided in the Bill.
- **Part 5** details requirements for dealing with persons arrested, detained or otherwise held in the exercise of powers provided in the Bill.
- **Part 6** sets out offences for failing to comply with certain requirements created by the Bill.
- **Part 7** contains a range of miscellaneous but not insignificant provisions including those relating to costs, compensation, information sharing and delegation and regulation making powers.

**Key definitions**

Clause 104 provides each of the following is a *maritime officer*:

- a member of the ADF
- an officer of Customs (within the meaning of the *Customs Act 1901*)
- a member or special member of the AFP and
- a person appointed as a maritime officer by the Minister.

In relation to the last category, the Minister may set limits on the person’s appointment, including by limiting the exercise of powers by the person as a maritime officer.

The Explanatory Memorandum states that:

> 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. For example, the

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Minister could appoint a fisheries officer as a maritime officer to exercise powers only in relation to the *Fisheries Management Act 1991*.26

However, there are no explicit limitations in the Bill on who may be appointed by the Minister. The Scrutiny of Bills Committee has been critical in the past of provisions that allow powers to be conferred on persons other than Commonwealth employees. It has also stressed the importance of ensuring that those exercising powers have appropriate training and qualifications.27 While the Explanatory Memorandum states that it may be appropriate for state or territory officers to be appointed in some circumstances, clause 104 as drafted also leaves open the possibility of private contractors being appointed. There is also no requirement for appointments to be made public, as they would be if they were made in regulations.

*Installation* is defined in clause 8 as an artificial island, an installation or a structure within the meaning of the *United Nations Convention on the Law of the Sea* (the Convention), but not a thing that has been or could be such a thing but is not installed.

*Protected land area* is defined in clause 8 as an area of land that is outside the states and internal territories and prescribed by the regulations.

**Part 1: Introduction**

**Division 2** provides a guide to the Act.

**Division 3** sets out definitions of general application throughout the Bill and includes cross-references to terms defined in other parts of the Bill. **Clauses 9 and 10** set out when vessels, installations, aircraft, protected land areas and persons are taken to be involved in a contravention of a law, including an actionable contravention. **Clause 11** provides that for the purposes of the Act, the continuous exercise of powers does not end only because there is a period of time between the exercise of one or more of those powers.

**Clause 12** provides that an international agreement or arrangement to which Australia is a party or an international decision that binds Australia applies to a vessel, installation or aircraft if it:

- provides for the exercise of powers by Australia in relation to the vessel, installation or aircraft at that time and
- is either prescribed by the regulations or there is a current Ministerial approval of the exercise of powers under the agreement, arrangement or decision in relation to the vessel, installation or aircraft under Division 3 of Part 2.

**Clauses 13 and 14** provide that Australian laws apply to foreign vessels and places in other countries in particular circumstances.

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Part 2: Exercising powers

Who may authorise powers

Clause 16 sets out who is an ‘authorising officer’, that is, who may authorise the exercise of maritime powers available under Part 3. The powers may be authorised by the most senior maritime officer or member or special member of the AFP who is in a position to exercise any of the powers in person, the most senior maritime officer on duty in an operations room, the person in command of a Commonwealth ship or aircraft from which the exercise of powers is to be directed or coordinated, or a person appointed in writing by the Minister. It also provides that an authorisation given by someone who reasonably believed they were an authorising officer has effect as if it were an authorisation.

Clause 35 provides that a maritime officer is not required to obtain a warrant to exercise any power under the Act.

Circumstances in which authorisations may be given

Clauses 17 to 22 set out the circumstances in which maritime powers may be authorised, in particular:

- where the authorising officer suspects on reasonable grounds that a vessel, installation, protected land area or person is involved in a contravention of an Australian law
- where the authorising officer suspects on reasonable grounds that an aircraft is involved in an ‘actionable contravention’ of Australian law (as defined in clause 10)
- to administer or ensure compliance with a ‘monitoring law’ (as defined in clause 8)
- where the authorising officer suspects on reasonable grounds that an international agreement, arrangement or decision applies to the vessel, installation or aircraft
- where the authorising officer suspects on reasonable grounds that there is evidential material on the vessel, installation or protected land area
- where the authorising officer believes on reasonable grounds that the exercise of the powers is necessary to enforce a warrant in force under Australian law
- where a vessel is not flying the flag of a state
- where the authorising officer suspects on reasonable grounds that the vessel has been flying the flag of more than one state, or of a state that it is not entitled to fly, or that it is not entitled to fly the flag of any state
- where a requirement made in the exercise of aircraft identification powers has not been complied with or the authorising officer suspects on reasonable grounds that information given in response was false or misleading or
- where an authorising officer suspects on reasonable grounds that an aircraft is carrying ‘seizable transit goods’ (as defined in clause 8 – including goods connected with a terrorist act).

