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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MARITIME POWERS BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Nicola Roxon MP)

MARITIME POWERS BILL 2012

OUTLINE

The Maritime Powers Bill 2012 (the Bill) consolidates and harmonizes the Commonwealth's existing maritime enforcement regime. It also provides a single framework for use by our on-water enforcement agencies.

The Bill establishes a system of authorisations under which a maritime officer may exercise enforcement powers in the maritime domain. The comprehensive powers under the Bill will be available to enforce a diverse range of Australia's maritime laws, including in relation to illegal foreign fishing, customs, migration, quarantine and drug trafficking, as well as international agreements and arrangements at sea.

The enforcement powers are framed in a manner specific to the maritime domain, an area which poses particular challenges to the effective enforcement of Australian laws. Enforcement operations in maritime areas frequently occur in remote locations, isolated from the support normally available to land-based operations and constrained by the practicalities involved in sea-based work. The unique aspects of the maritime environment merit a tailored approach to maritime powers, helping to ensure flexibility in their exercise and to assist maritime officers to deal with quickly changing circumstances and difficult and dangerous situations. The powers contained in the Bill are primarily based on powers currently available to operational agencies.

The Bill does not alter operational roles, functions or responsibilities, nor reallocate existing resources, between agencies.

Part 1 of the Bill deals with preliminary matters, including commencement and definitions. It also provides a guide to the remainder of the Bill.

Part 2 of the Bill establishes a framework for the exercise of maritime powers. In particular, it provides for the 'authorisation' of maritime powers. In most cases, an authorising officer is the most senior 'maritime officer' available in a particular operational situation. A maritime officer is defined as a member of the Australian Defence Force, an officer of the Australian Customs and Border Protection Service, a member or special member of the Australian Federal Police, or other person appointed by the Minister for the purposes of enforcing particular domestic laws or international agreements. This system of authorisations builds on existing operational practices, while providing a clear legislative framework for the authorisation of specific actions by maritime officers.

An authorising officer can give an authorisation to a maritime officer to exercise enforcement powers in relation to vessels, installations, aircraft, protected land areas and isolated persons on a number of grounds. These include: where the authorising officer reasonably suspects that an Australian law has been contravened; to administer or ensure compliance with a monitoring law; or where the authorising officer reasonably suspects that an international agreement or decision applies.

An authorisation must be in force for the exercise of powers by a maritime officer to begin. The only exceptions are aircraft identification powers and the exercise of powers for the purposes of ensuring the safety of persons.

Once an authorisation is in force, a maritime officer generally has access to the full range of powers set out in the Bill (described in Part 3). The maritime officer may exercise these powers as necessary for the purposes of the authorisation and for other purposes set out in the Bill.

The exercise of maritime powers under an authorisation is subject to certain geographical limits. For example, maritime powers cannot be exercised in another country except in limited circumstances, such as with the agreement of that country. These provisions are consistent with limits under international and Australian law in relation to the exercise of maritime enforcement powers.

Part 3 of the Bill outlines the comprehensive set of maritime enforcement powers available to maritime officers. Enforcement powers are available with respect to: boarding vessels, installations and aircraft; interdiction; entering on land; obtaining information; searching things and people; examining and copying things; securing things, including weapons; seizing and taking possession of things; moving and detaining persons; detaining vessels, aircraft and other conveyances; arresting persons, and requiring persons to cease conduct that contravenes Australian law.

Part 4 establishes processes for dealing with things seized and retained, and detained vessels and aircraft, as a result of the exercise of maritime powers. The Bill imposes notification requirements and regulates the use and return of things.

Part 5 establishes processes for dealing with persons held in the exercise of maritime powers.

Part 6 of the Bill creates offences for failing to comply with particular requirements under the legislation.

Part 7 of the Bill deals with miscellaneous matters, such as delegations, costs and compensation. It also enables the Governor-General to make regulations.

The Maritime Powers (Consequential Amendments) Bill 2012 repeals maritime enforcement powers in a number of other Acts where they overlap with powers in the Bill.

FINANCIAL IMPACT STATEMENT

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

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Maritime Powers Bill contains a comprehensive set of powers and uniform procedures that will be used to enforce Australia's maritime laws, including in relation to fisheries, customs and migration. The Bill consolidates and harmonises the Commonwealth's existing maritime enforcement regimes, which are presently spread across numerous Acts. The provisions mirror powers that officers have under those Acts. The Bill also establishes a range of appropriate safeguards in relation to the exercise of maritime powers. The Bill sets out:

- a system for authorising maritime officers to exercise powers in relation to a vessel, installation, aircraft, protected land area or isolated persons on certain grounds
- the purposes for exercising maritime powers, their scope and geographical limits
- the range of enforcement powers available to maritime officers once an authorisation is in place such as: boarding; obtaining information; searching, detaining, seizing and retaining things; and moving and detaining persons (together, the maritime powers)
- the processes for dealing with things seized, retained or detained and persons held, and
- offences for failure to comply with requirements.

Human rights implications

The Bill engages the following human rights:

Right to privacy and reputation

Sections 59, 61, 62 and 116 in the proposed Bill engage the prohibition on interference with privacy and attacks on reputation, which is contained in Article 17 of the ICCPR. Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. The prohibition on interference with privacy and attacks on reputation is engaged where legislation involves the collection, storage, security, use, disclosure or publication of personal information, or where the legislation provides for sharing of personal information across or within agencies. The concept of privacy also encompasses the protection of personal integrity, which is engaged by sections 59, 61 and 62 of the Bill. Interference with privacy that is lawful and not arbitrary is permissible pursuant to Article 17 of the ICCPR. Interference is not arbitrary where it is in accordance with provisions, aims and objectives of the ICCPR, and is reasonable, necessary and proportionate in the particular circumstances.

Searches of places and persons

Sections 59 and 61 of the Bill enable maritime officers to conduct searches of places (including living quarters) and persons (including conducting ordinary searches and frisk searches). These powers constitute an interference with privacy. In this case, the interference is authorised by domestic law (sections 59(1) and 61(1) of the Bill) and is therefore lawful.

The interference is also not arbitrary, because it is in accordance with the provisions, aims and objectives of the ICCPR, and is reasonable, necessary and proportionate in the circumstances. There are a number of safeguards in place, in relation to the exercise of search powers, which demonstrate that the exercise of these powers is reasonable, necessary and proportionate.

First, proposed section 51 of the Bill provides that the powers in Part 3 (which include these search powers) may only be exercised in accordance with Part 2. Part 2 states that an authorisation must be granted by an authorising officer before powers can be exercised. Additionally, proposed section 31 sets out a limited set of purposes for which these powers can be exercised, including investigating a contravention of a law and administering or ensuring compliance with a monitoring law. The search powers are necessary to enable maritime officers to conduct enforcement and compliance activities (including to protect safety by searching for weapons or explosives), and as a result of the above safeguards, are reasonable and proportionate in the circumstances.

Additional safeguards are provided in the Bill in respect of frisk searching people. A maritime officer may conduct an ordinary search or a frisk search. An ordinary search is a search of a person, or things in their possession and includes the removal of some items of clothing (like a coat). A frisk search is defined in section 61 as a search of a person by quickly running hands over the person's outer garments and examining things worn or carried by the person.

Proposed section 62 provides that a frisk search must be conducted by a person of the same sex as the person being searched, except in circumstances where a maritime officer or other suitable person of the same sex is not available. This includes any person who agrees to a request to assist a maritime officer (see section 38(5)(a) for the definition of a 'person assisting'), including another person on board the vessel.

Conducting searches of persons and places pursuant to an authorisation is necessary in the interests of Australia's national security, including border protection and combating transnational crime, and to protect safety by searching, for example, for concealed weapons. The power to conduct searches is lawful, and accords with the provisions, aims and objectives of the ICCPR and is not arbitrary, because it is reasonable, necessary and proportionate in these particular circumstances.

The power to conduct searches is therefore consistent with the right to privacy in Article 17 of the ICCPR.

Information sharing

Section 116 facilitates the sharing of information between agencies for certain maritime purposes. Section 116 of the Bill provides that information that can be shared between maritime officers may include personal information. This power therefore constitutes an interference with privacy. In addition to this Bill, the use or disclosure of personal information obtained under section 116 is regulated under the *Privacy Act 1988*. The interference with privacy is therefore lawful.

Section 116 is also not arbitrary, because it is in accordance with the provisions, aims and objectives of the ICCPR, and is reasonable, necessary and proportionate in the circumstances. Section 116 provides that information may only be shared between maritime officers in the exercise of powers under the Bill to a cooperating agency for use by that agency in relation to maritime security or safety, maritime domain awareness, or the functions or powers of that agency. In addition to this requirement, the use or disclosure of any information that is personal information is subject to the *Privacy Act 1988*. Accordingly, the sharing of personal information pursuant to this provision is reasonable, necessary and proportionate in the circumstances.

In addition, certain limitations on privacy may be legitimate in some circumstances, such as those that are necessary in a democratic society in the interests of national security and the protection of the rights and freedoms of others. The sharing of information between maritime enforcement agencies is necessary in the interests of Australia's national security, including border protection and combating transnational crime.

The proposed measures are reasonable given the safeguards in place under the Bill itself and under the *Privacy Act 1988* in terms of the use and disclosure of personal information. The information sharing provision is necessary as it allows for the sharing of information between agencies for certain maritime purposes, as currently authorised under other Acts. The protection of Australia's national security and the protection of the rights and freedoms of others are legitimate objectives for Australia to pursue. There is a legitimate purpose for the provision and the provision is suitable to achieve this aim, particularly in light of the purposes for which information can be shared. The information sharing provision is therefore proportionate. The interference with the right to privacy in section 116 is therefore lawful and not arbitrary. Accordingly, the provision is consistent with Australia's human rights obligations in relation to the right to privacy.

Prohibition on torture and cruel, inhuman or degrading treatment or punishment

The prohibition on torture and cruel, inhuman or degrading treatment or punishment is contained in Article 7 of the ICCPR, as well as Articles 1, 2, 3, 13, 14, 15 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Proposed section 95 codifies the prohibition on cruel, inhuman or degrading treatment or punishment in the maritime context. It states that 'persons arrested, detained or otherwise held must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.' Accordingly, this Bill is compatible with Australia's

human rights obligations to prohibit torture and cruel, inhuman or degrading treatment or punishment.

Non-refoulement obligations

Australia has implied non-refoulement obligations under Articles 6 and 7 of the ICCPR and under the Second Optional Protocol to the ICCPR. This comprises the obligation not to remove a person to a country where there is a real risk that the person would face the death penalty, arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment. Such a risk must be a necessary and foreseeable consequence of the person's removal. Australia also has an explicit non-refoulement obligation under Article 3 of the CAT not to remove a person to a country where there are substantial grounds for believing that they would be subjected to torture.

Proposed section 72 of the Bill may engage Australia's non-refoulement obligations. Section 72(4) of the Bill provides that a maritime officer may detain a person and take the person, or cause the person to be taken to a place in or outside the migration zone, including a place outside Australia.

In circumstances where the CAT, the ICCPR and/or the Second Optional Protocol to the ICCPR apply, obligations of non-refoulement may be engaged and a person may be eligible to apply for a protection visa under section 36(2)(aa) of the *Migration Act 1958* (Cth).

In such circumstances, in order to ensure that a maritime officer who has detained a person aboard a vessel acts in accordance with Australia's non-refoulement obligations, procedures relating to the consideration of refoulement risks would need to be in place. The Bill does not inhibit or impose any restriction on a maritime officer acting in accordance with Australia's non-refoulement obligations.

However, in order for an action taken under section 72 to be compliant with such obligations, procedures relating to the consideration of refoulement risks would need to be in place in circumstances where the CAT, the ICCPR and/or the Second Optional Protocol to the ICCPR apply. The Bill will take effect within 12 months of Royal Assent which will allow time for enforcement agencies to revise the necessary operational practices and procedures for the exercise of maritime powers under the Bill. Accordingly, on its face, this Bill is compatible with Australia's non-refoulement obligations under the ICCPR and CAT.

Right to life

The right to life under Article 6(1) provides the right not to be deprived of life arbitrarily or unlawfully by a country or its agents.

Use of force

Section 37 of the Bill relates to using force, and therefore engages the right to life. Circumstances may arise in the maritime context where a degree of force may be necessary, such as where a person on a vessel threatens to harm him or herself, or others. Section 37(2)(b) in particular, engages the right to life, as it provides two exceptions to the prohibition on maritime officers from doing anything likely to cause the death of, or grievous bodily harm to, a person.

Any use of force pursuant to the Bill would be lawful. Additionally, any use of force would not be arbitrary, because it is necessary, reasonable, necessary and proportionate in the circumstances. Section 37(1) provides that in exercising powers under the Bill, force may only be used where it is reasonable and necessary in the circumstances.

There are several other safeguards in using force in the exercise of any power under the Bill, which mean that any use of force will be proportionate. Pursuant to section 37(2)(a), a maritime officer must not subject a person to greater indignity than is necessary and reasonable to exercise the powers. Pursuant to section 37(2)(b)(i), a maritime officer must not do anything that is likely to cause the death of, or grievous bodily harm to, a person, unless the officer believes on reasonable grounds that the doing of that thing is necessary to protect life or to prevent serious injury to another person (including the officer). Finally, pursuant to section 37(2)(b)(ii), where a person is attempting to escape arrest by fleeing, force may be only used where, if practicable, the person has been called on to surrender and the officer believes on reasonable grounds that the person cannot be apprehended in any other manner.

The use of force pursuant to the exercise of powers in the Bill is therefore lawful and not arbitrary. Accordingly, the use of force provision is consistent with Australia's human rights obligations in relation to the right to life, as it is both lawful and not arbitrary.

Mutual assistance

Section 49 of the Bill may also engage Article 6(1) of the ICCPR. Section 49 of the Bill would allow maritime officers to exercise the maritime powers for the purposes set out in the request or agreement with another country. If a request or agreement specifies that a certain power must not be exercised, then this clause also makes clear that the power should not be exercised.

There is no obligation under the Second Optional Protocol to the ICCPR or under other human rights treaties to deny mutual assistance to States where there is a risk that the death penalty may be applied. However as a matter of policy, the Australian Government does not generally provide assistance to a country where a person has been detained or charged on suspicion of having committed an offence which attracts the death penalty, unless special circumstances exist (including where the evidence would assist the defence or where the foreign country undertakes not to impose the death penalty).

The Australian Federal Police (AFP) also has guidelines to act as a practical guide for AFP officers when death penalty issues arise in international police to police liaison. The guidelines require senior AFP management to take account of a series of relevant factors, before providing assistance in potential death penalty scenarios. The guidelines require ministerial approval of assistance in any case in which a person has been arrested or detained in relation to, charged with, or convicted of, an offence which carries the death penalty.

Separately, under the *Mutual Assistance in Criminal Matters Act 1987*, a formal request for assistance **must** be refused where a person has been charged with, or convicted on suspicion of having committed an offence which attracts the death penalty, unless special circumstances exist. Australia **may** refuse to provide assistance to a foreign requesting

country if the Attorney-General believes the provision of assistance may result in the death penalty being imposed on a person and after taking into consideration the interests of international criminal cooperation is of the opinion that the request should not be granted.

This Bill meets Australia's human rights obligations with respect to the right not to be arbitrarily or unlawfully deprived of life.

