Maritime Powers (Consequential Amendments) Bill 2012

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Law and Bills Digest Section

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Maritime Powers (Consequential Amendments) Bill 2012

Date introduced: 30 May 2012

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1 to 3 commence on the day of Royal Assent. Schedules 1 to 6 will commence when clause 3 of the Maritime Powers Bill 2012 commences.

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 Maritime Powers (Consequential Amendments) Bill 2012 (the Bill) amends five pieces of legislation1 to remove overlapping provisions that authorise the exercise of maritime enforcement powers. These powers are consolidated in the Maritime Powers Bill 2012, which provides a single framework of powers for use by Commonwealth enforcement agencies in the maritime environment. The current maritime enforcement provisions contained in the five pieces of legislation will therefore be made redundant and are repealed by the Bill. The transitional provisions of the Bill enable any existing maritime operations happening at the time of the Bill’s commencement to continue validly under the existing law, and also enable the Governor-General to make regulations prescribing matters of a transitional nature in relation to amendments proposed by the Bill.2

Background

The Maritime Powers (Consequential Amendments) Bill 2012 is a companion Bill to the Maritime Powers Bill 2012. See the Bills Digest to the Maritime Powers Bill 2012 for a detailed coverage of the background to the current Bill.3

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Financial implications

The Explanatory Memorandum states that ‘there will be financial implications in implementing the Bill, relating to the development of new operational guidelines and training. These costs will be absorbed within existing resources’.  

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 states the Bill is compatible with human rights as it does not raise any human rights issues.

Key provisions

Schedule 1—Customs Act 1901 (Customs Act)

Authorised person

Section 183UA of the Customs Act defines a number of terms that are used in Division 1 of Part XII of that Act, which sets out the powers of Customs officers. One of the terms defined in section 183UA is ‘authorised person’. Item 6 of Schedule 1 of the Bill repeals and replaces paragraph (f) of the definition of authorised person in section 183UA. This part of the definition of authorised person sets out who is regarded as an authorised person for the purposes of exercising powers under sections 203CA and 203CB of the Customs Act. Section 203CA deals with the seizure without a warrant of certain goods on a ship or aircraft or at a place in the protected zone. Section 203CB deals with the seizure without a warrant of certain other goods in a protected zone. Under current paragraph (f) of the definition of ‘authorised person’ in section 183UA of the Customs Act, the powers under sections 203CA and 203CB may only be exercised by ‘an officer as defined by subsection 185(5)’, which is an officer of Customs, a police officer or a member of the Australian Defence Force. Under proposed new paragraph (f) of the definition of authorised person, the seizure powers under sections 203CA and 203CB of the Customs Act will be exercisable by:

- a Customs officer
- a maritime officer exercising powers under the Maritime Powers Act 2012
- a police officer or
- a member of the Defence Force.

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6. Subsection 30A(1) of the Customs Act defines protected zone as a ‘zone established under Article 10 of the Torres Strait Treaty, being the area bounded by the line described in Annex 9 to that treaty’.
7. Customs officers, members of the Australian Defence Force, special members of the Australian Federal Police and any other person appointed by the Minister are maritime officers – see clause 104 of the Maritime Powers Bill.

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The key difference between the current and proposed provisions is that the seizure powers under sections 203CA and 203CB of the Customs Act will be able to be exercised by a new group of people - ‘maritime officers’. This group encompasses those who can currently exercise powers under sections 203CA and 203CB of the Customs Act and also people appointed as maritime officers by the Minister. The Explanatory Memorandum to the Maritime Powers Bill 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 Minister could appoint a fisheries officer as a maritime officer to exercise powers only in relation to the *Fisheries Management Act 1991*.  

However, as noted in the Bills Digest to the Maritime Powers Bill:

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.  
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.

**Repeal of and transfer of existing powers**

**Item 7** repeals sections 184A to 185B. These provisions are the general enforcement powers contained in the Customs Act that will be replaced by those in the Maritime Powers Bill. The powers that are repealed and replaced by those in the Maritime Bill are:

- power to board a ship (existing section 184A)
- power to chase foreign ships for boarding (existing section 184B)
- power to chase Australian ships for boarding (existing section 184C)
- identifying an aircraft and requesting it to land for boarding (existing section 184D)
- power to board and search ships and aircraft (existing section 185)
- boarding of certain ships on the high seas (existing section 185A)
- searches of people on certain ships or aircraft (existing section 185AA)
- retention of relevant items taken possession of under sections 185 or 185AA

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• returning persons to ships (existing section 185AB) and
• moving or destroying hazardous ships (existing section 185B).