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When authorisations and approvals end

Clause 23 details when authorisations for the exercise of powers are in force. An authorisation remains in force until it is either spent or lapses. An authorisation is spent when the continuous exercise of powers (as defined in clause 11) under the authorisation ends. An authorisation lapses if no powers are exercised under it in the 72 hours after it was given.

Under clause 10, an approval from the Minister or prescription in the regulations is required before an authorisation can be given to exercise powers in relation to an aircraft for an actionable contravention. While the regulations may prescribe particular laws to be actionable contraventions, the Minister can only approve the exercise of maritime powers in relation to an aircraft for the purposes of investigating a particular contravention, or contraventions in general. An approval from the Minister may also be given under clause 12 for the exercise of powers under an international agreement, arrangement or decision in relation to a vessel, installation or aircraft. Clause 24 provides that both such approvals lapse 14 days after they are given. Clause 25 provides that authorisations and approvals do not need to be made in writing.

Exercise of powers with and without authorisation

Clauses 28 and 29 outline the two circumstances in which powers may be exercised without authorisation. A maritime officer may exercise aircraft identification powers (as set out in subclause 55(1)) to identify an aircraft and may exercise maritime powers to ensure the safety of themselves or any other person.

Clauses 30 to 32 set out how powers may be exercised under an authorisation. Powers may be exercised for a purpose in accordance with which the authorisation was given (for example, to investigate a suspected contravention of law) and, unless they are to be used in relation to an aircraft in flight, for the purposes listed in clause 32. The purposes listed broadly reflect the exercise of powers that may be required in the circumstances in which an authorisation may be given under clauses 17 to 22, for example to administer or ensure compliance with a monitoring law or enforce a warrant. A threshold of suspicion on reasonable grounds is required before the more coercive powers, such as seizure and retention of things or arrest of a person, may be exercised. The Explanatory Memorandum provides the example of a maritime officer boarding a vessel under an authorisation for a suspected breach of migration laws then subsequently suspecting its involvement in illegal fishing to support the need for such operational flexibility.28

Clause 33 provides that a maritime officer may also exercise powers in relation to a vessel, installation or aircraft in accordance with an international agreement, arrangement or decision and prescribed in the regulations if they are exercised for the purpose of administering, ensuring

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compliance with, or investigating a contravention of, the agreement, arrangement or decision, subject to any limits prescribed in the regulations.

Scope of powers and limits on force

Clause 34 outlines the limits on where powers may be exercised in relation to a vessel, installation, aircraft or protected land area. For example, the exercise of powers may extend to persons and things on or ‘in the vicinity of’ a vessel, installation, aircraft or land. Vicinity is not defined. The Explanatory Memorandum states that it refers to a ‘reasonable physical proximity’ between the vessel, installation, aircraft or land and the person or thing.  

Clause 37 provides that in exercising powers under the Bill, a maritime officer may use necessary and reasonable force against things and persons. It also prohibits officers subjecting a person to greater indignity than is reasonable and necessary to exercise the powers, and from doing anything likely to cause death or grievous bodily harm unless the officer believes on reasonable grounds that doing so is necessary to protect life or prevent serious injury to another person (including that officer).

Clauses 38 and 39 allow a maritime officer to request assistance of another person and to require assistance of a person on, or in the vicinity of a vessel, installation, aircraft or land in relation to which he or she is exercising powers. A person may refuse a request to assist (or refuse to continue assisting) but it is an offence to fail to comply with a requirement to assist. The offence is punishable by up to two years imprisonment, 120 penalty units, or both. The only limitation placed on what may be requested or required are that an officer must not require a person to do anything that would endanger someone’s health or safety (subclause 39(4)). A person who agrees to a request to assist may use necessary and reasonable force against things.