Right to security of the person and freedom from arbitrary detention

Proposed sections 100 and 101 of the Bill engage the right to liberty and security of the person, which is contained in Article 9 of the ICCPR. The right to personal liberty requires that persons are not to be subject to arrest except as provided for by law, and provided that neither the arrest nor the detention is arbitrary. Article 9(2) of the ICCPR provides that a person has the right to be informed at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her. The second right contained in Article 9(2) reflects Article 14(3)(a) of the ICCPR, which deals with minimum guarantees in criminal trials and the right to be informed promptly and in detail in a language that the person understands, of the nature and cause of the charge against him or her.

Section 100 sets out the procedures that apply after a person has been arrested by a maritime officer in accordance with sections 76 or 77 of the Bill. It is important to note that the circumstances in which maritime officers will need to arrest individuals at sea are limited. Even where a person has committed a crime at sea, a maritime officer will usually detain the person until an opportunity arises to transfer that person to officials on land, for the purposes of arrest.

Section 100(1) requires that the maritime officer inform the person, at the time of the arrest, of the offence for which the person is being arrested, consistent with Australia's international human rights obligations. Section 100(1) does not apply in the exceptional circumstances listed in section 100(3). This means that a maritime officer is not required to inform the person of the reasons for arrest where:

- the person should, in the circumstances, know the substance of the offence for which he or she is being arrested
- the person's actions make it impracticable to inform him, or her, or
- the officer believes on reasonable grounds that the person does not speak English and it is not practicable for the officer to inform the person, in a language that he or she understands, of the offence for which he or she is being arrested.

The first two exceptions reflect the exceptions in the common law to the rule that a person arrested must be informed of the reason for the arrest.¹ The third exception reflects the need for flexibility in applying arrest requirements in the maritime operational environment, where maritime officers are more likely to encounter individuals who do not speak English and obtaining translation services can be difficult or impossible due to the geographic isolation of

¹ *Christie v Leachinsky* [1947] AC 573 at 585 cited with approval in *Michaels v The Queen* (1995) 184 CLR 117, 129-130 per Gaudron J.

vessels. Such persons will still need to be informed of the reasons for their arrest once an interpreter is available.

Under Article 9(2) of the ICCPR, there is no obligation that the reason for a person's arrest be provided in a language that the arrested person understands. Nonetheless, Australia has criminal processes in place to safeguard the rights of persons who are non-English speakers, for instance, by ensuring a suspect has access to an interpreter before they are questioned.² In addition, Australia's existing criminal processes safeguard the rights of persons who may not have been (for exceptional reasons) informed of the reason for their arrest in relation to informing suspects of their rights before questioning.³

Division 3 of Part 5 of the proposed Bill sets out the procedures to be followed in the limited circumstances where maritime officers arrest individuals at sea. Section 101 provides that an arrested person must, 'as soon as practicable', be taken before a magistrate; or delivered to the Australian Federal Police, or State or Territory police; or if the arrest relates to an offence against another law, delivered to a person with the power to arrest, or the power to deal with a person who has been arrested, under that law. There are a number of processes required by statute and the common law to safeguard a person's minimum guarantees in criminal proceedings, in relation to investigating crimes and charging, set out in applicable criminal laws.

Proposed section 96 lists factors that must be taken into account in determining whether a maritime officer has done things 'as soon as practicable' pursuant to section 101. These factors include the need to ensure the safety of a vessel, installation or aircraft; the need to protect human life, animal life or the environment; and the need to aid a vessel in distress; as well as acknowledging that in the maritime operational environment, there are added complexities in terms of transferring arrested persons to law enforcement authorities immediately.

These provisions and their relationship with existing domestic criminal procedures (including domestic legislation) meet Australia's human rights obligations to promote the right to security of the person and freedom from arbitrary detention.

Right to minimum guarantees in criminal proceedings

Proposed sections 57 and 103 of the Bill engage the right to minimum guarantees in criminal proceedings, particularly those set out in Article 14(2) and (3)(g) of the ICCPR. Article 14(2) provides that '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. Article 14(3) of the ICCPR establishes a number of guarantees that must be observed in criminal proceedings, including the right to be free from self-incrimination.

² See for instance, section 23N of the *Crimes Act 1914* (Cth).

³ See for instance, section 23F and section 23G of the *Crimes Act 1914* (Cth).

Offences

Proposed section 103 of the Bill sets out the offences in the Bill. This provision may engage the presumption of innocence set out in Article 14(2) of the ICCPR. This presumption means that the onus is on the prosecutor to prove the defendant's guilt.

Generally speaking, offences comprise physical elements (such as conduct) and fault elements (which relate to the defendant's state of mind at the time the physical elements are engaged in, or arise). The Criminal Code, which is scheduled to the *Criminal Code Act 1995* (Cth), codifies the general principles of criminal responsibility under laws of the Commonwealth, and applies to any Commonwealth offence. Section 6.1 of the Criminal Code states that '[i]f a law that creates an offence provides that the offence is an offence of strict liability... there are no fault elements for any of the physical elements of the offence.' Strict liability offences can therefore only be applied by an express provision to this effect.

Section 103 does not make any such express provision and accordingly, the fault elements for each of the offences listed in this provision are determined by reference to Section 5.6 of the Criminal Code. Section 5.6 states that where a fault element is not specified in an offence where the physical element is conduct, intention is the fault element for that physical element. In an offence where the fault element is not specified and the physical element is a circumstance or result, the fault element for that physical element is recklessness. Accordingly, if a person commits an offence, it will be constituted by the physical requirements in section 103 (b) and (c), and the default fault elements in the Criminal Code will apply to each of the physical elements in respect of those offences.

The application of a default fault element is relevant in considering proposed sections 53, 54 and 55 of the Bill. These provisions allow maritime officers to require the 'person in charge' of a vessel, installation or aircraft to take reasonable steps to facilitate boarding. Sections 53(3), 54(2) and 55(3) provide that the requirement to facilitate boarding is made whether or not the person in charge of the vessel, installation or aircraft understands or is aware of the requirement. It is an offence under section 103 to fail to comply with a requirement under section 53(1), 54(1) or 55(1). The purpose of these subclauses is to ensure that a maritime officer is able to carry out the boarding, even where the person in charge does not comprehend the command (for instance, where they do not speak English). A maritime officer must issue the requirement before they can board the vessel, installation or aircraft. However, it would not be an offence to fail to comply with a requirement under section 103, because the requisite fault element would not be satisfied.

Accordingly, the offence provisions of this Bill and their relationship with existing domestic legislation meets Australia's human rights obligations with respect to the presumption of innocence.

Requirement to answer questions

Proposed section 57 of the Bill engages the prohibition on self-incrimination, as set out in Article 14(3)(g) of the ICCPR. Section 57 allows a maritime officer to require a person to answer questions or produce records or documents. Examples of the things that the questions or records may relate to are set out in subclause 57(2). For example, a maritime officer may

require crew to state the journey that they have undertaken for quarantine purposes. This clause gives maritime officers broad powers of inquiry to enable them to properly perform their functions in the maritime domain. The note to subclause 57(1) provides that proposed section 103 makes it an offence to fail to comply with a requirement under this provision. However, section 57 does not displace a person's rights and privileges at common law including the right to silence, the right not to incriminate oneself and the right to claim legal professional privilege.

Accordingly, these provisions and their relationship with existing domestic legislation and common law therefore meet Australia's human rights obligations to afford minimum guarantees in criminal proceedings.

Conclusion

The Bill is compatible with human rights because it advances the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable and proportionate.

Part 1 – Introduction

The purpose of Part 1 is to provide general information about the Bill, including its title, commencement and application. It also defines the various terms used throughout the Bill.

Division 1 - Preliminary

Clause 1: Short title

This clause specifies that when the Bill is enacted, it is to be cited as the *Maritime Powers Act 2012*.

Clause 2: Commencement

This clause sets out when the various parts of the Bill are to commence. Proposed sections 1 and 2 of the Bill will commence on the day the Bill receives Royal Assent. Proposed sections 3 to 126 of the Bill are to commence on a single day to be fixed by Proclamation. However, if any of the provisions do not commence within 12 months of the day that the Bill receives Royal Assent, then they are to commence on the day after the end of that period.

The commencement provisions allow time for enforcement agencies to develop the necessary practices and procedures for the exercise of maritime powers under the Bill.

Clause 3: Act binds the Crown

This clause expressly provides that the Bill will bind the Crown in each of its capacities, not only in right of the Commonwealth. This means that the Bill will bind the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island. This clause reflects similar provisions in existing legislation such as section 4 of the *Environment Protection and Biodiversity Conservation Act 1999* and section 6 of the *Fisheries Management Act 1991*.

Clause 4: Application of Act

Subclause 4(1) provides that the Bill will apply to every external territory of Australia. External territory has the meaning given to it by the *Acts Interpretation Act 1901*. On this basis, ‘external territory’ refers to a territory that is not an internal territory and for the government of which, as a territory, provision is made by any Act.

Subclause 4(2) further provides that the Bill will have extraterritorial application by extending to acts, omissions and things outside Australia. This application is subject to the geographical limits on the exercise of powers set out in Division 5 of Part 2 of the Bill.

This clause reflects similar provisions in existing legislation such as section 7 of the *Fisheries Management Act 1991*.

Clause 5: Effect on executive power

This clause provides that the Bill will not limit the executive power of the Commonwealth. This means that the Bill does not override the ability of the executive government to exercise any of those powers traditionally known as Crown prerogatives, which enable the executive to make certain decisions without the need for parliamentary or legislative approval. This

clause reflects similar provisions in existing legislation such as section 7A of the *Migration Act 1958*.

Clause 6: Relationship to other laws

Subclause 6(1) states that the provisions of the Bill will be in addition to, and not in substitution for, any other law of the Commonwealth. Some Commonwealth maritime enforcement regimes will need to be preserved in existing legislation, especially where the powers under the relevant Acts apply both on land and in the maritime domain. The Bill will operate alongside these regimes. In situations where an officer could act under the Bill or a parallel maritime enforcement regime, the officer may apply the most appropriate regime.

Subclause 6(2) provides that the Bill is not intended to exclude or limit the concurrent operation of any law of a State or Territory. The Bill will not ‘cover the field’ in maritime enforcement with respect to existing maritime enforcement regimes under State and Territory laws. This means that State and Territory and Commonwealth maritime enforcement regimes can operate in parallel. This clause reflects similar provisions in existing legislation such as section 10 of the *Environment Protection and Biodiversity Conservation Act 1999*.

Division 2 – Guide to this Act

Clause 7: Guide to this Act

This clause provides a guide to the Bill.

Division 3 – Definitions

Clause 8: Definitions

This clause contains a list of every term that is defined in the Bill. The definitions are explained below in alphabetical order.

actionable contravention

The meaning of this term is set out in clause 10.

aircraft

This clause adopts a broad interpretation of the term ‘aircraft’ in order to capture a wide range of aerial propulsion as defined in other legislation. An example of a craft that would derive support from reactions of the air against the earth’s surface would be a hovercraft (which is included in the definition of ‘vessel’). This clause reflects similar provisions in existing legislation such as section 528 of the *Environment Protection and Biodiversity Conservation Act 1999* and section 5 of the *Quarantine Act 1908*.

aircraft identification powers

The meaning of this term is set out in subclause 55(4).

approval

The meaning of this term is set out in subclause 24.

archipelagic waters

‘Archipelagic waters’ has the same meaning as in Article 49 of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982 (defined in the Bill as ‘the Convention’) (i.e. the waters enclosed by the archipelagic baselines drawn in accordance with Article 47 of the Convention, regardless of their depth or distance from the coast).

Australia

The Bill will have general application in Australia. ‘Australia’ includes the coastal sea of Australia (as defined in section 15B of the *Acts Interpretation Act 1901*), the territorial sea, certain offshore installations within Australia’s maritime zones and any safety zone around such an installation. The term also includes Australia’s external territories, which comprise the:

- Australian Antarctic Territory;
- Coral Sea Islands Territory;
- Territory of Norfolk Island;
- Territory of Ashmore and Cartier Islands;
- Territory of Heard Island and McDonald Islands;
- Territory of Cocos (Keeling) Islands; and
- Territory of Christmas Island.

It also includes the airspace above the external territories, territorial seas, specified installations and safety zones.

The meaning of ‘Australia’ is, amongst other things, important for interpreting the provisions on geographical limitations on the exercise of powers in Division 5 of Part 2 of the Bill. The definition of ‘Australia’ is relevant, for example, to determining when a foreign vessel is between Australia and a foreign country for the purposes of the exercise of maritime powers under clause 41.

Australian aircraft

The definition of ‘Australian aircraft’ includes all aircraft registered in Australia as well as Commonwealth aircraft (as defined in clause 8). This definition is drawn from the definition of ‘Australian aircraft’ in section 3 of the *Crimes (Aviation) Act 1991*.

Australian law

‘Australian law’ means a law of the Commonwealth or of a State or Territory. Including State and Territory laws in the definition of ‘Australian law’ provides the option for maritime officers to enforce these laws in the maritime domain in certain circumstances. For example, if a vessel was contravening a State law offshore and there was no State enforcement capability in that area, maritime officers could act instead. It is proposed that there would

need to be prior cooperation and agreement between Commonwealth and the relevant State or Territory agencies before this option could be exercised.

Certain laws, or parts of laws, may be prescribed by the regulations as not falling within the meaning of an Australian law. If a law is prescribed, an authorisation for the exercise of maritime powers under clause 17 cannot be made in respect of that law. This means certain laws can be excluded from the Bill's framework, as appropriate. Laws may be prescribed, for example, if it is not appropriate for maritime powers under the Bill to be exercised in relation to those laws.

Australian national

'Australian national' means Australian citizens, certain bodies corporate and the Commonwealth or a State or Territory. This term is used in the Bill in the definition of 'Australian vessel'.

Australian vessel

'Australian vessel' means an 'Australian ship' within the meaning of section 29 of the *Shipping Registration Act 1981* or a vessel that is not registered under the law of a foreign country and is either wholly owned by, or solely operated by, one or more residents of Australia and/or Australian nationals. This definition is similar to the meaning of 'Australian ship' in section 4 of the *Customs Act 1901*. The term 'Australian vessel' is used in the definition of 'foreign vessel'.

Authorisation

The meaning of this term is set out in subclause 23(1).

Authorising officer

The meaning of this term is set out in subclause 16(1).

Border controlled drug

'Border controlled drug' is defined by reference to Part 9.1 of the Commonwealth *Criminal Code*, in particular section 300.2. The power to seize 'border controlled drugs' is provided in clause 67.

Border controlled plant

'Border controlled plant' is also defined by reference to Part 9.1 of the Commonwealth *Criminal Code*, in particular section 300.2. The power to seize 'border controlled plants' is provided in clause 67.

Chased without interruption

The meaning of this term is set out in clause 42.

Civil Aviation Regulations

This term refers to the regulations made under the *Civil Aviation Act 1988*, including where those regulations are in force under the law of a State. The term *Civil Aviation Regulations* is used in the definition of 'Australian aircraft' (as defined in clause 8).