Clause 16 of the Maritime Powers Bill enables certain officers (referred to as ‘authorising officers’) to authorise the exercise of powers contained in Part 3 of that Bill. Clauses 17 to 22 of the Maritime Powers Bill set out the circumstances in which maritime powers may be exercised. The Explanatory Memorandum to the Bill explains that all the powers contained in the provisions repealed by item 7 of the Bill will be available under the Maritime Powers Bill.

Seizure of goods without a warrant—ship

As discussed in relation to item 6 of Schedule 1 of the Bill, section 203CA of the Customs Act deals with the seizure without warrant of goods that are reasonably suspected of being special forfeited goods (other than narcotics), and evidential material relating to such goods, on a ship or aircraft in the Protected Zone. Subsection 203CA(1) relates to ships and subsection 203CA(2) relates to aircraft. The Protected Zone is defined in subsection 30A(1) as meaning ‘the zone established under Article 10 of the Torres Strait Treaty, being the area bounded by the line described in Annex 9 to the Treaty’.

Item 11 of the Bill repeals and substitutes existing paragraphs 203CA(1)(a) and (b) with proposed paragraphs 203CA(1)(a), (b) and (c) to identify ships to which section 203CA applies (that is, ships on which the specified goods or materials could be seized). Under these proposed paragraphs, section 203CA will apply if the ship is outside the territorial sea of a foreign country, could be boarded under the Maritime Powers Act 2012 and is exempt from any provisions of the Customs Act under subsections 30A(3) or (5) of the Customs Act (which sets out exemptions under the Torres Strait Treaty). The difference between the current and proposed provisions is that existing subsection 203CA(1) refers to section 185 of the Customs Act (power to board and search ships and aircraft), which is repealed by item 7 of the Bill, whereas the proposed provision will refer to the boarding power that will be available under the Maritime Powers Act.

Seizure of goods without a warrant—aircraft

As set out above, existing subsection 203CA(2) applies to the seizure of certain goods and evidential material without a warrant on an aircraft in the Protected Zone. Item 12 of the Bill repeals and substitutes existing paragraphs 203CA(2)(a) and (b) with proposed paragraphs 203CA(2)(a)-(d). These provisions identify the aircraft to which section 203CA applies (that is, aircraft on which the specified goods or materials could be seized). Under these proposed paragraphs, section 203CA will apply if the aircraft has landed in Australia as a result of a direction under subsection 55(7) of the Maritime Powers Act and the flight of the aircraft is exempt from any provision of the Customs Act under subsection 30A (5) of the Customs Act (which sets out exemptions under the Torres Strait Treaty). The difference between the current and proposed provisions is that existing subsection 203CA(2) refers to section 185 of the Customs Act, which is repealed by item 7 of the Bill,

11. Subclause 55(7) of the Maritime Powers Bill allows a maritime officer to require an aircraft to land in Australia. Failure to comply is an offence.

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whereas the proposed provision will refer to the power to require an aircraft to land that will be available under the Maritime Powers Act.

**Items 22-24, 26 and 28-30** renumber the subsections of existing section 228 of the Customs Act. Existing section 228 deals with the forfeiture of ships, boats and aircraft to the Crown where the master of the ship fails to facilitate the boarding of a ship or an aircraft fails to land at an airport as required. Current subsection 228(2) of the Customs Act will be amended and become paragraph 228(1)(b) under **items 24 and 25** of the Bill. **Proposed paragraph 228(1)(b)** provides that any ship that fails to facilitate boarding when its master is required to do so under the Maritime Powers Act in the circumstances set out under **proposed subsections 228(2) or (3)** of the Customs Act, will be forfeited to the Crown.