Geographical limits of powers

Division 5 of Part 2 of the Bill sets out a range of geographical limits on the exercise of powers that, according to the Explanatory Memorandum, reflect those derived from international and Australian law, including the Convention. In particular, it sets limits around the exercise of powers:

- at places in other countries (clause 40)
- in relation to foreign vessels (clause 41), foreign installations (clause 43) and foreign aircraft (clause 44) at a place between Australia and another country
- in relation to a foreign vessel at a place in Australia (clause 45) and
- in relation to a vessel, installation, person (clause 46) or aircraft (clause 47) in a state or internal territory (clause 46).

29. Explanatory Memorandum, p. 34.
30. Section 4AA of the Crimes Act 1914 provides that one penalty unit is currently equal to $110.

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The exercise of powers is generally not authorised in the above circumstances, but is permitted to the extent that certain exceptions, such as the request or agreement of the relevant country, apply. Powers may also be exercised in relation to a foreign vessel after the vessel has been chased without interruption to a place between countries. ‘Chased without interruption’ is defined in clause 42, and only applies where the vessel has been chased from a place where a maritime officer is permitted to exercise powers in relation to the vessel without having chased it and in certain circumstances.

The manner and form of requests and agreements of other countries and the scope of powers that may be exercised under a request or agreement are set out in clauses 48 and 49. A request or agreement does not need to be in writing.

Comment

For analysis of issues concerning the authorisation of coercive powers, including exercising powers without a warrant, readers are directed to the Main issues section of this Bills Digest.

There is a lack of clarity around when an authorisation for the exercise of powers given under Division 2 of Part 2 is taken to be spent. Clause 23 provides that an authorisation is spent when the continuous exercise of powers under the authorisation ends. However, clause 11 provides that the continuous exercise of powers does not end only because there is a period of time between the exercise of one or more of those powers. The Explanatory Memorandum states that the term ‘period of time’ is intended to be interpreted such that there must be a reasonable temporal connection between the use of the powers, but that it would need to be determined on a case by case basis. The Explanatory Memorandum justifies framing the provisions in this manner due to the difficulty of prescribing how long powers may be required in the maritime environment, from a short period of time in most cases to weeks or months in others. Given the significance of the powers available under an authorisation, consideration could be given to the inclusion of a time limit with provision for extensions if required.

There is no specific threshold, such as suspicion or belief on reasonable grounds, that must be met before a maritime officer can exercise powers without authorisation under clauses 28 (identifying aircraft) or 29 (ensuring safety). Clause 28 enables the exercise of a limited set of aircraft identification powers. Clause 29 enables the use of the broader range of powers available under Part 3. The Explanatory Memorandum notes that the lack of a threshold for the exercise of powers under clause 29 is a departure from the Guide, and points out that the powers must be exercised ‘for the purpose of ensuring the safety of the officer or another person’, a matter that would be determined objectively in all the circumstances (emphasis in original). The exercise of powers would also be subject to general safeguards in the Bill such as those relating to use of force (clause 37) and treatment of persons held (clause 95). The Scrutiny of Bills Committee considered

33. Explanatory Memorandum, p. 32.
clause 29 and, noting the information provided in the Explanatory Memorandum, resolved to leave the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole. However, it has sought the Attorney-General’s advice on whether there are any subsequent reporting requirements on the use of maritime powers without authorisation.  

There is some inconsistency in the limits around use of force under clauses 37–39. Under subclause 37(2), a maritime officer must not subject a person to greater indignity than is necessary and reasonable for the exercise of powers. While the use of force by a person assisting under clause 38 (on request) is limited to force against things, there is no such provision in clause 39 (persons assisting by requirement). Further, while assistance under either provision may include searching a person, there is no provision equivalent to that in subclause 37(2) concerning dignity. Finally, while assistance under clause 38 is voluntary, the person may not have the same understanding of safety risks as a maritime officer. Inclusion of a subclause equivalent to 39(4) to limit the assistance an officer may request, such that the officer may not ask someone to do something that would endanger a person’s health or safety, may be appropriate.

The Scrutiny of Bills Committee has noted the high degree of force that may be exercised under clause 37 in circumstances of self-defence or the defence of others. Given the provision is consistent with the approach in the Crimes Act 1914, it resolved to leave the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Parts 3 and 5: Maritime powers and dealing with persons held

Boarding and related powers

Clause 52 provides that a maritime officer may board a vessel, installation or aircraft. Unless the officer is in uniform and is a member of the ADF, officer of Customs, member or special member of the AFP or an officer prescribed in regulations, he or she must produce an identity card or other written evidence of being a Commonwealth officer at the request of the person in charge of the vessel, installation or aircraft. Under clause 53, a maritime officer may require the person in charge of a vessel to stop or manoeuvre the vessel, adopt a specified course or speed or maintain a specified course or speed. Failure to comply is an offence, punishable by up to two years imprisonment, 120 penalty units, or both. This clause also provides powers to chase or obstruct a vessel if the person in charge fails to comply with a requirement to stop or facilitate boarding. These powers include firing at or into the vessel to disable it or compel it to be brought to for boarding, if a warning shot is fired first.