Commonwealth aircraft

The definition of ‘Commonwealth aircraft’ includes both Commonwealth owned aircraft, as well as aircraft in the possession or control of the Commonwealth or a Commonwealth authority. This is a wide definition that will include aircraft owned, borrowed or leased by border protection agencies, such as Customs and Defence. This definition is drawn from the definition of ‘Commonwealth aircraft’ in section 3 of the *Crimes (Aviation) Act 1991*.

Commonwealth officer

‘Commonwealth officer’ means a person holding or performing an appointment, office or position under a law of the Commonwealth, or who is otherwise in the service of the Commonwealth.

Commonwealth ship

The definition of ‘Commonwealth ship’ includes both Commonwealth owned vessels, as well as vessels in the possession or control of the Commonwealth or a Commonwealth authority. This is a wide definition that will include vessels owned, borrowed or leased by border protection agencies, such as Customs and Defence.

Contiguous zone

‘Contiguous zone’ has the same meaning as in Article 33 of the Convention (i.e. a maritime zone that may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured). Australia’s contiguous zone, for the purposes of the Convention, is as proclaimed under the *Seas and Submerged Lands Act 1973*.

Continental shelf

‘Continental shelf’ has the same meaning as in Article 76 of the Convention (i.e. the seabed and subsoil of the submarine areas that extend beyond a coastal State’s territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance). Australia’s continental shelf, for the purposes of the Convention, is as proclaimed under the *Seas and Submerged Lands Act 1973*.

Contravention of a law

‘Contravention of a law’ includes, but is not limited to, an offence against the law.

Continuous exercise of powers

The meaning of this term is set out in clause 11.

Convention

‘Convention’ means the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982.

Conveyance

‘Conveyance’ includes, but is not limited to, a vessel, aircraft or vehicle.

Cooperating agency

The meaning of this term is set out in subclause 116(3).

Country

The Bill applies in limited circumstances to other countries. A reference to a ‘country’ encompasses the territorial sea of the country, any archipelagic waters of the country, any installation attached to the continental shelf or the seabed within the exclusive economic zone of the country, any safety zone around any such installation, the airspace above such areas and the airspace above the country itself. The meaning of ‘country’ is, amongst other things, important for interpreting the provisions on geographical limitations on the exercise of powers in Division 5 of Part 2 of the Bill. The definition of ‘country’ is relevant, for example, to determining when a foreign vessel is between Australia and a foreign country for the purposes of the exercise of maritime powers under clause 41.

Defence Minister

‘Defence Minister’ means the Minister administering the *Defence Force Discipline Act 1982*.

Detained aircraft

The meaning of this term is set out in subclause 69(5).

Detained vessel

The meaning of this term is set out in subclause 69(4).

Detention provision

The meaning of this term is set out in subclause 73(2).

Engage in conduct

To ‘engage in conduct’ means to do an act or to omit to perform an act.

Evidence and warrants authorisation

The meaning of this term is set out in subclause 20(2).

Evidential material

‘Evidential material’ means anything that may afford evidence of a contravention of an Australian law, including such a thing in electronic form. A power to seize ‘evidential material’ is included in clause 67 of the Bill.

Exclusive economic zone

‘Exclusive economic zone’ has the same meaning as in Article 57 of the Convention (i.e. a zone that shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured). Australia’s exclusive economic zone, for the purposes of the Convention, is as proclaimed under the *Seas and Submerged Lands Act 1973*.

Foreign Affairs Minister

‘Foreign Affairs Minister’ means the Minister administering the *Diplomatic Privileges and Immunities Act 1967*.

Foreign aircraft

‘Foreign aircraft’ means an aircraft that is not an ‘Australian aircraft’ (as defined in clause 8). This means that the definition will encompass both aircraft registered in or owned by foreign countries, as well as any aircraft without nationality. The term ‘foreign aircraft’ is significant for clause 44 of the Bill, which sets out the limitations on powers that may be exercised in relation to such aircraft.

Foreign installation

‘Foreign installation’ means an installation controlled by a foreign country. A foreign country’s control over an installation would include situations where a foreign country has jurisdiction over that installation in accordance with international law.

Foreign vessel

‘Foreign vessel’ means a vessel that is not an ‘Australian vessel’ (as defined in clause 8). This means that the definition will encompass both vessels registered in or owned by foreign countries, as well as any vessels without nationality.

The term ‘foreign vessel’ is, amongst other things, important for interpreting the provisions on geographical limitations on the exercise of powers in Division 5 of Part 2 of the Bill.

Frisk search

The meaning of this term is set out in subclause 61(5).

Installation

‘Installation’ means an artificial island, installation or structure within the meaning of the Convention. ‘Installation’ does not include something that is not installed. The definition encompasses a wide range of installations in relation to which officers may exercise maritime enforcement jurisdiction under Australian and international law.

International agreement

‘International agreement’ means any agreement or arrangement between Australia and one or more other countries. This is a broad definition, capturing both formal and informal expressions of consensus between Australia and other countries. The word ‘agreement’ captures formal documents such as written treaties, while ‘arrangement’ captures less formal expressions of consensus, such as any memoranda of understanding or mutual commitments.

International decision

The definition of ‘international decision’ encompasses decisions made by international bodies that are binding on Australia. International decisions include Chapter VII of the United Nations Charter resolutions made by the United Nations Security Council.

Involved

The meaning of the term ‘involved’ is set out in clause 9.

Isolated person

An ‘isolated person’ is a person who is not on, or in the vicinity of, a vessel, installation, aircraft or protected land area (as defined in clause 8). This definition captures persons who are at sea, but not on, or associated with, vessels, installations, aircraft or protected land areas, so that officers may exercise powers in relation to them. An example might be a scuba diver who has swum directly from shore and is not related to any vessel. The inclusion of ‘isolated persons’ in the Bill will help to ensure that Australian laws are comprehensively applied within Australia’s maritime zones.

Maritime officer

The meaning of this term is set out in subclause 104(1).

Maritime powers

‘Maritime powers’ means the powers set out in Part 3 of the Bill.

Migration zone

‘Migration zone’ has the same meaning given to it by section 5 of the *Migration Act 1958* (i.e. the area consisting of the States, the Territories, Australian resource installations and Australian sea installations, including: (a) land that is part of a State or Territory at mean low water; and (b) sea within the limits of both a State or a Territory and a port; and (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea; but does not include sea within the limits of a State or Territory but not in a port).

Monitoring law

A ‘monitoring law’ is a specified law under which officers may exercise maritime powers related to the monitoring of people or things, provided the powers are exercised for the purposes of administering or ensuring compliance with that law (see clause 18). Monitoring laws may include a range of maritime-related obligations and other regulatory matters. The definition expressly lists some primary monitoring laws in relation to which maritime powers are expected to be exercised, such as the *Customs Act 1901*, the *Fisheries Management Act 1991*, the *Migration Act 1958* and the *Torres Strait Fisheries Act 1984*. The Bill allows additional laws to be prescribed as monitoring laws, as appropriate.

Ordinary search

The meaning of this term is set out in subclause 61(4).

Personal information

‘Personal information’ has the same meaning as it is given in section 6 of the *Privacy Act 1988* (i.e. information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion).

Person assisting

The meaning of this term is set out in subclause 38(5).

Person in charge

A ‘person in charge’ is the person who appears to an officer exercising maritime powers to be in charge of the vessel, installation or aircraft. In relation to a protected land area, a person in charge is the person who appears to an officer to be in control, possession or occupation of the land, or any premises on the land.

It is sufficient for a person to appear to the officer to be in charge, rather than formally be in charge, to qualify as a ‘person in charge’.

Control, possession and occupation in this context have their ordinary meanings. For example, a person will be in control of a vessel if the vessel is under his or her direction or command.

This approach facilitates the exercise of maritime powers by allowing officers to make a judgment about who is in charge of a vessel, installation, aircraft or land.

Protected land area

A ‘protected land area’ can be prescribed by the regulations to enable the maritime powers under the Bill to apply to that area. For example, an isolated, uninhabited piece of land within Australia’s maritime zones may be prescribed as a protected land area. Such areas would be outside of the States and internal Territories. The inclusion of protected land areas within the scope of the Bill ensures that the enforcement of Australian laws can take place despite their geographical isolation. This is necessary because such land areas are essentially part of the maritime domain. Also, maritime officers may be the only individuals with access to the protected land areas. The inclusion of protected land areas within the scope of the Bill will help to ensure a seamless transition between the use of onshore and offshore powers in these circumstances.

Resident of Australia

‘Resident of Australia’ means an individual who is usually resident in Australia or an external territory and whose continued presence is not subject to a limitation by law. It also includes certain bodies corporate. The term ‘resident of Australia’ is used in the definition of ‘Australian vessel’ in clause 8 of the Bill.

Retained thing

The meaning of this term is set out in subclause 68.

Safety zone

Safety zone, in relation to an installation, has the same meaning as it is given in Article 60(5) of the Convention (which provides that the breadth of the safety zones is to be determined by the coastal State, taking into account applicable international standards and that such zones must be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organisation). A safety zone includes the column of water below that zone.

Seizable transit goods

‘Seizable transit goods’ means goods that are connected with the carrying out of a terrorist act, as well as goods, the existence or the shipment of which prejudices, or is likely to prejudice, Australia’s defence or security or international peace and security. This definition is based on section 203DA of the *Customs Act 1901*. The note for the definition points out that seizable transit goods may be forfeited to the Commonwealth under the *Customs Act 1901* (e.g. sections 209J and 229). Clause 22 provides for authorisations to be made relating to aircraft carrying ‘seizable transit goods’. These goods may also be seized from vessels via an authorisation under clause 18 (i.e. for the purposes of ensuring compliance with s203DA of the *Customs Act 1901* as a ‘monitoring law’).

Seized thing

The meaning of this term is set out in subclause 67.

Support vessel

The meaning of this term is set out in subclause 9.

Territorial sea

‘Territorial sea’ has the same meaning as it is given in Article 3 of the Convention (i.e. a zone with a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the Convention). Australia’s territorial sea, for the purposes of the Convention, is as proclaimed under the *Seas and Submerged Lands Act 1973*.

Terrorist act

‘Terrorist act’ has the same meaning as it is given in Part 5.3 of the *Criminal Code 1995*. In summary, ‘terrorist act’ refers to some act or threat of harm to persons or damage to property that is done with the intention of advancing a political, religious or ideological cause and with the intention of coercing or intimidating certain Governments or intimidating the public.

Thing

‘Thing’ includes, but is not limited to, a record or document.

This Act

‘This Act’ means the Bill, once enacted, and any regulations made under it.

Vessel

‘Vessel’ means a vessel or boat of any description, including a hovercraft and any floating structure. This clause adopts a broad definition in order to capture vessels as defined in other legislation. A vessel does not include an installation because ‘installations’ (as defined in clause 8) are covered separately in the Bill (see clauses 17, 18, 19 and 20 for authorisations that may be made in respect of installations). This clause reflects the substance of similar provisions in legislation such as the definition of ‘boat’ in section 4 of the *Fisheries Management Act 1991*.

Vessel identification powers

‘Vessel identification powers’ means the powers under clauses 52 (boarding vessels, installations and aircraft), 53 (requirement to facilitate boarding), 54 (additional powers—vessels), 57 (requiring answers, records and documents), 58 (obtaining readings), 59 (searching places), 61 (searching persons), 63 (examining things) and 66 (securing weapons). The term is used in subclause 41(2) to limit the range of powers that may be used when identifying a foreign vessel at a place between Australia and another country under paragraph 41(1)(f). This is consistent with the position at international law.

Vessels without nationality authorisation

The meaning of this term is set out in subclause 21(2).

Weapon

‘Weapon’ includes a thing that is capable of being used to inflict bodily injury (including ammunition), help a person escape from detention or custody, cause damage to a vessel, installation or aircraft. It also includes a thing that could be or is reasonably capable of being converted into a weapon. Specific powers to secure and seize ‘weapons’ are included in clauses 66 and 67 of the Bill.

Clause 9: Involved in a contravention

This clause deals with the circumstances when a vessel, installation, aircraft, isolated person or protected land area will be considered to be ‘involved’ in a contravention of a law for the purposes of the Bill. Involvement in a contravention is not limited to conduct occurring purely on a vessel, installation, aircraft or protected land area.

If a law is being contravened in the vicinity of a vessel, installation, aircraft or protected land area, it will be taken to be ‘involved’ in a contravention. ‘Vicinity’, in this context, refers to a reasonable physical proximity between the location of the vessel, installation, aircraft or protected land area and the location of the contravention of the law. For example, if a scuba diver leaves a vessel to plant an explosive device in a nearby location, that vessel will be involved in a contravention. This would allow an authorisation to be made under clause 17 for the exercise of powers against the vessel (and the scuba diver via clause 34) to the extent necessary to investigate the suspected contravention.

A vessel, installation, aircraft or protected land will also be involved in a contravention if there is ‘some other connection’ between one of those things and a contravention or intended contravention. There will be ‘some other connection’ between a vessel and a contravention, for example, if a person involved in committing an offence is on board the vessel in question.

A vessel, installation or aircraft may be also be ‘involved’ in a contravention if it has been, is being, or is intended to be used in the contravention of the law. For example, if there is a plan to use a vessel as a weapon against another vessel in the territorial sea, the first vessel will be involved in a contravention under the Bill.

A vessel is also ‘involved’ in a contravention if it has been, is being, or is intended to be used in direct support of another vessel or aircraft that is involved in a contravention of the law or

in preparation for the contravention. The vessel supporting the other vessel is said to be a ‘support vessel’, which is otherwise known as a mother ship.

An isolated person is ‘involved’ in a contravention of a law if the person has, is or is intending to contravene the law. An isolated person will also be involved in a contravention of a law if there is ‘some other connection’ between the person and a contravention or intended contravention. For example, if a person is helping a reef fisherman to illegally raid wildlife on a reef, then he or she will have such a connection and will be involved in a contravention.

The term is used in provisions such as clause 17, which provides for the authorisation of the exercise of maritime powers in relation to contraventions of Australian laws.

Clause 10: *Actionable contraventions—aircraft*

This clause provides that a contravention of a law is an ‘actionable contravention’ in relation to an aircraft if the law is prescribed by the regulations or if the Minister has approved the exercise of maritime powers in relation to the aircraft for the purposes of investigating a contravention, and the approval has not lapsed. The term is used in subclause 17(2), which permits the authorisation of maritime powers in relation to ‘actionable contraventions’ by aircraft. Given that a broad legislative framework governing the exercise of enforcement powers in relation to aircraft already exists, it is proposed that only aircraft offences that have a close nexus with the maritime environment would be prescribed or approved.

Clause 11: *Continuous exercise of powers*

This clause 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. However, it is intended that the phrase ‘period of time’ be interpreted reasonably in this context (i.e. there must be a reasonable temporal connection between the use of the powers).

This would need to be determined in the circumstances, on a case by case basis. However, some examples are illustrative. For instance, if a maritime officer boards a vessel, returns to his or her own vessel to obtain some equipment for a short period of time and then re-boards the other vessel, then this would be a continuous exercise of powers. On the other hand, if a maritime officer boarded a vessel, performed all the necessary activities, left the vessel for a number of days and then wished to reboard the vessel, then it is likely that the exercise of powers would have been discontinued. This term is relevant to, amongst other provisions, subclause 23(2), which specifies when authorisations end.

