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Law and Bills Digest Section

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House: House of Representatives

Portfolio: Infrastructure and Transport

Commencement: Refer to page 5 of this Digest for details.

Links: The links to the Bills, their Explanatory Memoranda and second reading speeches can be found on the Bills’ home pages for the Marine Safety (Domestic Commercial Vessel) Levy Bill 2018 and the Marine Safety (Domestic Commercial Vessel) Levy Collection Bill 2018 and the Marine Safety (Domestic Commercial Vessel) Levy (Consequential Amendments) Bill 2018, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

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The Bills Digest at a glance

Purpose and Background

The Marine Safety (Domestic Commercial Vessel) Levy Bill 2018, the Marine Safety (Domestic Commercial Vessel) Levy Collection Bill 2018 and the Marine Safety (Domestic Commercial Vessel) Levy (Consequential Amendments) Bill 2018 together implement a new levy to be paid by persons responsible for domestic commercial vessels in Australia. Domestic commercial vessels are vessels used for commercial, government or research activities.

The new levy implemented by the three Bills will allow the Australian Maritime Safety Authority (AMSA) to cost recover for regulatory services provided to domestic commercial vessels under the Marine Safety (Domestic Commercial Vessel) National Law Act 2012, which implemented a National System for Domestic Commercial Vessel Safety which regulates certification, construction, equipment, design and operation of domestic commercial vessels. Regulatory services provided under this National System include providing certificates of survey (proof that a vessel has been surveyed and meets the required standards) and certificates of operation to vessels. Currently services under the National System are provided by marine safety agencies in each state and territory; with the passage of these three Bills, it is envisaged that AMSA will take over most of the service delivery from these agencies.

Stakeholders have largely been critical of the concept of a new levy for domestic commercial vessels. The Transport and Infrastructure Council and the Commonwealth Government have together agreed to a funding package of $112.4 million to assist industry with the transition and no levy will be charged to industry in the first three years of AMSA taking over responsibility for service delivery. Legislative rules made under the Bills will allow the amount of the new levy to account for this transitional package.
Purpose of the Bill

The purpose of the Marine Safety (Domestic Commercial Vessel) Levy Bill 2018 (Levy Bill) is to create and impose a levy on certain domestic commercial vessels. The Levy Bill provides for which domestic commercial vessels the levy will apply to, how the amount of levy is determined and what persons are liable to pay the levy.

The purpose of the Marine Safety (Domestic Commercial Vessel) Levy Collection Bill 2018 (Levy Collection Bill) is to provide requirements around the collection of the levy imposed by the Levy Bill. Specifically, the Levy Collection Bill will provide for when a levy is due and payable, requirements around late penalties, advance payments and refunds of certain payments.

The purpose of the Marine Safety (Domestic Commercial Vessel) Levy (Consequential Amendments) Bill 2018 (Consequential Amendments Bill) is to make consequential amendments the *Australian Maritime Safety Authority Act 1990* (AMSA Act), the *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* (Regulatory Functions Levy Collection Act) and the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (National Law Act) to give effect to the levy.

The three Bills in conjunction (the Levy Package Bills) have the purpose of creating a framework that enables the Australian Maritime Safety Authority to recover the costs of providing services under the *National Law Act*.

Structure of the Bill

**Levy Bill**

The Levy Bill does not consist of any distinct parts or schedules. The provisions can be divided up as follows:

- **clauses 1-7** relate to definition of key terms and provisions about the application of the Levy Bill
- **clauses 8-10** relate to the amount of the levy and how it is imposed
- **clauses 11-14** relate to persons liable to pay the levy
- **clause 15** is a constitutional provision and
- **clauses 16-17** relate to the making of legislative rules under the Levy Bill.

**Levy Collection Bill**

The Levy Collection Bill does not consist of distinct parts or schedules. The provisions can be divided up as follows:

- **clauses 1-7** relate to definition of key terms and provisions about the application of the Levy Collection Bill
- **clauses 8-9** relate to when the levy is due and payable
- **clauses 10-11** relate to late penalties
- **clause 12** relates to AMSA assessments
- **clauses 13-15** relate to other requirements around payments
- **clauses 16-18** relate to treatment of partnerships, unincorporated associations and trusts with multiple trustees
- **clause 19** relates to delegation and
- **clause 20** relates to legislative rules made under the Levy Collection Bill.
**Consequential Amendments Bill**

The Consequential Amendments Bill consists of three clauses and one schedule:

- **clauses 1-3** relate to the title, commencement of the Bill and the operation of Schedule 1 and
- **Schedule 1** contains amendments to the *AMSA Act*, the *Regulatory Functions Levy Collection Act* and the *National Law Act*.