34. Scrutiny of Bills Committee, Alert Digest, no. 6, 2012, p. 56.

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Clause 55 provides that a maritime officer may require the person in charge of an aircraft to disclose certain information, including the identity or flight path of the aircraft. This power is exercisable without an authorisation having been given under Part 2. Failure to comply is an offence punishable by up to two years imprisonment, 120 penalty units, or both. This clause also provides maritime officers powers to intercept an aircraft with their own, and to require the person in charge of an aircraft to land it in Australia. Subclause 55(8) requires the officer to have regard to the safety of the aircraft when requiring it to land. Failure to comply with a requirement to land is an offence punishable by up to two years imprisonment, 120 penalty units, or both.

Entering on land

Clause 56 provides that a maritime officer may enter onto land. This power is limited by the geographical limits set out in Division 5 of Part 2, which require that the exercise of maritime powers on land is an extension of the exercise of those powers in the maritime domain. This is similar to the limited power to enter onto land under section 193 of the Customs Act 1901. Unless the officer is in uniform and is a member of the ADF, officer of Customs, member or special member of the AFP or an officer prescribed in regulations, he or she must produce an identity card or other written evidence of being a Commonwealth officer at the request of the person in charge of the land.

Obtaining information

Clause 57 allows a maritime officer to require a person to answer questions or produce records or documents. Clause 58 allows a maritime officer to read or make readings from navigational and other instruments relating to the operations of a vessel, installation or aircraft, or to require the person in charge to show them such readings. Failure to comply with a requirement made under either clause is an offence punishable by up to two years imprisonment, 120 penalty units, or both.

Search, seizure and related powers

Clause 59 provides maritime officers with powers to conduct a search of a place, and to break open spaces and use dogs or equipment to assist in a search. The officer must give the person in charge of the vessel, installation, aircraft or land a chance to open a space before breaking it open unless it is not reasonably practicable to do so.

Clause 61 allows a maritime officer to conduct an ordinary search or a frisk search of a person and to require the production of any thing found as a result of the search. The definitions of ordinary search and frisk search are consistent with the Crimes Act 1914. Failure to comply with a requirement to provide a thing found in a search is an offence. The offence is punishable by up to two years imprisonment, 120 penalty units, or both. Clause 62 provides that a frisk search must be conducted by a person of the same sex as the person being searched unless there is no maritime officer of the same sex available and no other suitable person of the same sex will agree to assist.

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Clause 60 provides that a maritime officer may cause a person or thing to be lifted from the sea.

Division 6 of Part 3 of the Bill makes provision for what maritime officers may do with things found or produced. It allows a maritime officer to:

- examine a thing, including using force to open a thing or a part of it (subject to limitations) (clause 63)
- seal, mark or secure a thing (including a plant or live animal) (clause 64)
- copy a record or document, or a part thereof (clause 65)
- secure a weapon (clause 66)
- seize things (clause 67) and
- retain things (clause 68).

A maritime officer may seize a weapon or any thing that he or she suspects on reasonable grounds is evidential material, a border controlled drug or plant, or that it is owned by the Commonwealth or a state or territory. A maritime officer may retain a thing that he or she suspects on reasonable grounds could be seized under an Australian law, even if a warrant would be required to take possession of the thing under that law.

Clause 64 contains offences for interfering with certain things done by a maritime officer under that clause, such as breaking or defacing a seal or removing a tag from an animal. The offence applies where the continuous exercise of powers in relation to a vessel, installation, aircraft or land has not ceased and the interference is undertaken without the consent of a maritime officer. The offence is punishable by up to 50 penalty units.

Part 4 of the Bill governs what may be done with seized and retained things and their return or disposal.

Detaining vessels, aircraft and other conveyances

Clauses 69 and 70 provide maritime officers with powers to detain vessels, aircraft, vehicles and other conveyances. The officer may take a vessel or aircraft, or cause it to be taken, to a port, airport or other suitable place. The officer may remain in control of the vessel or aircraft, or require the person in charge to remain in control of it, at that place, until it is released or disposed of. It is an offence to fail to comply with a requirement to remain in control of a vessel or aircraft. The offence is punishable by up to two years imprisonment, 120 penalty units, or both.