Division 4 – International agreements and decisions

Clause 12: *When international agreements and decisions apply*

This clause sets out when an ‘international agreement’ or ‘international decision’ (as defined in clause 8) will apply to a vessel, installation or aircraft for the purposes of the Bill. This will occur if there is an international agreement or international decision that provides for the exercise of enforcement powers by Australia in relation to the relevant vessel, installation or aircraft. The agreement or decision must be prescribed by the regulations or the Minister must have approved the exercise of powers under that agreement or decision.

Once an international agreement or decision applies under clause 12, clause 19 permits an authorising officer to authorise the exercise of maritime powers in relation to a vessel, installation or aircraft if the officer suspects on reasonable grounds that the international agreement or decision applies to that particular vessel, installation or aircraft.

Clause 13: Treating foreign vessels as Australian vessels

This clause extends the application of Australian laws to foreign vessels so long as this is provided for in an international agreement with the relevant foreign country. For example, if another country agreed for Australian laws to apply to vessels flagged to that country, the Bill would allow for the enforcement of Australian laws in relation to those foreign vessels (subject to the geographic limitations on the exercise of powers in Division 5 of Part 2). This is also permitted under international law.

Clause 14: Applying Australian law in other places

Under clause 14, if an international agreement to which Australia is a party provides for an Australian law to apply in a place outside Australia, then Australian law will apply as if that place were a part of the equivalent part of Australia's territory. Specifically:

- Under subclause 14(1), if the parties agree to apply Australian law to a place in another country, then Australian law will apply as if that place were a part of Australia. The territorial sea of that country falls within this subclause, as 'country' (as defined in clause 8) includes a country's territorial sea.
- Under subclause 14(2), if the parties agree to apply Australian law to a place in the exclusive economic zone of another country, then Australian law will apply as if that place were a part of Australia's exclusive economic zone.
- Under subclause 14(3), if the parties agree to apply Australian law to a place in the continental shelf of another country, then Australian law will apply as if that place were a part of Australia's continental shelf.

This provision extends the application of Australian laws to foreign jurisdictions so long as this is provided for in an international agreement to which Australia and the relevant foreign country are parties. For example, if a Pacific Island nation agreed to apply Australian law in their territorial sea, the Bill would allow for the enforcement of such laws in that place. This is permitted under international law.

Part 2 – Exercising powers

The purpose of Part 2 is to establish a new regime for authorising maritime officers to exercise maritime powers. This new regime provides clarity about who may make decisions authorising the exercise of maritime powers and in what circumstances authorisations may be made. The regime also provides for appropriate levels of oversight by identifying the most senior maritime officer in the relevant set of circumstances as the authorising officer. Further, Ministerial level oversight is provided for the exercise of maritime powers in relation to actionable contraventions, international agreements and international decisions.

Division 1 – Introduction

This Division provides a guide to Part 2.

Clause 15: Guide to this Part

This clause provides a guide to Part 2.

Division 2 – Authorising the exercise of maritime powers

This Division provides for who may make authorisations for maritime officers to exercise maritime powers and in what circumstances they may be made. This Division also provides for Ministerial approval of the exercise of maritime powers in relation to actionable contraventions, international agreements and international decisions.

Clause 16: Authorising officers

Subclause 16(1) outlines who may authorise any particular exercise of powers under the Bill. The authorisation system is generally based on the most senior maritime officer in the circumstances approving the exercise of powers. This provides clarity around who must make decisions to take enforcement action and ensures a degree of oversight in relation to the exercise of powers. At the same time, it allows for multiple categories of decision-makers to suit the variety of situations which arise in the maritime environment.

The clause permits the following five categories of senior officers to make authorisations:

- the most senior maritime officer who is in a position to exercise any of the maritime powers in person.

This category covers situations such as where maritime officers are outside of a vessel or aircraft or an operations room. For example, among a group of maritime officers on an installation or protected land area, the most senior officer present could make an authorisation for the exercise of maritime powers.

- the most senior member or special member of the Australian Federal Police who is in a position to exercise any of the maritime powers in person.

This category allows an officer of the Australian Federal Police to make an authorisation whether or not they are the most senior maritime officer in the situation in view of their plenary powers to enforce offences under Australian law.

- the most senior maritime officer on duty in a duly established operations room.

This category covers those officers present in an operations room. The officer in charge of this room at any time can make an authorisation for the exercise of maritime powers.

- the person in command of a Commonwealth ship or Commonwealth aircraft from which the exercise of powers is to be directed or coordinated.

This category covers the commanding officer of a vessel or aircraft from which operations are being directed or partly directed.

- a person appointed in writing by the Minister.

This category provides for the Minister to appoint certain maritime officers as authorising officers in relation to specific laws, international agreements or decisions. For example, an officer of the Australian Fisheries Management Authority could be appointed by the Minister as an authorising officer in relation to fisheries management legislation.

Provided an officer falls within one of the above categories, she or he may make an authorisation. A maritime officer with a limited appointment under subclauses 108(2) to (4) of the Bill can only make authorisations to the extent of that appointment.

The above categories are designed to ensure that a senior maritime officer will always be available to make an authorisation. For example, in the event that a split second decision needs to be made, the most senior officer on the immediate scene could authorise the exercise of maritime powers. Operational arrangements will be made between relevant agencies operating in the maritime environment about seniority of officers in circumstances where officers from more than one agency are involved in an activity.

This clause would also allow a maritime officer to authorise themselves to use the powers if necessary in the circumstances. For example, if an officer is alone on an installation, then he or she would automatically be the most senior officer who is in a position to exercise the maritime powers in person.

This clause raises the possibility that multiple authorisations can be made in relation to the same operational situation - for example, if there are multiple vessels on the scene of a potential boarding or if an operations room is communicating with a vessel to take enforcement action.

Some possible examples of multiple authorisations being made and their intended effect include:

- if two similar authorisations are made by two different authorising officers, maritime powers could be exercised under either authorisation;
- if one officer refused to make an authorisation in a given situation and another officer was prepared to make an authorisation in that situation, then that authorisation would apply;
- if one officer made an authorisation to investigate a contravention of migration legislation and another officer made an authorisation to investigate a contravention of fisheries legislation, both authorisations would apply;

- if one officer made an authorisation on one ground, such as vessel identification under clause 21 and another officer made an authorisation on another potentially wider ground, such as a contravention of an Australian law under clause 17, then maritime officers could act under the wider authorisation.

Therefore, while multiple authorisations can occur under the Bill, they are workable in an operational sense and, as stated above, having multiple categories of decision-makers will provide greater flexibility for authorising the exercise of powers in the variety of situations which arise in the maritime environment.

Subclause 16(3) provides that a purported authorisation given by a person who reasonably believed that he or she was an authorising officer has effect as if it were an authorisation. This would validate an authorisation in circumstances where a maritime officer was operating under a reasonable, but mistaken, belief that he or she was an ‘authorising officer’. For example, if a maritime officer made an authorisation believing on reasonable grounds that he or she was the most senior officer in a position to exercise powers in person, but it was later established that there was a more senior officer in that situation, the authorisation would remain valid.

Clause 17: Contraventions

This subclause is directed at vessels, installations, land and isolated persons that are reasonably suspected by an authorising officer to be involved in a contravention (as defined in clause 9) of an ‘Australian law’ (as defined in clause 8). The threshold for an authorising officer to make an authorisation is suspicion on reasonable grounds. This is similar to prerequisite thresholds for enforcement of offences in existing legislation such as in Part XII of the *Customs Act 1901* and several sections in the *Migration Act 1958*, including section 245B.

Subclause 17(2) enables an authorising officer to authorise the exercise of maritime powers in relation to an aircraft if the authorising officer suspects, on reasonable grounds, that the aircraft is involved in a contravention of an Australian law and the contravention is an ‘actionable contravention’ in relation to the aircraft.

This subclause is directed at aircraft that are reasonably suspected by an authorising officer to be ‘involved’ in a contravention (as defined in clause 9) of an ‘Australian law’ (as defined in clause 8). Further, the contravention must be an ‘actionable contravention’ in relation to an aircraft as defined in clause 10. Australian laws would need to be prescribed in regulations or approved by the Minister in order to qualify as ‘actionable contraventions’. As a legislative framework already exists for the aviation environment, it is proposed that this subclause will provide for the exercise of maritime powers in relation to aircraft that have a nexus with the maritime environment.

Similar enforcement regimes in relation to aircraft in the maritime domain currently exist under Australian legislation such as Part XII of the *Customs Act 1901* and Division 12A of Part 2 of the *Migration Act 1958*.

Other authorisations in relation to aircraft are available under subclause 21(3) and clause 22. Aircraft identification powers are available without authorisation under clause 28.

Clause 18: Monitoring laws

This clause enables an authorising officer to authorise the exercise of maritime powers in relation to a vessel, installation, protected land area or isolated person for the purposes of administering or ensuring compliance with a ‘monitoring law’ (as defined in clause 8). Examples of monitoring laws include the *Customs Act 1901*, the *Fisheries Management Act 1991* and the *Migration Act 1958*. The clause allows for a range of obligations and regulatory matters to be administered and monitored. For example, a vessel could be approached to ensure that it has an appropriate fishing licence under fisheries management legislation.

Authorisation of the exercise of maritime powers under this clause must be for the purposes of administering or ensuring compliance with a monitoring law. No specific threshold is required. This is consistent with existing provisions of monitoring laws. For example, paragraph 84(1)(b) of the *Fisheries Management Act 1991* does not require a specific threshold to board a vessel for the purposes of determining compliance with a fishing concession. Another example is subsection 184A(3) of the *Customs Act 1901* which does not require a specific threshold for boarding Australian vessels outside the territorial seas of other countries.

This subclause does not apply to aircraft. Authorisations for the exercise of maritime powers in relation to aircraft in the maritime environment can only be made under subclauses 17(2) and 21(3), as well as clauses 19 and 22.

Clause 19: International agreements and decisions

This clause enables an authorising officer to authorise the exercise of maritime powers in relation to a vessel, installation or aircraft if the authorising officer suspects, on reasonable grounds, that an international agreement or international decision applies to the vessel, installation or aircraft. This clause provides a basis in Australian law to enforce international agreements and decisions. For example, if Australia was party to a fisheries convention that provided for maritime enforcement powers against foreign vessels in certain circumstances (and the convention was prescribed or approved under clause 12), then maritime officers could be authorised to exercise certain maritime powers in the Bill to enforce the convention. The threshold for an authorising officer to make an authorisation under this subclause is suspicion on reasonable grounds.

This clause does not apply in relation to protected land areas or isolated persons as these are not relevant for the purpose of international agreements and decisions.

Clause 12 sets out when international agreements and international decisions ‘apply’ to a vessel, installation or aircraft. Clause 33 provides for additional powers to be exercised if they are included in international agreements and decisions, as well as limitations on the powers that may be exercised via those agreements and decisions.

Clause 20: Evidential material and warrants

Subclause 20(1) enables an authorising officer to authorise the exercise of maritime powers in relation to a vessel, installation or protected land area if the officer suspects, on reasonable grounds, that there is evidential material on the vessel, installation or land, or if the officer believes, on reasonable grounds, that the exercise of the powers is necessary to enforce a warrant that is in force under an Australian law. The purpose of this provision is to allow, amongst other things, for the enforcement of warrants made under other Australian laws and the seizing of evidential material where the underlying contravention is land-based. For example, if a person robs a bank and flees by vessel, then a warrant could be obtained, and the Bill utilised, to arrest the person on the vessel and to seize evidential material. This would not be possible under the Bill without this provision because other provisions of the Bill do not provide for the exercise of powers for land-based offences. For maritime-based contraventions, seizure of evidential material, searching and arresting could be done without warrant under the Bill (usually via a clause 17 authorisation).

The threshold for an authorising officer to make an authorisation in respect of evidential material is suspicion on reasonable grounds, and for warrants it is belief on reasonable grounds. The term ‘evidential material’ is defined in clause 8. It is not necessary for an officer to have actual possession of the relevant warrant to make an authorisation under subclause 20(1)(b). For example, if a maritime officer is told of the existence and terms of the warrant by a reliable source, this would be sufficient to establish a reasonable belief.

Subclause 20(2) provides that an authorisation made under subclause 20(1) is an ‘evidence and warrants authorisation’. This authorisation has specific geographical limits imposed in clause 45 (which outlines the circumstances when warrants can be enforced against foreign vessels in Australia’s territorial sea and internal waters in accordance with international law). Clause 77 contains the specific power that would be used to arrest persons under an arrest warrant. The powers to search persons and things under a search warrant are outlined in Division 5 of Part 3.

Clause 21: Identifying vessels and aircraft

Subclause 21(1) enables an authorising officer to authorise the exercise of maritime powers in relation to a vessel if the vessel is not flying the flag of a State or if the authorising officer suspects, on reasonable grounds, that the vessel has been flying the flag of more than one State, is flying the flag of a State that it is not entitled to fly or the vessel is not entitled to fly the flag of any State. This threshold is similar to existing section 184A(9) of the *Customs Act 1901*. Under subclause 21(2), this authorisation is to be referred to as a ‘vessels without nationality authorisation’.

Article 110 of the Convention provides Australia with certain rights to visit a vessel which is not flying a flag or flying a flag which it is not entitled to fly. These rights already exist in maritime enforcement legislation (e.g. section 185A of the *Customs Act 1901*) and are reflected in subclause 21(1).

Subclause 21(3) allows an authorisation to be made to use maritime powers if the exercise of aircraft identification powers has not been complied with by an aircraft, or the officer

reasonably suspects that the response received from the aircraft is materially false or misleading. ‘Aircraft identification powers’ (as defined in subclause 55(4)) can be exercised without an authorisation under clause 28.

Clause 22: Seizable transit goods—aircraft

This clause enables an authorising officer to authorise the exercise of maritime powers in relation to an aircraft if the officer suspects, on reasonable grounds, that the aircraft is carrying seizable transit goods.

‘Seizable transit goods’ are defined in clause 8 (which is based on s203DA of the *Customs Act 1901*). These goods may also be seized from vessels via an authorisation under clause 18 (monitoring laws) when, for example, a maritime officer is administering or ensuring compliance with the *Customs Act 1901*.

Division 3 – Authorisations and approvals

This Division outlines when authorisations are in force and when they become spent, lapse or expire. The Division also provides for Ministerial approval of the exercise of maritime powers in relation to actionable contraventions, international agreements and international decisions. As authorisations and approvals in the maritime context may need to be made urgently, this Division provides that they need not be in writing.

Clause 23: When authorisations are in force

Subclause 23(1) provides that an ‘authorisation’ (i.e. an authorisation given by an authorising officer under Division 2 of Part 2) remains in force until it is either spent or it lapses.

Subclause 23(2) provides that an authorisation is spent when the continuous exercise of powers under the authorisation ends. However, clause 11 provides that a continuous exercise of powers does not end only because there is a period of time between the exercise of one or more of the powers (though there would need to be a reasonable temporal connection between the use of the powers). An authorisation will continue to operate until the exercise of maritime powers is no longer required. It is necessary for the duration of authorisations to be phrased in this way because of the difficulty in prescribing how long powers may be needed in the maritime environment. In many situations, the exercise of powers will only last for a short period of time. In others, for example, a chase or ‘hot pursuit’ of a vessel, the powers could be needed for weeks or months.

Subclause 23(3) provides for the expiry of an authorisation where no powers are exercised under it within 72 hours. This means that if an authorisation is made, but no powers are exercised under it, it lapses after three days.