**Commencement details**

The Levy Bill will commence on the day after receiving royal assent. **Clauses 1-2** of the Levy Collection Bill commence on the day of royal assent, however the remainder of the Bill commences at the same time as the Levy Bill, and will not commence at all if the Levy Bill does not commence. **Clauses 1-3** of the Consequential Amendments Bill commence on the day of royal assent. The remainder of the Consequential Amendment Bill, which represent the key provisions of that Bill, commence on 1 July 2019, but do not commence at all if the Levy Bill does not commence.

**Background**

**Domestic commercial vessels**

Domestic commercial vessels are defined in the *National Law Act* as vessels that are used in connection with a commercial, governmental or research activity. A vessel is not a domestic commercial vessel if it is a regulated Australian vessel, a foreign vessel, a defence vessel or owned by a primary or secondary school or certain other community groups. Section 15 of the *Navigation Act 2012* defines a regulated Australian vessel as one that is registered, required to be registered or entitled to be registered under the *Shipping Registration Act 1981* and is not a recreational vessel; domestic commercial vessels do not include such vessels.

The *National Law Act* defines a ‘vessel’ as a craft that can be used in navigation by water and includes an air-cushion vehicle, a barge, a lighter, a submersible, a ferry in chains and a wing-in-ground effect aircraft.

According to the then Assistant Minister to the Deputy Prime Minister, Damian Drum’s second reading speech, there ‘are over 66,000 seafarers employed on 27,000 domestic commercial vessels around Australia’, including:

- ‘passenger vessels, such as ferries and scuba diving tour operators
- research and emergency response vessels, including tugs and barges
- fishing vessels and
- vessels that are commercially hired out for recreational use, such as houseboats, sailboats, jet skis and kayaks.’

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2. For example an Australian owned commercial ship longer than 24 metres in tonnage length that may operate on overseas voyages, see Australian Maritime Safety Authority (AMSA), ‘*What is a regulated Australian vessel?*’, AMSA website.
3. Ibid., Schedule 1, subsection 7(3).
4. Ibid., Schedule 1, section 8.
6. Ibid.
Changes to regulation of domestic commercial vessels

In 2009, the Council of Australian Governments agreed to major reform in the area of transport regulation, specifically agreeing to implement national regulatory systems for maritime safety, rail safety and heavy vehicles. This agreement gave rise to the Intergovernmental Agreement on Commercial Vessel Safety Reform that was agreed to by the Commonwealth of Australia and the various states and territories on 19 August 2011.

This intergovernmental agreement stipulated that the outcomes of this agreement would include:

- a national law for all commercial vessels operating in Australian waters and
- a National Regulator (the Australian Maritime Safety Authority (AMSA)) that develops, maintains, and monitors national standards for these vessels.

The National Law Act implemented this agreement, replacing ‘eight federal, state and territory laws with a single regulatory framework for certification, construction, equipment, design and operation of domestic commercial vessels inside Australia’s exclusive economic zone (EEZ).’ The National Law is found at Schedule 1 to the National Law Act and the regulatory system that it implements is known as the National System for Domestic Commercial Vessel Safety. The National Law provides for the issuing of certificates of survey and certificates of operation to domestic commercial vessels and the issuing of certificates of competency to crew.

Prior to the passage of the National Law Act, domestic commercial vessels were regulated by the relevant laws in the various states and territories.

The need for a levy

The intergovernmental agreement of 2011 stipulated that while the National Regulator would be responsible for the operation and administration of safety regulation of commercial vessels, the states and territory would be responsible for ‘service delivery’ in delivering the National Regulator’s operational and enforcement functions.

In a paper released for consultation, AMSA states that a 2014 review of the National System ‘found that this chosen service-delivery model limited the potential benefits of the National System due to inconsistencies in service delivery, regulatory and cost-recovery arrangements between jurisdictions.’ The Council of Australian Governments’ Transport and Infrastructure Council (TIC) subsequently agreed in 2014 to AMSA taking full responsibility of service delivery for domestic commercial vessel regulation under the National System on a cost recovery basis.