Part 4 of the Bill governs what may be done with detained vessels and aircraft and their return or disposal.

Placing and moving persons

Clause 71 allows a maritime officer exercising powers in relation to a vessel, installation, aircraft or land to place or keep a person in a particular place on the vessel, installation, aircraft or land. While
this power is subject to general safeguards elsewhere in the Bill, as covered in the notes beneath the provision, no time limits apply to how long a person may be kept in a particular place.

Clause 72 provides maritime officers with powers in relation to a person on a vessel or aircraft detained under clause 69 or whom a maritime officer reasonably suspects was on a vessel or aircraft when it was detained. A maritime officer may:

- return the person to the vessel or aircraft
- require the person to remain on the vessel or aircraft until it is taken to a place or permitted to depart from a place (with an offence for failing to comply punishable by up to two years imprisonment, 120 penalty units, or both)
- detain the person and take them, or cause them to be taken, to a place in the migration zone or a place outside the migration zone, including a place outside Australia (subclause 72(4))
- for the purposes of taking the person to another place, place the person on a vessel or aircraft, restrain the person on a vessel or aircraft or remove the person from a vessel or aircraft.

The only specific limitation on these powers is clause 74, which provides that a maritime officer must not place or keep a person in a place unless he or she is satisfied on reasonable grounds that it is safe for the person to be there. However, broader safeguards available under the Bill would apply to constrain the exercise of the powers.

Clause 97 provides that if a person is detained and taken to another place under subclause 72(4), the detention ends at that place.

Under clause 73, a maritime officer may also detain a person under a ‘detention provision’ of another piece of legislation as if the officer were an officer within the meaning of that provision. Detention provision is defined to include particular provisions of the Environment Protection and Biodiversity Conservation Act 1999, the Fisheries Management Act 1991 and the Torres Strait Fisheries Act 1984 and provisions prescribed by the regulations. Clause 98 requires the officer to deliver the person, or make arrangements for the person to be delivered, into the custody of an officer within the meaning of the detention provision as soon as practicable. It also provides that the Act containing the detention provision has effect as if the officer to whom the person is delivered had detained the person at the time at which he or she is delivered into their custody.

Clause 75 provides that any restraint on the liberty of a person resulting from the operation of clauses 71 to 75 does not constitute arrest and is not unlawful. The rights and obligations flowing from arrest therefore do not apply. This clause also provides immunity for maritime officers, persons assisting and the Commonwealth from legal proceedings relating to such restraint.

Arrest

Clause 76 allows a maritime officer to arrest a person if he or she suspects on reasonable grounds that the person has committed an indictable offence (an offence punishable by more than
12 months imprisonment) against an Australian law. The person must be released from arrest if the officer ceases to hold that suspicion on reasonable grounds before the person is charged.

Arrest powers in the maritime environment are available under existing provisions, such as section 185 of the *Customs Act 1901* and section 245F of the *Migration Act 1958*. Those provisions include the same threshold of suspicion on reasonable grounds, but enable arrest only in relation to specified offences.

Under clause 77, an officer may also arrest a person for whom an arrest warrant is in force under an Australian law.

Clause 100 requires a maritime officer to inform a person arrested under the Act of the offence for which he or she is being arrested, at the time of the arrest.

Subject to clause 102, clause 101 requires the officer to take the arrested person, or arrange for the person to be taken, before a magistrate or delivered on land to an Australian police officer or a person with the power to arrest or deal with a person arrested under another law. Clause 102 requires an officer who arrests a person in order to enforce an Australian warrant to comply with any requirements in the warrant that would have been complied with by a person executing the warrant as soon as practicable. The officer need not comply with clause 101 to the extent that it is inconsistent with any of those requirements.

Dealing with persons held

Clause 95 provides that a person arrested, detained or otherwise held under the Act must be treated with humanity and respect for human dignity and must not be subject to cruel, inhuman or degrading treatment.

Clause 96 provides a non-exhaustive list of factors to be taken into account in determining whether a maritime officer has done something as soon as practicable under Part 5.

Requiring conduct to cease

Clause 78 allows a maritime officer to require a person to cease conduct if he or she believes on reasonable grounds that it constitutes a contravention of an Australian law. It is an offence to fail to comply with such a requirement. The offence is punishable by up to two years imprisonment, 120 penalty units, or both.