Clause 24: When approvals lapse

This clause provides that an approval given by the Minister lapses 14 days after it is given, if the approval is to exercise maritime powers for the purpose of actionable contraventions (subclause 10(b)) or international agreements and international decisions (as defined in clause 8, and applicable in accordance with clause 12). The period of 14 days should allow sufficient time to undertake the relevant maritime operation in many cases. However, where

an approval lapses, and the exercise of powers is still required, clause 26 enable a further authorisation to be given.

Clause 25: Form of authorisations and approvals

In the maritime context, authorisations and approvals may need to be made urgently and without the requirement for a written form. Subclause 25(1) makes clear that an authorisation or approval need not be in writing. For example, it would be sufficient for the commander of a Commonwealth vessel to give an oral direction to exercise maritime powers if he or she reasonably suspected a contravention of an Australian law. This is similar to existing arrangements in the maritime environment. For example, a commander of a Customs vessel may give an order to an officer to exercise powers under the *Customs Act 1901* without the necessity to put this order in writing under the legislation. Similar to current arrangements, an authorising officer may be required to give evidence about the existence and nature of an orally-made authorisation for the purposes of prosecuting an offence that was enforced under the Bill.

Subclause 25(2) makes clear that an authorisation or approval in writing is not a legislative instrument for the purposes of section 5 of the *Legislative Instruments Act 2003* on the basis that it is applying the law in a particular case.

Clause 26: Further authorisations and approvals

This clause provides flexibility in making authorisations and approvals as required in the maritime operational environment. The clause allows for the making of multiple authorisations and approvals in relation to a given situation. It provides that nothing in Division 3 of Part 2 of the Bill would prevent the giving of further authorisations or approvals in relation to a particular vessel, installation, aircraft, protected land area or isolated person.

Division 4 – Exercising powers

This Division provides for the circumstances in which an authorisation is not required. An authorisation is not required for the exercise of airport identification powers as maritime officers need to be in a position to identify any aircraft. Further, no prior authorisation is required to ensure the safety of persons because dangerous situations may arise suddenly in the maritime environment and maritime officers must be able to act quickly to avoid injury or harm.

This Division also provides for the circumstances in which an authorisation is required, the purposes for which authorisations may be used and the scope of the maritime powers that may be exercised. Further, the Division provides for how warrants may be enforced and when they are not required.

Subdivision A—Effect of Division

Clause 27: Effect of Division

This clause provides that Division 4 of Part 2 of the Bill has effect subject to Division 5 of Part 2 of the Bill. Accordingly, the exercise of all powers under the Bill is subject to certain

geographical limitations. These limitations reflect the restrictions on the exercise of powers derived from international and Australian law.

Subdivision B—Exercising powers without authorisation

Clause 28: Aircraft identification powers

This clause allows a maritime officer to exercise aircraft identification powers (as defined in subclause 55(1)) without authorisation. An example of an aircraft identification power is the ability to contact the pilot of an aircraft and ask for certain details about the aircraft. The power is necessary because the identity and nationality of any given aircraft may not always be known. This information may be needed by a maritime officer, for example, to assess the appropriateness of the course of the aircraft or the legality of the presence, entry or departure of the aircraft in Australian air space. It is appropriate for these powers to be exercised without authorisation as they are powers directed at identification of aircraft and are less coercive and intrusive in nature than many other maritime powers provided in the Bill (e.g. intercepting an aircraft). Aircraft identification powers are contained in existing legislation (e.g. section 184D of the *Customs Act 1901*).

Clause 29: Ensuring safety

This clause makes clear that no authorisation is required for a maritime officer to exercise maritime powers to ensure their own safety or the safety of others. It is appropriate that maritime officers should be able to take action for the safety of themselves or others without the need for an authorisation. For example, if a vessel is sinking, a maritime officer should be able to act quickly (as is required under Regulation 33, Chapter V of the Annex to the International Convention for the Safety of Life at Sea 1974 (SOLAS)) to save persons on board from drowning. The benefits of ensuring the safety of persons in the maritime environment, particularly in emergency situations, will usually outweigh the reduced oversight of maritime officers exercising powers without having obtained an authorisation.

There is no specific threshold which requires ‘suspicion on reasonable grounds’ in this clause as there is underlying the exercise of other powers (e.g. clause 17). Thresholds in the form of a ‘belief on reasonable grounds’ are recommended for the exercise of enforcement powers in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004). While the clause departs from this approach, it would require that a maritime officer must exercise the powers *for the purpose of* ensuring the safety of the officer or another person. Whether or not an action was for such a purpose would be determined objectively in all the circumstances. For instance, this determination would need to take into account that a maritime officer may be acting in urgent or emergency circumstances, in the difficult maritime environment, where lives may be at stake, and with little time to ascertain all relevant information.

Subdivision C—Exercising powers with authorisation

Clause 30: Authorisation required

This clause allows a maritime officer to exercise powers in relation to a vessel, installation, aircraft, protected land area or isolated person in accordance with Subdivision C of

Division 4 of the Bill if an authorisation is in force in relation to them. This provides the link between an authorisation and the ability to exercise powers under it or for other purposes identified in clauses 32 and 33.

Clause 31: Exercise of maritime powers for authorised purpose

This clause allows a maritime officer to exercise maritime powers to do whichever of the following applies in accordance with the authorisation made under clauses 17 to 22: investigate the contravention; administer or ensure compliance with the monitoring law; administer, ensure compliance with or investigate a contravention of the international agreement or international decision; access or seize the evidential material; enforce the warrant in force under Australian law; identify the vessel or aircraft; and retain the seizable transit goods. The words ‘in accordance with’ signify that the powers used must reasonably be for the purpose of discharging the particular authorisation.

Clause 32: Exercise of maritime powers for other purposes

Subclause 32(1) provides that, once a maritime officer is acting under an authorisation, they are permitted to exercise maritime powers to take any of the actions set out in paragraphs (a) to (h) of the subclause, so long as any requisite elements are met.

Paragraphs (a) to (i) allow a maritime officer to:

- investigate or prevent any contravention of an Australian law that the officer suspects, on reasonable grounds, the vessel, installation, aircraft, protected land area or isolated person may be involved in;
- administer or ensure compliance with any applicable monitoring law;
- in the case of a vessel, installation or aircraft, to administer, ensure compliance with or investigate a contravention of any international agreement or international decision that the officer suspects, on reasonable grounds, applies to the vessel, installation or aircraft;
- access or seize any thing that the officer suspects is owned by the Commonwealth or a State of Territory, is evidential material or is a border controlled drug or plant;
- arrest any person whom the officer suspects has committed an indictable offence against an Australian law;
- enforce any warrant that is in force under an Australian law;
- retain any thing that the officer believes could be seized under an Australian law; and
- identify vessels and aircraft.

For example, if a maritime officer boards a vessel under an authorisation for a suspected breach of migration legislation, and then subsequently suspects that the vessel has been involved in illegal fishing, clause 32 would allow the maritime officer to investigate the illegal fishing. This provision will provide maritime officers acting under an authorisation operational flexibility in the maritime environment. The benefits of maritime officers being able to operate flexibly and quickly in the maritime environment, particularly in

circumstances of urgency, outweigh the reduced oversight of maritime officers resulting from not obtaining further authorisations.

Subclause 32(2) provides that subclause 32(1) does not apply in relation to an aircraft in flight. This means that the exercise of powers by maritime officers under this clause in relation to an aircraft in flight is confined to those that are for the purposes of the authorisation only. It is appropriate that the most senior officer in the relevant circumstances authorise every purpose of any authorisation in relation to the exercise of powers over aircraft in flight because this would inherently involve greater risk of injury to persons or damage to property and therefore should be subject to greater oversight.

Clause 33: Additional powers and limitations under international agreements and decisions

Where the exercise of powers under an authorisation has commenced, clause 33 provides for additional powers to be exercised in relation to a vessel, aircraft or installation under international agreements and decisions. The powers must be specified in an international agreement or international decision, prescribed by the regulations and exercised for the purpose of the agreement or decision.

However, regulations may prescribe that certain powers must not be exercised and that certain maritime officers may not exercise powers under particular agreements or decisions. This allows the exercise of powers under international agreements and decisions to be tailored as necessary. This limitation on the exercise of powers prevails over the other provisions in Subdivision C of Division 4 of Part 2 of the Bill.

Subdivision D—Scope of power

Clause 34: Scope of power—vessels, installations, aircraft and protected land areas

This clause clarifies the scope of where, and against whom and what, maritime powers may be exercised in relation to vessels, installations, aircraft or protected land areas.

This clause provides that a maritime officer exercising powers in relation to a vessel, installation, aircraft or protected land area may exercise the powers on or in any part of the vessel, installation, aircraft or protected land area. A maritime officer may also exercise maritime powers in relation to any person or thing on, or in the vicinity of a vessel, installation, aircraft or land. ‘Vicinity’, in this context, refers to a reasonable physical proximity between the location of the vessel, installation, aircraft or protected land area and the location of the person or thing that is subject to the exercise of powers. Allowing maritime officers to exercise powers in the vicinity of vessels, installations, aircraft or protected land areas accords flexibility and continuity in the exercise of maritime powers, in an environment where circumstances can change quickly and unexpectedly. For example, if maritime officers are exercising powers in relation to a vessel, and the crew throw goods overboard, this provision would permit the exercise of powers in relation to those goods as they would remain in the vicinity of the vessel.

A maritime officer may also exercise maritime powers in relation to any person whom the officer suspects, on reasonable grounds, was on or is intending to go onto a vessel,

installation, aircraft or land. For example, if a vessel runs ashore and the crew run onto land, the maritime officer could continue to pursue the crew on land. In addition, a maritime officer may exercise maritime powers in relation to any thing that the officer suspects was on or is to be taken onto a vessel, installation, aircraft or land or is, was, or is to be, attached to, or controlled or directed from, a vessel, installation, aircraft or land.

Clause 35: Warrants not required

This clause clarifies that maritime officers may exercise powers under the Bill without a warrant. While the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (February 2004) recommends that enforcement powers such as entry, search and seizure should ordinarily be conducted under a warrant, a departure is reasonably justified under this Bill. Warrants are not required in exercising maritime enforcement powers under existing legislation which is being replaced as a consequence of this Bill (e.g. the *Customs Act 1901*, the *Migration Act 1958*, the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984*). In addition, enforcement operations in maritime areas frequently occur in remote locations, isolated from the support normally available to land based operations and constrained by the practicalities involved in sea-based work. In many situations, it would simply not be feasible to have to obtain a warrant from a Magistrate. The ability to exercise powers without a warrant will allow officers to deal with quickly changing circumstances in difficult and dangerous situations at sea. Even though warrants are not required, the system of authorisations in the Bill provides a degree of oversight in relation to the exercise of powers under the Bill.

Clause 36: Enforcing warrants

This clause provides that in using the powers in the Bill to enforce a warrant that is in force under an Australian law (via a paragraph 20(1)(b) authorisation), a maritime officer must comply with any requirements in the warrant that would have to be complied with by any other person executing the warrant. For example, if the warrant imposed specific requirements before entering and searching premises, then those requirements would still need to be observed when exercising powers to enforce the warrant under the Bill.

Subdivision E—Using force and assistance

Clause 37: Using force

Circumstances may arise in the maritime context where a degree of force may be necessary, such as where a person on a vessel threatens to harm him or herself or others.

Subclause 37(1) provides that a maritime officer, in exercising any of the powers under this Bill, may use such force against a person or thing as is necessary and reasonable in the circumstances.

Subclause 37(2) provides certain additional safeguards in using force in the exercise of any power under the Bill. A maritime officer must not subject a person to greater indignity than is necessary and reasonable to exercise the powers. Further, a maritime officer must not do anything that is likely to cause the death of, or grievous bodily harm to, a person unless the officer believes on reasonable grounds that doing that thing is necessary to protect life or to

prevent serious injury to another person (including the officer). This ensures that high degrees of force may only be used in situations of self-defence or defence of others. If the person is attempting to escape arrest by fleeing, lethal force or force likely to cause grievous bodily harm may only be used if necessary for self-defence or defence of others, and if the maritime officer has, if practicable, called on the person to surrender and, after so doing, believes on reasonable grounds that the person cannot be apprehended in any other manner. The use of force provision reflects equivalent provisions in the *Crimes Act 1914*.

It should be noted that use of force powers may be curtailed on the Ministerial appointment of maritime officers under subclause 104(3). For example, where particular maritime officers may not require the ability to use lethal force in their particular duties or role, then their appointment under subclause 104(3) may limit their use of maritime powers accordingly. Operational guidelines and training for maritime officers during implementation of the Bill will also help ensure that the use of force will be appropriate in the circumstances.

Clause 38: Requesting assistance

Subclause 38(1) allows a maritime officer to request the assistance of any other person, including an officer of another country. In the maritime operational context where circumstances can change quickly and be somewhat unpredictable, maritime officers should be able to seek assistance where necessary from persons who may be in a position to assist. Precedents for requesting assistance exist in current legislation (e.g. section 185AA of the *Customs Act 1901* allows a Customs officer to request a person to search other persons in particular circumstances).

Subclause 38(2) provides that the request may include, but is not limited to: a request to operate a vessel, aircraft or installation in a particular manner; operate machinery or equipment on a vessel, aircraft, installation or land in a particular manner; search a person; or assist the officer to access data held in, or accessible from, an electronic device that is on a vessel, aircraft, installation or land. Subclause 38(3) provides that subclause (2) does not limit subclause (1).

Subclause 38(4) provides that the person may refuse to assist. A person may refuse to assist at any time, even after initial agreement is given. For instance, if a person agrees to assist, but then feels uncomfortable doing a particular act, the person can withdraw from that act.

Subclause 38(5) provides that if the person agrees to assist, she or he needs to follow any directions given by the officer. The subclause defines such a person as a ‘person assisting’.

Subclause 38(6) allows for the use of force against a thing as is necessary and reasonable in the circumstances – for example to break open a container which is suspected to contain evidential material. Nothing in clause 38 would prevent a person assisting from acting in self-defence.

Clause 39: Requiring assistance

Subclause 39(1) allows a maritime officer exercising powers in relation to a vessel, installation, aircraft or protected land area to require the assistance of a person who is on, in or in the vicinity of, the vessel, installation, aircraft or land. This subclause provides

maritime officers with the ability to compel a relevant person to assist. This is appropriate in the maritime operational environment in certain situations. For example, if a vessel is drifting towards a reef, a person who knows how to operate the vessel may need to be compelled to manoeuvre the vessel out of harm's way. It is an offence not to comply with a requirement under this subclause (see clause 103).

Subclause 39(2) provides that the requirement may include, but is not limited to, a requirement to: operate a vessel, aircraft or installation in a particular manner; operate machinery or equipment on the vessel, aircraft, installation or land in a particular manner; assist the officer to access data held in, or accessible from, an electronic device or any other equipment on the vessel, aircraft, installation or land; or use force against a thing as is necessary and reasonable. An example of where use of force may be required in relation to a thing is where a container suspected of containing evidential material requires the use of force to break it open.

However, subclause 39(3) provides that the officer must not require the person to do anything that would endanger the health or safety of the person or any other person. This subclause provides safeguards for persons compelled to assist maritime officers. Nothing in clause 39 would prevent a person required to assist from acting in self-defence.