The practical effect of such a change was summarised as follows in AMSA’s Working Boats magazine:

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9. Ibid., p. 5.
10. Australian Maritime Safety Authority (AMSA), Legislation, AMSA website, 22 December 2017.
12. Ibid., Intergovernmental Agreement, op. cit., p. 10.
15. Ibid.; see also D Chester (Minister for Infrastructure and Transport), Consultation on domestic commercial vessels levy, media release, 20 October 2016.
Currently, even though AMSA is responsible for regulating domestic commercial vessels (DCVs) across Australia, the way you get your services — such as certificates and vessel IDs, undertaking surveys and the fees associated with these services — is not the same around the country. Those services are currently delivered by each state and territory, which sets its own procedures and fees for these services.

In November 2014, Commonwealth, State and Territory Transport and Infrastructure Ministers unanimously agreed that AMSA be positioned to take up service delivery by July 2017 under the ‘one system, one process and one decision maker’ principle. From 1 July 2017, not only will the rules and standards for DCVs be consistent across Australia, but the way you receive services (and the fees for those services) will also be the same across Australia, regardless of where you operate.16

After originally agreeing that AMSA would take up service delivery and fully cost recover for providing these services by 1 July 2017,17 TIC subsequently agreed in November 2016 to extend this timeframe to 1 July 2018 ‘to allow jurisdictions and industry to better consult and prepare for these significant changes’.18

TIC mentioned in the same communiqué that AMSA will work with the states and territories to determine an amount of transition funding to address the impact of cost recovery raised by industry.19 In August 2016, AMSA released a consultation paper seeking feedback on two proposed models for a levy required to ensure cost recovery; a proportional levy based on a flat charge per metre of the length of a vessel or a progressive levy based on a combination of a fixed charge and an incremental rate per metre based on the length of the vessel.20 AMSA originally developed a gradual cost recovery model based on decreasing levels of subsidy from government each year;21 however this model is no longer current after a change in policy announced by the Deputy Prime Minister in July 2018 (see discussion below).

**Context of current Bill**

Industry originally had concerns that ‘the proposed levy represented an unexpected, significant and immediate increase in costs to industry.’22 In response to this, TIC agreed to provide $102.4 million in funding to support the industry to transition to the cost recovery arrangements required for AMSA to take over full service delivery.23 TIC’s transition package represented a joint contribution taking into account the level of cost recovery in each jurisdiction, and originally supported ‘a gradual increase in levy charges until industry funds around 80 per cent of the system, with the balance funded by governments.’24

The then Minister for Infrastructure and Transport, Darren Chester, announced that the Federal Government would commit $55 million as part of this package:

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17. AMSA, Consultation: cost recovery, op. cit., p. 7.
18. Transport and Infrastructure Council (TIC), Communiqué, TIC Meeting, Perth, 4 November 2016, p. 4.
19. Ibid.
20. AMSA, Consultation: cost recovery, op. cit., p. 15; see also D Chester, Consultation on domestic commercial vessels levy, op. cit.
24. Ibid.
We are committed to the national system delivering safety benefits for commercial boating, fishing and tourism operations across Australia, and importantly, the industry remains supportive of a national system of maritime safety regulation...

Following careful consideration of industry feedback and year-long negotiations, I have finalised the $102.4 million transition package with my State and Territory colleagues.

The Australian Government is committing $55 million to this transition package in recognition of the importance of the domestic commercial vessel industries to the Australian economy.

Changes to the national system will ensure consistent fees for vessel services across all Australian jurisdictions, and a cost recovery levy gradually phased in to allow time for industry to adjust and prepare for the changes.\(^25\)

In addition TIC originally decided that no levy will be charged in the first year of AMSA taking over full service delivery ‘to ensure fair and equitable treatment of all operators as charging arrangements are standardised and services transition across Australia.’\(^26\)

Significantly, the Deputy Prime Minister then released a policy statement in July 2018 announcing that the Australian Government would provide an additional $10 million of funding, thereby providing $65 million over a period of ten years. This takes the total funding support by all governments to $112.4 million. Critically, the policy statement also announced that no levy will be charged to industry for the first three years of AMSA’s service delivery, with a review of costs and charges to follow in 2020–21:

This additional funding will mean no levy will be charged to industry for the first three years of AMSA’s service delivery to assist all operators as services transition.