Comment

Subclause 52(4) provides an exception to the requirement for a maritime officer to produce identification at the request of the person in charge of a vessel, installation or aircraft upon boarding. Subclause 56(4) provides an equivalent exception in relation to producing identification.
upon entering onto land. The exceptions apply to members of the ADF, members and special members of the AFP, officers of Customs and officers prescribed by the regulations if they are wearing their uniform. The Explanatory Memorandum states that in such cases the uniform of the officer is considered sufficient identification.\(^3\) These exceptions are a departure from the Guide, are inconsistent with obligations on officers under Part 1AA of the **Crimes Act 1914** and are broader than that which currently applies only to members of the ADF under section 185A of the **Customs Act 1901**.

The Scrutiny of Bills Committee considered the search powers available under clauses 59, 61 and 62 in the context of their engagement of the right to privacy. The Committee noted the information provided in the Explanatory Memorandum, particularly that the powers are similar to those in existing legislation which they will replace and that they are necessary for national security and to protect safety. On that basis, it resolved to leave the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.\(^3\)

The threshold for arrest under clause 76 of suspicion on reasonable grounds is lower than that required under section 3W of the **Crimes Act 1914** and section 210 of the **Customs Act 1901**, both of which require belief on reasonable grounds. However, it is consistent with the threshold required by section 245F of the **Migration Act 1958**.

As outlined above, clause 98 provides that the other Act containing the detention provision under which a person has been detained has effect as if the officer to whom the person is delivered had detained the person at the time at which he or she is delivered into their custody. The Acts containing those detention provisions (listed in clause 73) include time limits on detention of up to 168 hours (one week). The time for which the person is detained by a maritime officer prior to being handed over will not count towards the time limit that would otherwise apply. While the Bill does require that the person be handed over as soon as practicable, clause 98 nevertheless effectively authorises detention for a longer period than originally provided for under the other Acts.

**Part 4: Dealing with things taken**

**Notices**

Clause 80 requires a maritime officer who seizes or retains a thing or detains a vessel or aircraft (also referred to as a thing hereafter) to give written notice to the owner of the thing or the person who had possession or control of the thing immediately before it was seized, retained or detained. Subclause 80(3) and clause 81 set out the information to be included in the notice.

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\(^3\) Explanatory Memorandum, p. 44.

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Clause 82 provides that notice of Commonwealth ownership may be given at any time. The notice must state that the Commonwealth claims ownership of the thing and that any other person who claims ownership or possession of the thing may apply to a court for its return within 30 days of the notice being given. Clause 89 outlines the process for such an application and the orders that may be made by a court as a result.

If an officer cannot conveniently give a notice made under clause 80 or 82 in person, he or she may give the notice by fixing it to a prominent part of the thing to which it relates, unless the thing is perishable.

Use of things taken

Clause 83 allows a maritime officer to use a seized thing, or make it available to another Commonwealth officer to use:

• to prevent, investigate or prosecute a contravention of an Australian law or an international agreement, arrangement or decision
• to administer or ensure compliance with a monitoring law or an international agreement, arrangement or decision
• for any other purpose under an Australian law, as if the thing had been seized, produced or required under that law or
• to decide whether to use the thing to do any of the above.

Clause 84 allows a Commonwealth officer to make a seized thing available to a state or territory officer to be seized under a law of the state or territory or used for any other purpose under a law of the state or territory.

Clause 85 allows seized electronic equipment to be operated for its usual purpose.

Things shared under clause 83 or 84 remain subject to the provisions governing return of seized things in clause 86.

Return and disposal

Division 4 of Part 4 of the Bill requires that seized, retained and detained things must be returned when they are no longer required and within a specified period.

Clause 86 requires a seized thing to be returned to its owner or the person who had possession or control of the thing immediately before it was seized once it is no longer required for a purpose mentioned in Division 3 of Part 4 (clauses 83–85). The thing must also be returned within 120 days, unless a magistrate has made an order under clause 88 extending the period for which it may be held.
Clause 87 requires that a retained thing or a detained vessel or aircraft (also referred to as a thing hereafter) be returned to its owner or the person who had possession or control of the thing immediately before it was seized. The thing must be returned within 28 days, unless a magistrate has made an order under clause 88 extending the period for which it may be held.