**Proposed subsections 228(2) and (3)** are inserted by **item 31** of the Bill. These provisions apply to foreign ships in Australia’s territorial sea and Australian ships that are outside the territorial sea of any foreign country. Under **proposed subsections 228(2) and (3)** a relevant ship will be forfeited if the master of the ship is directed under the Maritime Powers Act to facilitate boarding for the purposes of the Customs Act, or an Act prescribed in the Customs Regulations, or for determining whether there has been a contravention, or attempted contravention, of section 72.13 or Division 307 of the Criminal Code, and the master does not facilitate boarding as required. Section 72.13 of the Criminal Code deals with importing or exporting plastic explosives. Division 307 of the Criminal Code deals with importing or exporting border controlled drugs.

Current subsection 228(3) of the Customs Act will be amended and become paragraph 228(1)(c) under **items 26 and 27** of the Bill. **Proposed paragraph 228(1)(c)** provides that any aircraft that fails to land for boarding, when its pilot is required to do so under the Maritime Powers Act in the circumstances set out under **proposed subsections 228(4)-(6)** of the Customs Act, will be forfeited to the Crown. These provisions will apply to Australian aircraft that are flying anywhere except over a foreign country and foreign aircraft that are flying over Australia.

**Under proposed subsection 228(4)** an aircraft will be forfeited to the Crown if the pilot is directed under the Maritime Powers Act to land the aircraft for boarding in relation to the operation of the Customs Act and due to failure to comply with aircraft identification requirements, and does not land the aircraft as required.

**Under proposed subsection 228(5)** an aircraft will be forfeited if the pilot is directed under the Maritime Powers Act to land the aircraft for boarding because an authorising officer reasonably suspects that aircraft is involved in a contravention, or attempted contravention, of the Customs Act or section 72.13 or Division 307 of the Criminal Code, and the pilot does not land the aircraft as required. As set out above, section 72.13 of the Criminal Code deals with importing or exporting plastic explosives, and division 307 of the Criminal Code deals with importing or exporting border controlled drugs.

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12. As defined at clause 16 of the Maritime Powers Bill.

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Under proposed subsection 228(6) an aircraft will be forfeited if the pilot is directed under the Maritime Powers Act to land the aircraft for boarding because an authorising officer reasonably suspects that an aircraft is carrying goods which are connected with the carrying out of a terrorist act or the existence or shipment of the goods is likely to prejudice Australia’s defence or security or international peace or security, and the pilot does not land the aircraft as directed. Proposed subsection 228(7) provides that the definition of terrorist act has the same meaning as in section 183UA of the Customs Act.

Schedule 2—Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)

Item 1 of Schedule 2 repeals Division 11 of Part 17 of the EPBC Act. Division 11 contains one section only - section 457, which sets out the powers that can be exercised when a foreign vessel or foreign person has been pursued without interruption to a place that is outside the territorial sea of another country. The powers that may be exercised in these circumstances are set out at section 403 (boarding of vessels), section 406 (powers of authorised officers) and section 430 (powers of arrest) of the EPBC Act. The powers that are currently exercisable under section 457 after a ‘hot pursuit’ will be available under the Maritime Powers Bill (see the Explanatory Memorandum for that Bill for further details).

Schedule 3—Fisheries Management Act 1991 (Fisheries Management Act)

Section 84 of the Fisheries Management Act sets out the powers able to be exercised by officers appointed under that Act. Item 1 of Schedule 3 repeals paragraphs 84(1)(aa), (a), (b), (c), (k), (l), (m), (q) and (r) of the Fisheries Management Act. The powers repealed in the Fisheries Management Act will be replaced by equivalent powers in the Maritime Powers Bill.

Item 3 repeals subsections 84(1C) to (4) of the Fisheries Management Act. Existing subsection 84(1C) relates to powers in paragraphs 84(k) and (l), which are repealed by item 1. Existing subsections 84(2) and (3) relate to powers exercised by officers of the parties to Treaties. The Explanatory Memorandum states:

The Maritime Powers Bill will enable the Minister to appoint individuals as authorising officers in relation to a specific treaty (subparagraph 16(2)(a)(ii)) and international agreements will also apply to vessels (clause 12).


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Existing subsection 84(4) requires a person, other than a member of the Defence Force in uniform, when boarding a boat to give evidence of their identity. A similar requirement will be imposed under clause 52 of the Maritime Powers Bill. The key differences being that under clause 52 of the Maritime Powers Bill the exemption for those wearing uniforms extends beyond members of the Defence Force to also encompass uniformed officers of the Australian Federal Police, Customs, or an agency prescribed under the regulations. In addition, under clause 52 of the Maritime Powers Bill a person is only required to produce identification if it is requested by the person in charge of the vessel, installation or aircraft that is being boarded.