This will provide two more years for AMSA to engage with industry on a range of important matters including:

- the most efficient and effective ways to deliver services to industry;
- opportunities to reduce costs to industry without compromising safety; and
- ways to reduce administrative burden so industry can get on with the job...

... A review of all costs and charges for the national system will be conducted in 2020–21 and involve wide public consultation.

The review will consider the appropriateness of fees and charges for the national system in an informed manner, with the benefit of two years of nationally consistent data on the risk and effort required to implement the national system.\(^27\)

The details of any levy introduced following this three year period will be subject to the review mentioned above. Mr Drum stated in his second reading speech that the new National System with AMSA as the service provider will provide for ‘a nationally consistent level of service. It will also reduce barriers for industry, improve labour force mobility, and simplify vessel transfers

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across Australia."AMS A became the sole service provider under the National System on 1 July 2018, services were provided by state and territory marine safety agencies until that date. 

The Levy Package Bills provide the legislative basis for AMSA to cost recover once it takes over full service delivery from the states and territories as the National Regulator for domestic commercial vessels.

Committee consideration

The Levy Package Bills have been considered by the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights. On 10 May 2018, the Senate Standing Committee for Selection of Bills decided not to refer the Levy Package Bills to a committee. 

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills had no comments on the Levy Bill or the Consequential Amendments Bill, but did have some concerns on the Levy Collection Bill. These concerns are explored further in the ‘Key issues and provisions’ section of this Bills Digest.

Position of interest groups

While the Department of Infrastructure and Regional Development conducted consultation on the exposure draft of the Bills, the submissions in response to this consultation process do not appear to be publically available. In addition, the Levy Package Bills have not been referred to any Committees for consideration at the time of writing this Bills Digest, so there is a lack of publically available comments on the provisions of the Levy Package Bills themselves.

However, some information is available on industry’s thoughts on the concept of a levy itself, arising from responses to AMSA’s 2016 consultation paper. This consultation paper sought feedback on two proposed levy models to ensure AMSA can cost recover after taking over service delivery under the National Law Act. The consultancy firm Seftons assisted AMSA in conducting and reporting on this consultation process.

A range of industry organisations submitted feedback to the consultation process, including Maritime Industry Australia Limited, the Boat Industry Association of Western Australia, the International Institute of Maritime Surveying and the National Seafood Industry Alliance. Seftons’ report on the consultation process points to broad opposition to the idea of a levy, regardless of model:

- The proposed full cost recovery approach of the National System and the two model options prompted highly emotional and mainly very negative reactions.

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32. AMSA, Consultation: cost recovery, op. cit.
34. Seftons, Australian Maritime Safety Authority (AMSA) final report: consultation on cost recovery for services under the National System for Domestic Commercial Vessel Safety, Tamworth, 1 November 2016, p. 28.
While some operators (and industry organisations) expressed approval of the National System, positive reactions to the levy model were few and far between. They were voiced by a very small minority and were overshadowed by overwhelmingly negative feedback and concerns. Respondents also questioned the lack of subsidisation for their industry, and wanted a much longer phase-in time before the levy would take effect.

In response to this consultation process, aspects of the levy proposal changed, including a significant Government transition package, an extension of the time before the levy would commence and implementing a gradual increase in the levy over a longer transition period. Mr Drum’s second reading speech noted that industry organisations such as the Tasmanian Seafood Industry Council, the Western Australia Fishing Industry Council, the Boating Industry Association and the Northern Territory Seafood Council were supportive of the transition package. In addition, AMSA has noted on their website how feedback has been taken into consideration when amending the levy proposal. The transition package has again changed since the introduction of the Bill with the Deputy Prime Minister’s policy statement of July 2018 (see discussion in ‘Background’ section above). However it remains unclear whether the updated transition package has meant that the broader industry has softened its previous opposition to the levy.

Financial implications
The key financial implication of the Levy Package Bills is the transition funding package of $112.4 million committed by the Commonwealth and the states and Northern Territory. As discussed in the ‘Background’ section, the Commonwealth Government alone has pledged $65 million. This transition funding will be provided over a period of ten years. The Explanatory Memorandum states that the ‘levy will ultimately be AMSA’s funding source for safety services under the national system’.