Division 5—Geographical limits

The exercise of all powers under the Bill is subject to certain geographical limitations set out in Division 5 (see clause 27). These limitations reflect the restrictions on the exercise of powers derived from international and Australian law.

Subdivision A—Exercising powers in other countries

Clause 40: Exercising powers in other countries

This clause provides that the Bill will not authorise the exercise of powers at a place in another 'country' (as defined in clause 8), including the territorial sea of that other country, unless the powers are exercised:

- at the request or with the agreement of the other country;
- to administer, ensure compliance with or investigate a contravention of an international agreement or international decision that applies in that place;
- to investigate a contravention of a law (prescribed by the regulations) that applies in that place;
- to administer or ensure compliance with a monitoring law (prescribed by the regulations) that applies in that place; or
- to ensure the safety of a maritime officer or any other person when exercising powers under this clause.

This clause is consistent with the principle of territorial sovereignty at international law. It also reflects the accepted international norm that countries may consent to the use of enforcement powers by foreign countries in their sovereign territories. The clause applies

whether the subject of the exercise of powers is an Australian or foreign vessel, aircraft or installation.

Subdivision B—Exercising powers between countries

Clause 41: Foreign vessels between countries

This clause provides that the Bill does not authorise the exercise of powers in relation to a ‘foreign vessel’ (as defined in clause 8) at a place between ‘Australia’ (as defined in clause 8) and another ‘country’ (as defined in clause 8) unless the exercise of the powers satisfies certain exceptions. In summary, clause 41 applies to the exercise of powers against foreign vessels in Australia’s contiguous zone, exclusive economic zone and the high seas, as well as the contiguous and exclusive economic zones of other countries (subject to certain exceptions in relation to installations and safety zones). The exercise of maritime powers in the territorial seas of other countries is dealt with in clause 40.

The circumstances in which powers may be exercised against a foreign vessel under clause 41 are:

- to investigate a contravention of a law that applies to foreign vessels, or persons on foreign vessels, in that place (as well as to arrest or require a person to cease conduct);
- in the contiguous zone, to investigate or prevent a contravention of certain customs, fiscal, immigration or sanitary law prescribed by the regulations (as permitted by Article of 33 of the Convention);
- to administer or ensure compliance with a ‘monitoring law’ (as defined in clause 8) that applies in foreign vessels, or persons on foreign vessels, in that place;
- to administer, ensure compliance with or investigate a contravention of an international agreement or international decision (as defined in clause 8 and applied in clause 12) that applies to the vessel in that place;
- to identify a vessel (as permitted by Article 110 of the Convention and other international laws);
- in relation to a support vessel where the vessel being supported is involved in a contravention of Australian law (as reflected in Article 111 of the Convention, customary international law and section 245B of the *Migration Act 1958* and section 184A of the *Customs Act 1901*);
- in relation to a support vessel where the vessel being supported is either an Australian vessel involved in a contravention within the exclusive economic zone, or waters above the continental shelf, of Australia, or a foreign vessel involved in a contravention of a law that applies to the foreign vessel, or persons on the foreign vessel, in that place (as reflected in Article 111 of the Convention, customary international law and section 245B of the *Migration Act 1958* and section 184A of the *Customs Act 1901*);
- after the vessel has been chased without interruption to that place (as permitted under Article 111 of the Convention and other international laws);

- at the request or with the agreement of the country of the vessel's nationality;
- to seize a 'border controlled drug or plant' (as defined in clause 8) (as permitted under existing provisions of the *Customs Act 1901* (e.g. section 185A(6)) and international law e.g. the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988)); or
- to ensure the safety of a maritime officer or any other person.

These exceptions reflect the limits of international law in relation to the use of enforcement powers against foreign vessels.

The exercise of powers against Australian vessels is not subject to the same geographical restrictions as foreign vessels. Under international law, Australia may exercise powers against Australian vessels to enforce relevant laws in any location except within the territorial sea of another country (unless one of the exceptions in clause 40 applies).

Clause 42: Meaning of *chased without interruption*

Subclause 42(1) defines the term 'chased without interruption' for the purposes of subclause 41(1)(i). A vessel will be 'chased without interruption' if:

- at a place where a maritime officer may otherwise exercise powers in relation to the vessel (without having chased it), a maritime officer requires the 'person in charge' (as defined in clause 8) of the vessel to stop or facilitate boarding of the vessel;
- that requirement is not complied with; and
- the vessel is chased from that place and the chase is not interrupted.

This subclause reflects the requirements for conducting a hot pursuit of a foreign vessel under international law, particularly under the Convention. A 'chase' commences only once a requirement to stop or facilitate boarding of a vessel has been made. Merely following a vessel in the direction in which it is heading, without such a requirement, would not constitute a chase for the purposes of the Bill.

Subclause 54(3) provides that an order to stop or facilitate boarding made to a vessel that is being supported by another vessel is deemed to be such an order for that other vessel. This deeming provision applies for the purpose of subclause 42(1).

Subclause 42(2) sets out circumstances in which a chase will not be construed as being interrupted. This is consistent with developments in international law, taking into account technological innovations and the practicalities of conducting hot pursuits across long distances.

Clause 43: Foreign installations between countries

This clause makes clear that the Bill does not authorise the exercise of powers in relation to a 'foreign installation' (as defined in clause 8) at a place between 'Australia' (as defined in clause 8) and another 'country' (as defined in clause 8) unless the powers are exercised:

- to administer, ensure compliance with or investigate a contravention of an international agreement or international decision that applies to foreign installations, or persons on foreign installations, in that place;
- at the request or with the agreement of the country that controls the installation; or
- to ensure the safety of a maritime officer or any other person when exercising powers under this clause.

This clause reflects the limits of international law in relation to the use of enforcement powers against foreign installations, particularly as outlined in the Convention (as defined in clause 8).

Clause 44: Foreign aircraft between countries

This clause makes clear that the Bill does not authorise the exercise of powers, other than ‘aircraft identification powers’ (as defined in subclause 55(4)), in relation to a ‘foreign aircraft’ (as defined in clause 8) at a place between ‘Australia’ (as defined in clause 8) and another ‘country’ (as defined in clause 8) unless the powers are exercised:

- to investigate a contravention of a law that applies to foreign aircraft, or persons on foreign aircraft, in that place;
- to administer, ensure compliance with or investigate a contravention of an international agreement or international decision that applies to foreign aircraft, or persons on foreign aircraft, in that place;
- at the request or with the agreement of the country of the aircraft’s nationality; or
- to ensure the safety of a maritime officer or any other person when exercising powers under this clause.

These exceptions reflect the limits of international law in relation to the use of enforcement powers against foreign aircraft, particularly under international aviation conventions (especially, the Chicago, Montreal, Tokyo and Hague Conventions).

Subdivision C—Exercising powers in Australia

Clause 45: Foreign vessels in Australia—evidence and warrants authorisations

This clause makes clear that the Bill does not authorise the exercise of powers in relation to a ‘foreign vessel’ (as defined in clause 8) under an ‘evidence and warrants authorisation’ (as defined in subclause 20(2)) at a place in ‘Australia’ (as defined in clause 8) unless:

- the vessel is in Australia’s internal waters or passing through Australia’s territorial sea after leaving internal waters;
- the powers are exercised at the request or with the agreement of the country of the vessel’s nationality; or
- to ensure the safety of a maritime officer or any other person when exercising powers under this clause.

This clause reflects permitted exceptions under international law, including Article 27 of the Convention (which outlines the criminal jurisdiction of the coastal State over foreign ships in the territorial sea and internal waters). This clause is subject to clause 46 to ensure that the constitutional limits on the exercise of powers by the Commonwealth in States and internal Territories is respected.

Clause 46: Vessels, installations and isolated persons in States and internal Territories

This clause makes clear that the Bill does not permit the exercise of powers in relation to a vessel, installation or an isolated person in a State or internal Territory unless:

- the powers are exercised as part of the ‘continuous exercise of powers’ (as defined in clause 11) begun outside the State or internal Territory;
- the powers are exercised in relation to a Commonwealth law in waters navigable from waters of the sea; or
- to ensure the safety of a maritime officer or any other person when exercising powers under this clause.

This clause reflects the respective responsibilities of the Commonwealth and State and Territory Governments. The ‘limits of a State’ is prescribed in section 14 of the *Seas and Submerged Lands Act 1973*. Generally, it refers to areas landward of the low water mark and waters landward of closing lines along bays and rivers.

Powers under the Bill will be available in respect of vessels in ports in States or internal Territories where the maritime officer is enforcing a Commonwealth law in waters navigable from the sea or where one of the other exceptions in clause 46 applies.

Clause 47: Aircraft in States and internal Territories

This clause makes clear that the Bill does not authorise the exercise of powers in relation to an aircraft in a State or internal Territory unless the powers are exercised:

- as part of the ‘continuous exercise of powers’ (as defined in clause 11) begun outside the State or internal Territory, regarding conduct that occurred outside that State or internal Territory; or
- in relation to a law of the Commonwealth; or
- to ensure the safety of a maritime officer or any other person when exercising powers under this clause.

This clause reflects the respective responsibilities of the Commonwealth and State and Territory Governments. Although the Bill generally operates outside of the States and internal Territories, this clause ensures that maritime officers possess the ability to exercise powers in relation to aircraft located within Australia as necessary, for instance, where the aircraft was initially intercepted at sea and is directed to land in Australia. It also permits the exercise of powers in relation to aircraft (including foreign aircraft) within a State or internal Territory to enforce any applicable law of the Commonwealth.

Subdivision D—Requests and agreements of other countries

Clause 48: Manner and form of requests and agreements

Subclause 48(1) provides that a request or agreement of another country (e.g. under subclause 40(a)) need not be in writing and includes a standing request or agreement, a request or agreement relating to particular circumstances and a request or agreement that covers a particular period of time. This subclause makes clear that any of these forms of requests or agreements would be valid for the purposes of the Bill.

Subclause 48(2) allows international requests and agreements under the Bill to be made with certain specified representatives of other countries. This makes clear which classes of foreign officials are considered to have sufficient authority to make a request or agreement on behalf of their country.

Clause 49: Scope of powers under requests and agreements

This clause allows maritime officers to exercise maritime powers for the purposes set out in the request or agreement with another country. If a request or agreement specifies that a certain power must not be exercised, then this clause also makes clear that that power should not be exercised.

Part 3—Maritime powers

The purpose of Part 3 of the Bill is to set out the maritime powers that may be exercised by maritime officers. These powers include boarding vessels, installations and aircraft; entering on land; obtaining information; searching things and people; examining and copying things; securing things, including weapons; seizing and taking possession of things; moving and holding persons; detaining vessels, aircraft and other conveyances; arresting persons, and requiring persons to cease conduct that contravenes Australian law. These broad powers are based on powers currently available in existing legislation, including Part XII of the *Customs Act 1901*, Division 12A of Part 2 of the *Migration Act 1958* and Part 6 of the *Fisheries Management Act 1991*. These powers support, and are necessary for, the wide range of enforcement and compliance activities that currently occur in the maritime context.

Division 1—Introduction

Clause 50: Guide to this Part

This clause provides a guide to each Division of Part 3 of the Bill.

Clause 51: Effect of Part

This clause makes clear that Part 3 of the Bill must be exercised in accordance with Part 2 of the Bill. This means that the actual maritime powers in Part 3 must be exercised only under an authorisation (except for clauses 28 and 29). If an authorisation is in place, the powers must be exercised in accordance with that authorisation (see clause 31) or for certain additional purposes (e.g. see clause 32). The exercise of the powers is also subject to the geographical limitations in Division 5 of Part 2.

Division 2—Boarding

This Division enables maritime officers to board vessels, installations and aircraft. It is necessary to include these powers to ensure that maritime officers can properly investigate or prevent violations of laws and exercise other powers set out in Part 3 in relation to vessels, installations and aircraft in the maritime domain. Similar powers currently exist in legislation such as Part XII of the *Customs Act 1901*, Division 12A of Part 2 of the *Migration Act 1958* and Part 6 of the *Fisheries Management Act 1991*.

Clause 52: Boarding vessels, installations and aircraft

Subclause 52(1) allows a maritime officer to board a vessel, installation or aircraft. For example, it may be necessary to board a vessel where it is suspected of fishing illegally to determine whether there is evidence of such activity.

Subclause 52(2) provides that if the ‘person in charge’ (as defined in clause 8) of the vessel, installation or aircraft requests the officer to produce identification, the officer must produce the officer’s identity card or other written evidence of the fact that the officer is a Commonwealth officer. As well as providing for the production of identity cards, the subclause also allows the option of producing other written evidence of the fact that the officer is a Commonwealth officer. Clause 110 deals with the issuing, contents and form of identity cards.

Subclause 52(3) provides that if the officer fails to produce the identity card or other written evidence, the officer must leave the vessel, installation or aircraft and not re-board the vessel, installation or aircraft without producing the identity card or other written evidence. The subclause provides a safeguard against unauthorised persons attempting to exercise maritime powers.

Subclause 52(4) makes clear that subclauses (2) and (3) do not apply if the officer is one of the following in uniform: a member of the Australian Defence Force; an officer of Customs (within the meaning of the *Customs Act 1901*); a member or special member of the Australian Federal Police; or an officer prescribed by the regulations. The reason is that the uniforms of the officers specified will provide sufficient evidence of identification.

Clause 53: Requirement to facilitate boarding

Subclause 53(1) allows a maritime officer to require the ‘person in charge’ (as defined in clause 8) of the vessel, installation or aircraft to take reasonable steps to facilitate the boarding. This will enable maritime officers to board and will minimise risks to their safety.

The note to subclause 53(1) points out that clause 103 makes it an offence to fail to comply with a requirement under subclause 53(1).

Subclause 53(2) provides that the requirement to facilitate boarding may be made by any reasonable means (e.g. by radio or direct command or another type of clear signal).

Subclause 53(3) provides that the requirement to facilitate boarding is made whether or not the person in charge of the vessel, installation or aircraft understands or is aware of the requirement. The purpose of this subclause is to ensure that a maritime officer is able to carry out the boarding, even where the person in charge does not comprehend the command (e.g. where the person does not speak English). However, it would not be an offence to fail directions under subclause 53(1) in these circumstances because the requisite fault element would not be satisfied.

Clause 54: Additional powers—vessels

Subclause 54(1) allows a maritime officer to require a person in charge of a vessel to do certain things, including to stop or maintain a specified steady course as may be necessary in the circumstances. For example, it may be necessary for a vessel to maintain a particular course if it is being brought back to port and is navigating through an environmentally sensitive area. The note to subclause 54(1) points out that clause 103 makes it an offence to fail to comply with a requirement under this subclause.

Subclause 54(2) provides that a requirement under subclause 54(1) is made whether or not the person in charge of the vessel, installation or aircraft understands or is aware of the requirement. The purpose of this subclause is to ensure that a maritime officer is able to carry out the necessary actions and operations, even where the person in charge does not comprehend the command (e.g. where the person does not speak English). However, it would not be an offence to fail to comply with directions under subclause 54(1) in these circumstances because the requisite fault element would not be satisfied.

Subclause 54(3) provides for a power to chase or obstruct a vessel if it fails to comply with a requirement to stop or facilitate boarding.