**Item 6** repeals sections 87 to 87HA. The powers available under those sections, which are set out below, will be exercisable under the Maritime Powers Bill. The powers are:

- section 87 – officers’ powers at a place outside the Australian Fishing Zone (AFZ) following pursuit
- section 87G – officers’ powers in relation to an Australian – flagged boat beyond the AFZ
- section 87H – officers’ powers in relation to a boat on the high seas without nationality that is equipped for fishing and
- section 87HA – officers’ powers under international agreements and arrangements.

**Item 15** repeals subdivision CA of Division 6, Part 6 of the Fisheries Management Act. Part 6 deals with surveillance and enforcement. Existing subdivision CA of Division 6 of Part 6 deals with the recovery of pursuit costs in relation to certain foreign boats. These issues are dealt with at clause 112 of the Maritime Powers Bill.

**Schedule 4—Migration Act 1958 (Migration Act)**

**Items 6, 12, 13 and 14 of Schedule 4** repeal and replace provisions in the Migration Act\(^\text{16}\), primarily to:

- insert references to maritime officer:
  - rather than fisheries officer in paragraph 43(3)(b)
  - in addition to environment officers and commanders of Commonwealth vessels or aircraft in paragraph 43(3)(c) and subsection 164BA(1)
  - in addition to fisheries officers in subsections 164B(3) and (4) and
  - in addition to environment officers in subsections 164BA(3) and (4).
- provide for the exercise of powers under section 69 of the Maritime Powers Act 2012, which will allow a maritime officer to detain a vessel or aircraft.

However, these amendments do not change the substance of the current Migration Act provisions.

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Part 2 of the Migration Act deals with control of the arrival and presence of non-citizens. Division 12A of Part 2 is concerned with chasing and boarding ships and aircraft. **Items 15-21, 23-25 and 49** remove references to ships, as power to chase and board ships is dealt with in the Maritime Powers Bill. The Explanatory Memorandum states that the only reference to ships that will remain in Division 12A of Part 2 of the Migration Act is the reference in existing subsection 245F(9A), which provides for a person to be placed or restrained on a ship or aircraft or removed from a ship or aircraft in certain circumstances.

**Item 22** repeals sections 245B (request to board a ship), 245C (power to chase foreign ships for boarding), 245D (power to chase Australian ships for boarding). These powers will be available under the Maritime Powers Bill.

**Item 24** repeals subsection 245F(1) which relates to the power to board and search ships. This power is provided for in the Maritime Powers Bill.

**Item 50** repeals sections 245FB to 245H. Existing section 245FB relates to returning persons to ships. Section 245G concerns the power to board ships on the high seas and section 245H relates to moving or destroying hazardous ships. All these powers are contained in Part 3 of the Maritime Powers Bill.

**Schedule 5—Torres Strait Fisheries Act 1984**

Existing section 42 of the Torres Strait Fisheries Act sets out the powers of officers to enforce that Act.17 **Item 1** of **Schedule 5** repeals paragraphs 42(1)(a), (aa), (c), (e), (g), (h), (ha), (hb), (o) and (p). These powers relate to the boarding and searching of boats and people on the boats. Equivalent powers are consolidated in the Maritime Powers Bill.

**Item 2** repeals and replaces **subsection 42(2)** to remove references to paragraph 42(1)(g), which is repealed by item 1. Existing paragraph 42(1)(g) allows an officer to detain a boat suspected of being in contravention of the Torres Strait Fisheries Act.

**Schedule 6—Transitional provisions**

**Item 1** of **Schedule 6** provides that the amendments made by this Bill and the Maritime Powers Bill do not apply in relation to an exercise of power under any of the Acts amended by this Bill (that is, the Customs Act, the EPBC Act, the Fisheries Management Act, the Migration Act and the Torres Strait Fisheries Act) that is continuing at the time that the Bill commences. That is, ‘existing

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maritime operations that are ongoing [at that time] may continue validly under the existing legal framework'.

Item 2 provides a regulation making power to prescribe matters of a transitional nature relating to the amendment or repeals made by this Bill.

Maritime Powers (Consequential Amendments) Bill 2012

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