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Levy Package Bills are compatible as any limitations on the rights to a fair hearing or the presumption of innocence are reasonable, necessary and proportionate to the objective of protecting revenue to fund AMSA. In addition, the Government notes that the Levy Package Bills ‘supports and protects the right to safe and healthy working conditions for Australia’s domestic commercial vessel industries.’

35. Ibid., p. 4.
36. Ibid.
37. Ibid., p. 25.
38. AMSA, ‘Consultation feedback on the national system transition’, op. cit.
40. AMSA, ‘Consultation feedback on the national system transition’, op. cit.
42. Ibid.
43. The Statement of Compatibility with Human Rights can be found at page 4 of the Explanatory Memorandum to the Levy Package Bills.
44. Explanatory Memorandum, Levy Package Bills, p. 7.
Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights found that the Levy Bill and the Levy Package Bills did not raise human rights concerns.45

Key issues and provisions

Levy Bill

Leviable domestic commercial vessel

Clause 4 of the Levy Bill defines what is considered a leviable domestic commercial vessel for the purposes of the Levy Bill. Clause 4 provides the Minister the ability to exempt particular classes of vessels from the need to pay the levy. Clause 4 effectively means that all other domestic commercial vessels under the National Law Act are liable to pay the levy unless the Minister has explicitly exempted them.46 The ability for the Minister to exempt certain classes of vessel may become important if the Government reacts to certain stakeholder feedback on the concept of a domestic commercial vessel levy. Australian Sailing Limited submitted for example that all powered vessels owned by community groups should be exempted from paying the levy due to their belief that recreational activities provided on a not-for-profit basis should not be subject to a levy.47

Requirement to consult with AMSA and the principle of Cost Recovery

The Levy Bill has multiple provisions that require consultation or advice to be taken from AMSA. Subclause 4(3) requires the Minister to consult AMSA when making rules to exempt certain vessels from the requirement to pay a levy. The amount of the levy itself will have its basis in rules made by the Minister under subclause 9(2). These rules again require AMSA to be consulted for advice, under subclause 9(6).

Clause 10 sets out the parameters for the advice that AMSA must give the Minister when determining the levy amount. Importantly, subclause 10(2) stipulates that, when giving advice regarding the amount of the levy, AMSA must have regard to the fact that the levy should over time offset expenditure by AMSA in connection with providing services as the National Regulator. At the same time, paragraph 10(2)(b) excludes from the calculation funds from services or activities recovered by charging fees to individuals for services, such as seafarer certification.

This part of the Levy Bill reflects the central policy intention of the Government, which is that once AMSA takes over service delivery from the states and territories under the National System, these services should be cost recovered. A key element of TIC’s decision to move all service delivery to AMSA was that appropriate cost recovery arrangements should be implemented as part of this reform.48 The implementation of a levy is also consistent with Australian Government policy on cost recovery.49 As stated by the Department of Infrastructure and Regional Development, citing the Australian Cost Recovery Guidelines:

49. Ibid.
AMSA can recover its costs from industry through the imposition of fees, levies or a combination of both. It is the nature of an activity that determines which type of charge should be used. Where a product or service is provided directly to a specific individual or organisation, it is appropriate to charge a fee to that individual or organisation. A levy is more appropriate in circumstances where the product or service is provided more broadly and to the benefit of a wider group.\textsuperscript{50}

Legislating that AMSA must have regard to the principle of cost recovery when providing advice to the Minister maintains this principle of cost recovery as central to determining any levy amount, while still providing the Minister with flexibility to deviate from this principle if required.

\textbf{Transitional arrangements}

As discussed in the ‘Position of interest groups’ section, the imposition of a cost recovery levy for domestic commercial vessels has been met with widespread opposition. As outlined above, apart from the concept of a levy itself, concerns ranged from the lack of a sufficient lead-in time and concerns at no subsidisation for the industry (although these positions may have changed following the extension of the lead-in time and the additional funding pledged by the Government). Media reports have indicated that some stakeholders expressed concern that an excessive levy may be unsustainable and force them out of the industry.\textsuperscript{51}

Due to these concerns from industry, TIC originally decided the following:

- increase the level of government funding over the next ten years from $10 million to over $100 million, to support industry and ease the transition to new arrangements and
- support a gradual increase in levy charges until industry funds around 80 per cent of the system, with the balance funded by governments.\textsuperscript{52}