Subclause 54(4) provides that an order to stop or facilitate boarding made to a vessel that is being supported by another vessel is deemed to be such an order for that other vessel. This reflects similar provisions being replaced by this Bill in subsection 184B(3) of the *Customs Act 1901* and subsection 245C(3) of the *Migration Act 1958*. This deeming provision applies for the purposes of chasing that other vessel in subclause 54(3) and for the meaning of ‘chased without interruption’ in subclause 42(1).

Clause 55: Additional powers—aircraft

Subclause 55(1) allows a maritime officer to require the ‘person in charge’ (as defined in clause 8) of an aircraft to disclose any or all of the following to the officer: the identity of the aircraft, the identity of all persons on the aircraft, the flight path of the aircraft, and the flight plan of the aircraft. This information may be needed by a maritime officer, for example, to assess the appropriateness of the course of the aircraft or the legality of the presence, entry or departure of the aircraft in Australian air space. The note to subclause 55(1) points out that clause 103 makes it an offence to fail to comply with a requirement under the subclause. Although clause 44 allows for the exercise of aircraft identification powers in relation to a foreign aircraft at a place between Australia and another country, this does not give the offence under Item 4 of clause 103 any application outside Australia.

Subclause 55(2) provides that the requirement may be made by any reasonable means (e.g. by radio or another type of clear signal).

Subclause 55(3) provides that the requirement is made whether or not the person in charge of the aircraft understands or is aware of the requirement. The purpose of this subclause is to ensure that the requirements can be made even where the person in charge does not comprehend the command (e.g. where the person does not speak English). However, it would not be an offence to fail to comply with directions under subclause 55(1) in these circumstances because the requisite fault element would not be satisfied.

Subclause 55(4) provides that the powers in subclause 55(1) are ‘aircraft identification powers’. Clause 28 allows a maritime officer to exercise aircraft identification powers without authorisation.

Subclause 55(5) allows a maritime officer who is on board an aircraft to use that aircraft to intercept another aircraft. For example, if an aircraft is suspected of importing narcotics, it may need to be intercepted and required to land.

Subclause 55(6) provides that the interception must be in accordance with the practices recommended in Annex 2 (headed “Rules of the Air”) to the Convention on International Civil Aviation done at Chicago on 7 December 1944 (that was adopted in accordance with that Convention). These represent the standard rules for interception in international law.

Subclause 55(7) allows a maritime officer to require the person in charge of an aircraft to land the aircraft at the nearest airport in Australia or at another place in Australia that the

officer considers appropriate. The note to subclause 55(7) points out that clause 103 makes it an offence to fail to comply with a requirement under the subclause.

Subclause 55(8) requires a maritime officer to have regard to the safety of the aircraft when making a requirement under subclause 55(7).

Division 3—Entering on land

This Division enables maritime officers to enter land in circumstances where the exercise of maritime powers on land is an extension of the exercise of those powers in the maritime domain, as provided for in clauses 46 and 47. These powers are necessary to enable maritime officers to properly conduct enforcement and compliance activities in the maritime context.

Clause 56: Entering on land

Subclause 56(1) allows a maritime officer to enter onto land. It is necessary to include this power because the Bill provides for some circumstances in which maritime officers are permitted to exercise powers on land (see clauses 46 and 47). For example, if a vessel is chased, it lands on a beach and the crew run onto nearby land, then this provision would allow maritime officers to continue to pursue those persons onto the land.

Subclause 56(2) provides that if the ‘person in charge’ (as defined in clause 8) of the land requests the officer to produce identification, then the officer must produce the officer’s identity card or other written evidence of the fact that the officer is a Commonwealth officer. As well as providing for the production of identity cards, the subclause allows the option of producing other written evidence of the fact that the officer is a Commonwealth officer. Clause 110 deals with the issuing, contents and form of identity cards.

Subclause 56(3) provides that if the officer fails to produce the identity card or other written evidence, the officer must leave the land and not re-enter the land without producing the identity card or other written evidence. The subclause provides a safeguard against unauthorised persons attempting to exercise maritime powers.

Subclause 56(4) provides that subclauses 56(2) and 56(3) do not apply if the officer is one of the following in uniform: a member of the Australian Defence Force; an officer of Customs (within the meaning of the *Customs Act 1901*); a member or special member of the Australian Federal Police; or an officer prescribed in the regulations. The reason is that the uniforms of the officers specified will provide sufficient evidence of identification.

Division 4—Obtaining information

This Division enables maritime officers to obtain information by requiring persons to give answers to questions or to produce records or documents or by obtaining readings from vessels, installations or aircraft. These powers are necessary to enable maritime officers to conduct enforcement and compliance activities in the maritime context. For example, it may be necessary to obtain certain documents as evidence of a suspected offence. These powers are similar to existing powers, such as in Part XII of the *Customs Act 1901*.

Clause 57: Requiring answers, records and documents

Subclause 57(1) allows a maritime officer to require a person to answer questions or produce records or documents. The note to subclause 57(1) points out that clause 103 makes it an offence to fail to comply with a requirement under the subclause.

Some examples of the things that the questions or records may relate to are set out in subclause 57(2). For example, a maritime officer can require crew to state the journey that they have taken for quarantine purposes. This clause gives maritime officers broad powers of inquiry to enable them to properly perform their functions in the maritime domain.

However, clause 57 does not displace a person's rights and privileges at common law, including the right to silence, the right not to incriminate oneself or legal professional privilege.

Clause 58: Obtaining readings

This clause allows a maritime officer to obtain certain readings from a vessel, installation or aircraft. For example, it may be necessary to obtain readings from a vessel to determine where it may have been, for the purpose of proving a fisheries offence. The note points out that clause 103 makes it an offence to fail to comply with a requirement under this clause.

Division 5—Searching

This Division enables maritime officers to conduct searches and lift persons and things from the sea. These powers are necessary to enable maritime officers to conduct enforcement and compliance activities in the maritime context. These powers are similar to existing powers in Part XII of the *Customs Act 1901*, Part 12A of Part 2 of the *Migration Act 1958* and Part 6 of the *Fisheries Management Act 1991*.

Clause 59: Searching places

Subclause 59(1) allows a maritime officer to conduct a search, including, but not limited to, a search of private living quarters. For example, it may be necessary to search the cabin of a vessel if there is a suspicion that there are narcotics on board. A power to search vessels currently exists in section 245F of the *Migration Act 1958* and section 185 of the *Customs Act 1901*.

Subclause 59(2) allows a maritime officer conducting a search to break open any space (including a hold, compartment, container, receptacle or any place that could be used as a receptacle).

Subclause 59(3) provides that, before breaking open a space, a maritime officer must give the 'person in charge' (as defined in clause 8) of the vessel, installation, aircraft or land concerned a reasonable opportunity to open the space. This subclause helps to ensure any damage to property is minimised to that which is necessary.

Subclause 59(4) provides that subclause 59(3) does not apply if it is not reasonably practicable to give the person such an opportunity.

Subclause 59(5) allows a maritime officer to use a dog or any equipment or other thing to assist in a search.

Clause 60: Lifting persons or things from the sea

This clause allows a maritime officer to cause a person or thing to be lifted from the sea. This subclause allows for the retrieval of a thing which may have been thrown overboard prior to the officer exercising maritime powers (e.g. narcotics). It would also allow for an ‘isolated person’ (as defined in clause 8) to be lifted from the sea onto a vessel.

Clause 61: Searching persons

This clause allows a maritime officer to conduct ‘ordinary’ and ‘frisk’ searches of people. For example, it may be necessary to conduct a frisk search of a person if there is a suspicion that they have a weapon or evidential material. Similar powers to conduct searches of persons in the maritime domain exist in current legislation such as section 185AA of the *Customs Act 1901* and section 245FA of the *Migration Act 1958*. Subclause 61(3) also allows the officer to require the production of any thing found as a result of a search. The note to subclause 61(3) points out that clause 103 makes it an offence to fail to comply with a requirement under the subclause.

Subclauses 61(4) and (5) describe the nature of ‘ordinary’ and ‘frisk’ searches. An ‘ordinary search’ is a search of a person, or things in their possession and includes the removal of some items of clothing (e.g. a coat). A ‘frisk search’ involves a search of a person by quickly running hands over the person’s outer garments and examining things worn or carried by the person.

Clause 62: Conducting frisk searches

This clause sets out how frisk searches must be conducted. It ensures that a person of the same sex as the person being searched will conduct frisk searches, except in circumstances where an officer or suitable person of the same sex is not available.

Division 6—Things found or produced

This Division enables maritime officers to examine, secure and mark things, copy records and documents, secure weapons and retain and seize things. These powers are necessary to enable maritime officers to conduct enforcement and compliance activities in the maritime context. These powers are similar to existing powers, for example, in section 185 of the *Customs Act 1901*.

Clause 63: Examining things

This clause allows maritime officers to examine things and provides examples. For instance, it may be necessary to open a package to determine whether it contains an illegal import. Subclause 63(5) is aimed at preventing the unnecessary destruction of property in this context.

Clause 64: Securing and marking things

This clause allows a maritime officer to seal, mark, lock up and otherwise secure things (including in the hold of a vessel or aircraft). For example, it may be necessary for a maritime officer to mark a thing seized as evidential material. The clause also makes it an offence in certain circumstances for a person to unsecure a secured thing, or unmark a marked thing, without the consent of a maritime officer, provided the exercise of powers is continuing.

Clause 65: Copying records or documents

This clause allows a maritime officer to copy a record or document, or part of a record or document. For example, this may be necessary if it would provide evidence of an alleged offence committed on board a vessel.

Clause 66: Securing weapons

This clause allows a maritime officer to secure a weapon and gives certain examples of how that may occur. The purpose of this clause is to maximise the safety of maritime officers and other people in the vicinity.

Clause 67: Seizing things

This clause allows a maritime officer to seize a ‘weapon’ (as defined in clause 8) or any thing that the officer suspects, on reasonable grounds, is ‘evidential material’ (as defined in clause 8), is a ‘border controlled plant or drug’ (as defined in clause 8), or is owned by the Commonwealth or a State or Territory. Seizure of evidential material is permitted under existing legislation, including section 185 of the *Customs Act 1901*. The seizure of a ‘border controlled plant or drug’ is permitted under existing provisions of the *Customs Act 1901* (e.g. subsection 185A(6)) and international law (e.g. the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988). A thing owned by the Commonwealth or a State or Territory includes a thing that has been forfeited to the Commonwealth or the State or Territory. Forfeiture provisions are contained in existing maritime enforcement legislation such as the *Customs Act 1901*. A thing that is seized under this clause is referred to as a ‘seized thing’. Part 4 of the Bill (which governs such matters as notice in relation to retained things and when they need to be returned) outlines how seized things are to be dealt with.

Clause 68: Retaining things

This clause allows a maritime officer to retain (i.e. take possession of) any thing that the officer suspects, on reasonable grounds, could be seized under an Australian law (e.g. a seizure provision under the *Customs Act 1901*). A thing that is retained under this clause is referred to as a ‘retained thing’. Retention of a thing under this clause does not mean that it has actually been seized under another Australian law – it only provides for the holding of the thing pending it being dealt with as outlined in Part 4 of the Bill (i.e. it will need to be returned within 28 days or a period extended by a Magistrate, unless it is seized under an Australian law, disposed of under an Australian law or notice of Commonwealth ownership is given (see clause 87)).

This power will be used in conjunction with the power to seize things in clause 67. One advantage of clause 68 is that it will allow things to be ‘retained’ where they cannot otherwise be automatically seized under clause 67. An example would be a thing that could be seized under section 203DA of the *Customs Act 1901*, which deals with the seizure of certain goods in transit on ships, including goods, the existence or the shipment of which, prejudices, or is likely to prejudice, Australia’s defence or security or international peace and security, and which may not necessarily constitute evidence of a specific offence under Australian law. Section 203D requires a warrant from a judicial officer before such a seizure can be made. However, under the Bill, an officer who discovered such goods on a vessel at sea could retain the goods until a warrant could be obtained.

Division 7—Detaining vessels, aircraft and other conveyances

This Division enables maritime officers to detain vessels and aircraft. These powers are necessary to enable maritime officers to conduct enforcement and compliance activities in the maritime context. These powers are similar to existing powers in maritime enforcement legislation, particularly Division 12A of Part 2 of the *Migration Act 1958*.

Clause 69: Vessels and aircraft

This clause allows a maritime officer to:

- detain a vessel or aircraft (subclause 69(1)); and
- take the vessel or aircraft, or cause it to be taken, to a port, airport or to another place that the officer considers appropriate (paragraph 69(2)(a); and
- remain in control of the vessel or aircraft, or require the ‘person in charge’ of the vessel or aircraft to remain in control of it, at that place until the vessel or aircraft is released or disposed of (paragraph 69(2)(b)).

For example, it may be necessary to detain a vessel suspected of people smuggling and bring it to a particular port where persons may be transferred to immigration detention. This power currently exists in subsection 245F(8) of the *Migration Act 1958*. Note 1 to subclause 69(2) points out that written notice must be given if a vessel or aircraft is detained and refers to clause 80. Note 2 to subclause 69(2) points out that it is an offence to fail to comply with a requirement under paragraph (b) and refers to clause 103.

Subclause 69(3) allows the officer to take the vessel or aircraft, or cause it to be taken, to a port or other place even if it is necessary for the vessel or aircraft to travel outside Australia to reach the port or other place.

A ‘place’ for the purposes of this clause refers to the ultimate destination that the maritime officer has in mind (even if this may change on the journey), rather than any stopover points that may occur along the way.

Subclauses 69(4) and (5) provide that a vessel or aircraft detained under subclause 69(1) is a ‘detained vessel’ or a ‘detained aircraft’. Part 4 of the Bill (which governs such matters as notice in relation to retained things and when they need to be returned) outlines how detained vessels and aircraft are to be dealt with.

Clause 70: Other conveyances

A maritime officer may also detain a vehicle or other conveyance on land. Powers may be exercised on land in Australia only as permitted by clauses 46 and 47. It may be necessary to exercise this power, for example, where a person flees from a vessel on to land to attempt to escape by driving off in a vehicle.

Division 8—Placing and moving persons

This Division enables maritime officers to place and move persons. These powers are necessary to enable maritime officers to conduct enforcement and compliance activities in the maritime context. These powers are similar to existing powers in the *Customs Act 1901* and the *Migration Act 1958*.

Clause 71: Placing persons

This clause 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 a vessel, installation, aircraft or land. Keeping a person in a particular place would include their restraint. This clause will provide maritime officers with the power to control the movement of persons on vessels, aircraft, installations or land if operationally required in the maritime environment. For example, if maritime officers board a vessel and the persons on board are rioting, the power could be used to ensure the persons are contained to a part of the vessel for their safety and the safety of the officers. The notes to this clause refer to some of the safeguards that would apply to any person subject to this power to ensure that they are treated appropriately. For instance, such persons must be treated with humanity and respect for human dignity.

Clause 72: Persons on detained vessels and aircraft

This clause reflects existing subsections 245F(9) and (9A) of the *Migration Act 1958*. It deals with persons on detained vessels and aircraft, as well as persons whom an officer reasonably suspects was on a vessel or aircraft when it was detained. Subclause 72(2) allows a maritime officer to return the latter category of persons to a detained vessel or aircraft.