The time limits on the keeping of seized and retained things are relatively long. For example, the Guide recommends an upper limit of 60 days for the retention of seized items in most cases. However, Parliament may consider them suitable in the maritime context, where additional time may be required to reach land and determine what should be done with an item.

Subclauses 86(3) and 87(3) provide certain exceptions to the general rule that things must be returned, including where the thing has been disposed of under an Australian law.

Clause 90 clarifies the effect of a thing seized, retained or detained under the Act later being seized under another Australian law.

Clause 91 allows the Minister to dispose of a seized or retained thing or a detained vessel or aircraft (also referred to as a thing hereafter) if:

- keeping or maintaining the thing creates ‘serious difficulties’
- the expenses of keeping or maintaining the thing are likely to exceed its value
- the thing is a live plant or animal and its return to its native environment would be beneficial for its survival or
- the Commonwealth has claimed ownership of the thing and either no-one has applied for its return within the time allowed, or proceedings have been finalised without an order for return being made.

Subclause 91(2) provides a non-exhaustive list of circumstances in which keeping or maintaining a thing is taken to create serious difficulties, including where the thing is perishable and where it is an unseaworthy vessel.

Clauses 92 sets out methods by which things may be disposed, including provision for methods to be prescribed in regulations.

Clause 93 requires a notice of disposal to be given to the owner of a thing, or the person who was in possession or control of the thing immediately before it was taken, as soon as practicable following a thing’s disposal. If it is not possible to locate the person despite making reasonable efforts, the notice is not required.

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37. Guide to framing offences, op. cit., p. 82.

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Comment

Clause 70 allows a maritime officer to detain a vehicle or other conveyance on land. However, Part 4, which makes provision for what may and must happen in relation to things seized, retained or detained, deals only with detained vessels and aircraft. No mention is made of vehicles or other conveyances. This appears to be an oversight.

Clauses 80 and 82 allow a notice of seizure, retention or detention or of Commonwealth ownership to be given by fixing the notice to a prominent part of the thing to which it relates if it cannot conveniently be given in person. The Explanatory Memorandum characterises this as ‘constructive’ notice. That is, notice that exists not in fact, but by operation of the law. For example, publishing a notice in a newspaper instead of giving it to a person can be taken as constructive notice. However, there seems little practical benefit in placing a notice on a thing that may no longer be in a place accessible to the person to whom a notice would otherwise be given. Making the notice publicly available in some form, such as publishing it on the internet, would make it more accessible. Clause 82 also does not specify to whom a notice of Commonwealth ownership is to be given.

One of the circumstances under which Clause 91 allows the Minister (or delegate) to dispose of a seized, retained or detained thing is where custody or maintenance of the thing creates ‘serious difficulties’. While subclause 91(2) provides examples of such situations, it is not an exhaustive list, meaning there are no legislative limitations on what may constitute serious difficulties.

Part 6: Failing to comply with requirements

Clause 103 provides for 11 offences for failure to comply with certain requirements made by maritime officers under Parts 2 and 3. The specific offences are outlined in the summaries of those Parts above. Standard fault elements apply to the physical elements of the offences in accordance with section 5.6 of the Criminal Code Act 1995.

Comment

Placing offences together in a separate Part instead of with the provisions to which they relate is contrary to best practice as outlined in the Guide. The Explanatory Memorandum states that listing the offences in table form ‘ensures clarity in expressing the penalties for each offence.’ However, including the offence and the penalty with the substantive provisions would arguably be clearer. Explanatory notes beneath the substantive provisions do assist by providing cross-references to clause 103.

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38. Explanatory Memorandum, p. 54.
40. Explanatory Memorandum, p. 65.

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Part 7: Miscellaneous

Clause 105 allows a maritime officer authorised in another capacity to carry and use arms to do so in their capacity as a maritime officer, subject to the same conditions that apply in the other capacity.

Clause 106 allows the Minister to issue identity cards to maritime officers. It also creates an offence for a person not immediately returning an identity card upon ceasing to be a maritime officer, punishable by one penalty unit.

Clause 107 provides that authorising officers, maritime officers and others acting under their direction or authority are not liable to an action, suit or proceeding for or in relation to an act done, or omitted to be done, in good faith in the exercise or performance, or the purported exercise or performance, of a power or function under the Bill.