\textbf{Subclause 10(4) and subclause 10(5)} effectively provides for this transitional package to be implemented under Ministerial rules by allowing AMSA to disregard certain amounts of money when providing advice on what levy amounts will allow for cost recovery (\textbf{subclause 10(2)(a)}) . As stated in the Levy Bill’s Explanatory Memorandum:

This is a critical mechanism that will allow implementation of transition funding arrangements announced by the Transport and Infrastructure Council on 6 December 2017. This mechanism will also allow the Minister to not charge the levy in the first year and then introduce levy charges gradually from 1 July 2019 by excluding the amount of government transition funding from levy calculations in each subsequent year.\textsuperscript{53}

Following the Deputy Prime Minister’s policy statement (discussed above in the ‘Background’ section), this mechanism will allow no levy to be charged in the first three years and will potentially allow for the \textbf{gradual} introduction of levy fees after this point. However, the exact nature of the proposed levy following this three year period will likely be subject to the planned review in 2020–21 (see ‘Background’ section above). As a result, the above proposed subclauses will allow for the gradual introduction of the levy if that is the policy that is ultimately adopted, but does not mandate this to occur.

\textsuperscript{50} Ibid., p. 4.
\textsuperscript{51} B Fitzgerald, ‘\textit{Commercial fishers say licensing fee increase could force many out of industry’}, \textit{ABC News}, (online edition), 31 August 2016.
\textsuperscript{52} TIC, \textit{Communiqué}, 6 December 2017, op. cit., p. 1.
\textsuperscript{53} Explanatory Memorandum, Levy Package Bills, p. 11.
Incorporation of material

Section 14 of the [Legislation Act 2003](https://www.legislation.gov.au/Community/102003/6001/v2/legislation/2003/llegislation/01455003) provides that generally only Acts and disallowable instruments can be incorporated into a legislative instrument, as these pieces of legislation have been scrutinised by Parliament. Clause 17 of the Levy Bill allows rules made under the Levy Bill to apply, adopt or incorporate any matter in any written instrument, including the National Standard for Commercial Vessels and the Uniform Shipping Laws Code, despite section 14 of the Legislation Act 2003. The Explanatory Memorandum justifies this in light of the fact that these written instruments are ‘longstanding foundational documents which are not subject to change in future.’ Parliament may wish to consider the appropriateness of this provision, in light of the comments in the Explanatory Memorandum.

**Levy Collection Bill**

Power to seek or remit a late penalty

Clause 10 provides for a late penalty to be payable by a person if the levy is not paid by the due date. Subclause 10(3) specifies that the interest rate of the late penalty will be specified in legislative rules and must not exceed twenty per cent per annum. Parliament may wish to consider whether this twenty per cent threshold is an appropriate and proportionate safeguard to prevent excessive penalties being imposed by the rules.

Subclause 10(4) gives AMSA the power to remit the whole or part of a late penalty in certain circumstances, including the extent to which a person contributed (or not) to the delay, or reasonable steps taken to mitigate the delay. Under subclause 10(4)(c), AMSA can remit the late penalty if it is satisfied that there are ‘special circumstances’ that make it reasonable to remit some or the entirety of the late penalty amount. AMSA must give written notice of a decision to refuse remittance of a late penalty under subclause 10(7) and such decisions are reviewable by the Administrative Appeals Tribunal under subclause 10(8).

Notional payments by the Commonwealth

Clause 15 is a technical provision that notes that the Parliament’s intention (if the Levy Collection Bill becomes law) is that Commonwealth entities responsible for domestic commercial vessels should be liable to pay the levy, despite the fact that ‘the Commonwealth cannot technically charge itself.’ Subclause 15(2) allows the Finance Minister to give written directions to give effect to this intention.

Delegation to AMSA employees

The Senate Standing Committee for the Scrutiny of Bills expressed some concerns around clause 19 of the Levy Collection Bill in its Scrutiny Digest. As explained in the Explanatory Memorandum, ‘AMSA may delegate any power conferred on AMSA by the Levy Collection Act or legislative rules made under the Levy Collection Act to members of AMSA’s staff.’ The Senate Standing Committee’s concerns stem from the size of the class of person and the lack of a limit to the scope of the powers that could be delegated:

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56. Ibid., p. 15.
The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set on either the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated.  

The Explanatory Memorandum notes that this delegation power is required for AMSA to operate effectively and to deliver services to domestic commercial vessels around Australia. The Explanatory Memorandum also notes that powers are ‘expected to be delegated appropriately to specific, expert offices within AMSA through an instrument of delegation signed by AMSA’s Chief Executive Officer.’

Parliament may wish to consider the appropriateness of this delegation power given the Senate Standing Committee’s concerns and in light of the explanation provided in the Explanatory Memorandum.

**Consequential Amendments Bill**

**Expansion of AMSA’s Powers**

**Items 8-17 of Schedule 1** provide for consequential amendments to the *National Law Act*. Specifically, these clauses expand existing powers that AMSA has to suspend or revoke certificates of survey or to detain domestic commercial vessels in circumstances where a levy has not been paid. Detention of a vessel can be seen as quite a significant action, and Parliament may wish to consider whether this action is proportionate to the non-payment of a levy. However, the Explanatory Memorandum notes that the stronger sanctions exist mainly as a disincentive and are expected to be used as a ‘last resort’ and only after a ‘show cause’ notice is issued pursuant to section 72. In addition, the Explanatory Memorandum states that the Chief Executive Officer’s delegation instrument is expected to be supported by AMSA governance policies and processes to ensure powers are exercised appropriately. The Bill envisages a series of disincentives ranging from a late-payment penalty to pursuit of the payment through the courts in order to encourage compliance.

**Other provisions**

**Levy Bill**

**Imposition of Levy**

**Clause 8** provides for the imposition of the levy, and makes a distinction between a full-year levy that is levied on 1 July in a financial year and a pro-rata levy if a levy is only applicable for part of a financial year. **Clause 9** provides the formula for calculating this pro-rata levy.

**Clauses 11-14** clarifies the persons who are liable to pay the levy, effectively tying the requirement to pay the levy to a person who holds the certificate of survey for the vessel under the *National Law Act* and is the sole owner of the vessel. AMSA states that a ‘certificate of survey is proof that a vessel has been surveyed and meets specified standards for design, construction, stability and

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61. Ibid.
62. Ibid., p. 17.
63. Ibid., p. 18.
64. Ibid., p. 17.
safety equipment that apply to the vessel as defined in Marine Order 503 (Certificate of survey) 2017.\(^65\)

The Levy Bill recognises that multiple persons can be responsible for a vessel and that responsibility for a vessel can be more complex. **Subclause 11(2)** provides for joint and several liability where the holder of a certificate of survey and the owner of the vessel are different persons. **Clauses 12-14** clarify how the levy is payable where a ‘person’ with responsibility for the vessel is a partnership, an unincorporated association or a trust with multiple trustees.

**Clause 6** provides for the Levy Bill to operate externally to Australia. The Explanatory Memorandum explains that this provision exists to prevent vessels avoiding their obligations to pay the levy by leaving Australian waters at the time the levy becomes payable.\(^66\)

**Legislative rules**

**Subclause 9(2)** is a critical provision in the Levy Bill as it allows for the Minister to create rules prescribing the amount of the levy. This subclause stipulates that these rules are a legislative instrument. AMSA had originally published a proposed levy model which involved a fixed charge on the basis of a vessel’s class, length and area of operation together with an incremental rate per metre based on the vessel’s length.\(^67\) Any new proposed levy model will likely be subject to the review to be conducted in 2020–21 (see 'Background' section above).

**Clause 16** sets out the disallowance procedure around these legislative rules, which effectively mirror those of section 42 of the *Legislation Act 2003* which establishes a comprehensive regime for the registration, tabling, parliamentary scrutiny and sun-setting (automatic repeal) of Commonwealth legislative instruments. **Subclause 16(5)** has the effect that disallowance operates under the provisions of the National Law Act rather than those of the Legislation Act.

Generally, as per section 12 of the *Legislation Act 2003*, a legislative instrument commences at the start of the day it is registered unless the instrument provides otherwise. However, **subclause 16(3)** of the Levy Bill provides that the rules will only take effect on the day immediately after the period when a notice of a disallowance motion could be given (15 sitting days). This subclause ensures that Parliament has the opportunity to consider the levy amount before it takes effect; this may be due to issues caused by having a levy in effect that may subsequently be disallowed.