Evidentiary certificates

Clauses 108 to 110 allow the Minister and the Foreign Minister to certify certain matters relating to international agreements, arrangements or decisions, approvals for the exercise of powers and requests or agreements of other countries. Clause 111 provides that such certificates are prima facie evidence of the matters certified for all purposes and in all proceedings.

Recovery of costs

Clause 112 provides that the owner or purported owner of a vessel is liable to pay reasonable costs incurred in chasing a vessel under subclause 54(3) to the Commonwealth.

Clause 113 provides for liability to be owed to the Commonwealth for costs associated with keeping, maintaining, transporting or disposing of a seized thing. The costs may only be recovered from the person who made an application where:

- notice of Commonwealth ownership of the thing was given
- an application to a court for an order of return of the thing was made and
- the proceedings were finally determined without such an order being made.

The person is not liable for costs already met by them or incurred with the agreement of the Commonwealth officer who has control of the thing.

Gathering and sharing information

Clause 115 allows a maritime officer to copy a record or document found or produced in the exercise of powers under the Bill (or a part of it) if he or she is satisfied on reasonable grounds that it may contain information relevant to:

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• security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act)) or
• the performance of certain functions under the ASIO Act or the *Intelligence Services Act 2001*.

**Clause 116** allows a maritime officer to share information, a record or document, or a copy of a record or document obtained in the exercise of powers under the Bill with a ‘cooperating agency’ for use in relation to matters concerning maritime security or safety, maritime domain awareness, or for the exercise of the functions or powers of the agency. A cooperating agency includes the ADF, AFP, a state or territory police force, certain other Commonwealth, state or territory agencies, certain international bodies and any other body or agency prescribed by the regulations. The Explanatory Memorandum states that the practice of the Australian Government is that the transmission of material to a foreign country would require an arrangement ensuring the material is appropriately protected.\(^{41}\)

**Compensation for acquisition of property**

**Clause 117** provides that the Commonwealth is liable to pay a reasonable amount of compensation to a person if the Bill results in the acquisition of property from a person other than on just terms.

**Clauses 118 and 119** provide that the Commonwealth is liable to pay reasonable compensation for damage to documents and equipment caused as a result of the exercise of powers under the Bill in certain circumstances, such as insufficient care being taken by the person exercising the powers.

**Delegation and regulations**

**Clause 121** allows the Minister to delegate, by writing, any or all of his or her functions under the Act to certain officers in the Australian Public Service, ADF and AFP with classifications of Senior Executive Service (SES) Band 1 or equivalent or higher.

**Clause 122** provides the Governor-General with a general power to make regulations under the Act.

**Comment**

**Clause 112** provides that the owner or purported owner of a vessel is liable to pay reasonable costs incurred in chasing a vessel under subclause 54(3) to the Commonwealth. The Explanatory Memorandum states that such costs are recoverable under existing maritime legislation, including section 106L of the *Fisheries Management Act 1993* [sic].\(^{42}\) However, while the *Fisheries Management Act 1991* includes provisions for contestation of that debt, the Bill does not.

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41. Explanatory Memorandum, p. 71.
42. Explanatory Memorandum, p. 69.
The power for the Minister to delegate his or her functions under clause 121 is not limited to routine functions, but applies to any and all of the Minister’s functions under the Bill. This extends to approving the exercise of maritime powers in relation to aircraft under clause 10 and the exercise of powers in relation to vessels, installations and aircraft under an international agreement, arrangement or decision under clause 12.

Concluding comments

The Bill provides a comprehensive suite of maritime powers to officers of the ADF, AFP and Customs and others appointed as maritime officers. While they are generally based upon existing provisions, the powers in the Bill tend to correspond to the upper end of what is currently available. This accords with a commitment given by the then Attorney-General, Robert McClelland, when the reforms were first announced, that operational agencies would not lose any of the powers currently available to them. Further, it is unclear the extent to which the Bill truly represents a single regime for maritime enforcement when it will result in amendments to only five of the more than 35 pieces of legislation that, according to the Attorney-General, comprise the current Commonwealth framework.

The Bill is generally drafted clearly and includes a range of safeguards to ensure that powers are exercised within reasonable limits. However, some aspects of the Bill, such as when authorisations end, who may be appointed as a maritime officer and limitations around the use of force, could benefit from further clarification. Parliament is also likely to be more comfortable providing officers with significant powers if additional accountability measures were included, such as requirements to record authorisations for the exercise of powers.

The inquiries initiated in both the House of Representatives and the Senate will provide an opportunity for these and other issues to be examined in further detail.

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