**Levy Collection Bill**

**Mechanics around levy payment**

**Clauses 8-9** provide detail around when the full-year levy and the pro-rata levies are due and **clauses 13-14** provide details around circumstances where an advance on account of a levy is paid and the potential refund of overpayments by AMSA.

**Clause 12** provides for AMSA to make a written assessment on the amount of levy imposed on a leviable domestic commercial vessel. This clause links the Levy Bill and the Levy Collection Bill. While rules under the Levy Bill provide for the amount of levy that domestic commercial vessels will be subject to, **clause 12** in the Levy Collection Bill enables AMSA to inform the persons liable to pay the levy how much is owed. Given that levies are variable depending on the type and size of

\(^{65}\)Australian Maritime Safety Authority (AMSA), *Certificates of survey*, AMSA website, 6 March 2018.

\(^{66}\)Explanatory Memorandum, Levy Package Bills, p. 9.

\(^{67}\)AMSA, *Domestic commercial vessels—proposed subsidised cost recovery levy model*, op. cit.
a vessel, an AMSA assessment would likely be required to determine the amount of levy owing ahead of payment.

Clause 11 stipulates that an amount of levy owing or a late penalty owing is considered as a debt to the Commonwealth. This allows AMSA to recover owing amounts of money through the court system, as stipulated in subclause 2(c). The Explanatory Memorandum notes that the courts will be considered by AMSA as a ‘last resort’ option when attempting to recover these debts.68

Legislative rules

Clause 20 gives the Minister the power to make legislative rules required or permitted by the Levy Collection Bill or necessary or convenient to give effect to the Levy Collection Bill. For example, the rules may provide that the levy can be paid in quarterly instalments (subclause 8(3)) and that two or more persons can be jointly and severally liable to pay the levy (subclause 8(5)).

Subclause 20(2)(c) stipulates that the rules do not impose a tax. The Explanatory Memorandum also clarifies that the levy will be imposed by the Levy Bill; the Levy Collection Bill and its legislative rules will ‘perform separate but related legal functions such as prescribing the amount of levy, or when and how the levy is to be paid.’69

Consequential Amendments Bill

Amendments to the AMSA Act

Items 1-4 of Schedule 1 make amendments to the AMSA Act. These clauses amend provisions of the AMSA Act that regulate the requirements around existing levies that are already paid to AMSA, including levies under the Marine Navigation Levy Act 1989 and the Protection of the Sea (Shipping Levy) Act 1981. These clauses effectively mean that the levy under the Levy Bill is paid out of the Consolidated Revenue Fund to AMSA (section 48(2) of the AMSA Act) as the amount of levy is received, or purportedly received by the Commonwealth (items 1-2 of Schedule 1). If the levy is refunded, then AMSA has to pay to the Commonwealth an amount equal to the refund (item 4 of Schedule 1).

Amendments to the Regulatory Functions (Levy Collection) Act

Items 5-7 of Schedule 1 amend the Regulatory Functions (Levy Collection) Act. Levies imposed under the Regulatory Functions (Levy Collection) Act fund maritime safety regulation activities by AMSA:

The levy is a charge against all Australian and foreign vessels that call at Australian ports. It is used to fund the cost of safety activities such as ship inspections and surveys. These activities support and establish the seaworthiness of Australian vessels.70

The Consequential Amendments Bill effectively excludes vessels that are liable to pay a levy under the Levy Bill from the operation of the Regulatory Functions (Levy Collection) Act. This is because AMSA’s regulatory services for these vessels will be provided under the National System, not under another framework.71 However, the Explanatory Memorandum clarifies that vessels may

68. Explanatory Memorandum, Levy Package Bills, p. 15.
69. Ibid., p. 16.
still be liable for the Marine Navigation Levy or the Protection of the Sea Levy in addition to the levy under the Levy Bill.\textsuperscript{72}

\textbf{Concluding comments}

The Levy Package Bills implement a new levy on domestic commercial vessels. This levy represents one part of the broader reform aimed at having AMSA taking over all service delivery from the states and territories under the \textit{National Law Act}; effectively the Levy Package Bills will ensure that these services provided by AMSA are cost recovered once the scheme is fully implemented. Therefore when considering these Bills, Parliament may wish to consider not just the effect of the Bills themselves (which is limited to cost recovery), but the overall policy context and rationale for these reforms.

\textsuperscript{72} Ibid.