Under subclause 72(3), a maritime officer may require a person to remain on the vessel or aircraft until it is taken to a port, airport or another place (see clause 69) or permitted to depart from a port, airport or other place. The note to this subclause indicates that it is an offence to fail to comply with such a requirement and refers to clause 103.

Subclause 72(4) provides that a maritime officer may detain a person and take the person, or cause the person to be taken to a place in or outside the migration zone, including a place outside Australia. For example, it may be necessary to detain a person on a vessel suspected of people smuggling and bring it to a particular Australian port where persons may be transferred to immigration detention. In doing so, a maritime officer may, within or outside Australia, place or restrain the person on a vessel or aircraft or remove the person from a vessel or aircraft.

As with clause 69, a ‘place’ for the purpose of this clause refers to the ultimate destination that the maritime officer has in mind (even if this may change on the journey), rather than any

stopover or transit points that may occur along the way. Clause 97 outlines how detained persons are to be dealt with once they reach such a place.

Clause 73: Using detention provisions

This clause allows relevant detention provisions in other maritime related legislation to be utilised for the purposes of maritime operations carried out under the Bill.

Subclause 73(1) allows a maritime officer to detain a person under a ‘detention provision’ as if the maritime officer were an officer within the meaning of the provision. Clause 98 outlines how such a detained person must be dealt with.

Subclause 73(2) defines ‘detention provision’ to mean particular detention provisions in other legislation (e.g. clause 8 of Schedule 1A to the *Fisheries Management Act 1991* provides for the detention of illegal foreign fishers and clause 8 of Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999* provides for the detention of persons suspected of committing environmental offences). Other detention provisions may be prescribed by the regulations.

Clause 74: Safety of persons

This clause provides that a maritime officer must not place or keep a person in a place unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place. This is a safeguard against persons being compelled to remain in unsafe situations. For example, a maritime person could not compel a person to return to a vessel that was sinking. A reasonable interpretation of ‘safety’ in these circumstances would take into account unavoidable dangers that are inherent in being at sea such as remoteness from land and assistance and often treacherous sea and weather conditions.

Clause 75: Restraint is not arrest

This clause provides that a restraint on the liberty of a person does not constitute arrest. As such, the rights and obligations that flow from arrests (e.g. the right to consular access under Part IC of the *Crimes Act 1914*) do not apply in relation to detained persons or persons restrained. It also provides for the immunity of maritime officers and others from legal proceedings. Similar provisions are included in existing maritime enforcement legislation such as section 185 of the *Customs Act 1901*. Arrest is provided for separately, under Division 9 of Part 3 of the Bill.

Division 9—Arrest

This Division permits maritime officers to arrest persons. These powers are necessary to enable maritime officers to conduct enforcement activities in the maritime context. The powers are similar to existing powers, for example, in Part XII of the *Customs Act 1901* and Division 12A of Part 2 of the *Migration Act 1958*.

Clause 76: Arrest for indictable offences

Subclause 76(1) allows a maritime officer to arrest a person if the officer suspects that the person has committed an indictable offence against an Australian law. For example, it may be necessary to arrest a person suspected of importing illicit narcotics into Australia on board

a vessel. ‘Indictable offence’ for the purposes of Commonwealth law is defined in the *Crimes Act 1914* (i.e. an offence with penalties exceeding 12 months imprisonment). Clause 100 outlines how an arrested person must be dealt with. Arrest powers in the maritime domain are contained in existing legislation, such as section 185 of the *Customs Act 1901* and section 245F of the *Migration Act 1958*.

Subclause 76(2) provides that a person must be released from arrest if, before the person is charged with the offence, the officer ceases to suspect on reasonable grounds that the person committed the offence. This subclause provides a safeguard against arrests that would be unlawful.

Clause 77: Enforcing arrest warrants

This clause allows a maritime officer to arrest a person for whom an arrest warrant is in force under an Australian law. Authorisations for the enforcement of arrest warrants in force under Australian law may be made under clause 20. This clause is not limited to arrest for indictable offences as in clause 76. This is because an arrest warrant may relate to both indictable and non-indictable offences. Clauses 100 and 101 outline how a maritime officer must deal with an arrested person.

Division 10—Requiring conduct to cease

Clause 78: Requiring conduct to cease

This clause allows a maritime officer to require a person to cease conduct if the officer believes, on reasonable grounds, that the conduct constitutes a contravention of an Australian law. The note to clause 78 points out that it is an offence to fail to comply with a requirement under clause 78 and refers to clause 103. This clause gives maritime officers the option of requiring a person to cease conduct rather than having to immediately arrest or detain a person, which may be a more appropriate response in some situations (e.g. if detention would aggravate a situation which can better be dealt with by talking with the person and asking them to cease certain conduct).

Part 4—Dealing with things taken

Part 4 of the Bill sets out the processes for dealing with ‘seized things’ (as defined in clause 67), ‘retained things’ (as defined in clause 68) and ‘detained vessels or aircraft’ (as defined in clause 69) which may be taken in the exercise of maritime powers.

Once a thing has been seized, retained or detained under the powers in Part 3, Part 4 gives both guidance to the maritime officer and also transparency to the owner of the thing, by setting out each step of what must happen next – from the giving of notice to the owner, to the return or possible disposal of the thing. This will give certainty to owners of things about how their goods will be treated and the procedure for seeking to get them back again.

Division 1—Introduction

Clause 79: Guide to this Part

The Guide explains the operation of each Division of Part 4 of the Bill.

Division 2—Notice of seizure, retention or detention

The requirement to give notice of seizure, retention or detention in this Bill mirrors the notice requirements in other legislation that creates the power to take private property, such as section 209D of the *Customs Act 1901*. The requirement to give notice is particularly important in a maritime enforcement environment, where it may not be possible to communicate information at the time of seizure, retention or detention due, for instance, to the isolation of vessels, or the presence of non-English speaking individuals on foreign vessels. Giving a detailed notice increases transparency by letting the owner know, at a minimum, why the thing was taken, how long it will be held and the information about the return of the thing.

Clause 80: Notice of seizure, retention or detention

The purpose of this clause is to require that a written notice be given when a thing (including a vessel or aircraft) is seized, retained or detained under clauses 67, 68 or 69. The clause also sets out the formal requirements for such notice.

The clause requires that written notice must be given within 14 days, to the owner of the thing; or to the person who had possession or control of the thing immediately before it was seized, retained or detained (subclause 80(1)). The 14 day period will allow sufficient time for owners to be identified and for the notice to be issued.

If the officer cannot conveniently give the notice to the appropriate person, ‘constructive’ notice can alternatively be given by fixing the written notice to a prominent part of the thing (see subclause 80(2)). No written notice is required if the thing is perishable, because the Minister is permitted to dispose of perishable things (see subclauses 91(1) and 91(2)).

The purpose of subclause 80(3) (in combination with clause 81) is to set out the minimum information that the written notice given under subclause 80(1) or subclause 80(2) must contain. This will let owners or persons who were in possession of the thing know what has happened to the thing and when it may be returned. This clause should be read together with

clause 81, which sets out additional requirements that specify what the notice must contain about the return of the thing.

Clause 81: Information about the return of things

This clause provides further detail on the minimum information that must be contained in a notice given under clause 80. Under clause 81, a notice given under clause 80 must contain appropriate information regarding the return of the thing that was seized, detained or retained, such as the timeframe in which it will be returned.

Subclause 81(1) sets out the appropriate information that must be given in notices regarding seized things, and subclause 81(2) sets out the appropriate information that must be given in notices regarding retained and detained things (including vessels and aircraft).

The information that must be given under this clause corresponds with the substantive rules regarding the return of things contained in Division 4 of Part 4.

Under subclause 81(1), a notice regarding a seized thing must state that the thing will be returned within 120 days of its seizure. The 120 day period will allow sufficient time for the relevant maritime operation to cease, for maritime officers to use the thing under clause 83 and for determining whether the thing should be returned or otherwise dealt with. It is also consistent with standards in existing legislation (e.g. section 205D of the *Customs Act 1901*).

The notice must also state that there are specified exceptions to when the thing will be returned in 120 days, including where the thing is required for legal proceedings, or if it has been seized under another Australian law.

Under subclause 81(2), a notice regarding retained or detained things (including vessels and aircraft) must state that the thing will be returned within 28 days of its retention or detention. The 28 day period will allow sufficient time for maritime officers to determine whether the thing should be returned or otherwise dealt with. The notice must also state that return within 28 days will not occur if the time is extended by a Magistrate, the thing is disposed of under Division 5 of Part 4 or another Australian law, the thing is seized under an Australian law, or notice of Commonwealth ownership of the thing is given.

Clause 82: Notice of Commonwealth ownership

If the thing that is seized, retained or detained belongs to the Commonwealth, clause 82 requires that notice must be given of Commonwealth ownership (e.g. the Commonwealth considers that it already owns the thing or that it has been forfeited under Australian law to the Commonwealth). This notice is in addition to the requirements under clause 80.

This clause also sets out the minimum information that the notice of Commonwealth ownership must contain, including a statement that the Commonwealth claims ownership. The notice must also state that, if a person wishes to claim ownership of the thing, that person can apply to a court for return of the thing.

The giving of a notice of Commonwealth ownership under clause 82 will impact on the application of Division 4 of Part 4, which governs the return of things. In particular, requirements to return the thing under clauses 86 and 87 do not apply if notice of

Commonwealth ownership has been given. Clause 89 deals with what happens once a notice of Commonwealth ownership is given.

Division 3—Using seized things

This Division provides clarity around the purposes for which seized things may be used. For example, it expressly states that seized things can be used for prosecutions, for administering laws, and other legally sanctioned purposes.

The Bill contains different powers to take things: powers of ‘retention’, powers of ‘seizure’ and powers of ‘detention’. Of these, the circumstances permitting seizure are the most limited. Part of the reason for these initial limitations is that only a seized thing may be kept for the longer period of 120 days in order for it to be used for the purposes set out in Division 3.

Clause 83: Using seized things

Subclause 83(1) gives maritime officers the power to use a seized thing, or to make a seized thing available for another Commonwealth officer to use. However, the maritime officer or other Commonwealth officer may only use the seized thing for limited purposes, such as the investigation or prosecution of a contravention of an Australian law, or ensuring compliance with an Australian law.

The Bill empowers maritime officers to enforce many different Australian laws, and it is vital that enforcement agencies are not precluded from using a thing for enforcement, monitoring or another purpose merely because it has been seized under this Bill instead of another Act. The purpose of paragraph 83(1)(c) is to prevent such obstacles from arising. If a thing has been seized under the Bill, but could have been used for another purpose if seized under another Act, the thing may be used for that purpose in addition to the purposes listed in paragraph 83(1)(a) and (b). For example, documents seized as evidential material under the Bill could also be used for statistical purposes under section 23YP of the *Crimes Act 1914*.

The power to use a thing under paragraph 83(1)(c) does not require adherence to any procedural requirements (such as requirements for giving of notice) in the other law. Subclause 83(2) is included to expressly exclude any need to obtain a warrant before a thing is used under paragraph 83(1)(c), even if a warrant would have been required to seize the thing under the other law. Procedural requirements are excluded under this clause due to the unique nature of the maritime enforcement environment, which may, for instance, make access to a magistrate or the delivery of a written notice impracticable or impossible.

Clause 84: Using seized things—State and Territory officers

The purpose of clause 84 is to facilitate cooperation between Commonwealth and State and Territory law enforcement agencies. It allows a Commonwealth officer to make a seized thing available to an officer of a State or Territory for the purpose of allowing the thing to be seized under a law of the State or Territory, or to be used for any other purpose under a law of the State or Territory.

The note to clause 84 indicates that the thing will have to be returned in accordance with clause 86, unless an exception under subclause 86(3) applies. Seizure under State or Territory laws is one such exception.

Clause 85: Operating electronic equipment

Clause 63 of the Bill provides powers for a maritime officer to operate electronic equipment before that equipment is seized. This clause clarifies that the power to operate electronic equipment continues after the thing has been seized, by providing that if a seized thing may be used under this Division for a particular purpose and the thing is electronic equipment, the thing may be operated for that purpose.

Division 4—Returning things

Division 4 of Part 4 of the Bill requires that things that are seized, retained or detained be returned when either they are no longer needed, or after a specified period. The time frames for retention of things in the Bill take account of the length of the period that may elapse between the seizure of a thing at sea and the time that the relevant maritime officer reaches an Australian port, as well as the purposes for which the thing may need to be used and the time required to determine how the thing should ultimately be dealt with.

Clause 86: Returning seized things

This clause generally requires the return of seized things within 120 days. This period will allow time for the thing to be returned to shore, for maritime officers to use the thing under clause 83 and for determining whether the thing should be returned or otherwise dealt with. It is also similar to standards in existing legislation (e.g. section 203R of the *Customs Act 1901*). The clause does not apply to things that are retained or detained under this Bill, unless the retained or detained thing is subsequently seized under the Bill, in which case, the thing will be treated in accordance with the Bill's seizure provisions from the time that the seizure occurs.

The requirement to return things within 120 days is subject to exceptions (i.e. where the thing is needed for legal proceedings, has been disposed of under Division 5 of Part 4 or another Australian law (e.g. section 207 of the *Customs Act 1901* which provides for disposal of narcotics by certain officials), has been seized under another Australian law, or notice of Commonwealth ownership of the thing has been given).

The purpose of the clause is to set a maximum time for holding seized things (subject only to extensions by a magistrate under clause 88). However, reasonable steps should be taken to return the thing earlier if it is no longer required for a purpose mentioned in Division 3 of Part 4. Seized things must be returned either to the owner of the thing, or to the person who had possession or control of the thing immediately before it was seized.

Clause 87: Returning retained and detained things

This clause applies to the return of retained or detained things (including vessels and aircraft). This clause does not apply to the return of seized things, which is covered by clause 86. If a thing is initially detained or retained under the Bill, and then subsequently seized under the Bill, this clause will cease to apply and the return of the thing will be governed by clause 86.

Unlike seized things, retained and detained things may not be used by maritime officers. Retained or detained things must be returned within 28 days after retention or detention, unless the time is extended by a magistrate under clause 88 or certain limited exceptions apply (i.e. where the thing has been disposed of under Division 5 of Part 4 or, in rare circumstances, another Australian law (e.g. section 209R of the *Customs Act 1901* which provides for disposal of surrendered goods under certain conditions), has been seized under another Australian law, or notice of Commonwealth ownership of the thing has been given). The 28 day period will allow time for the thing to be returned to shore and for maritime officers to determine whether the thing should be returned or otherwise dealt with. It must be returned either to the owner of the thing, or to the person who had possession or control of the thing immediately before it was retained or detained.

Clause 88: Magistrate may extend holding period

Although subclause 86(2) requires that a seized thing must be returned after 120 days, this clause permits a magistrate to extend that period on the application of the person who has control of a seized thing. However, the magistrate must be satisfied that the thing is still required for a purpose mentioned in Division 3 of Part 4 (use of seized things) or there are other valid grounds for extension.

Before making the application, the person who has control of the thing must take reasonable steps to discover who has an interest in the thing and, if it is practicable to do so, notify each such person of the proposed application.

Clause 89: Returning things if notice of Commonwealth ownership given

If notice of Commonwealth ownership of a thing is given (i.e. the Commonwealth claims that it already owns the thing or that it has been forfeited under Australian law), then subclause 89(1) permits a person claiming ownership or possession of the thing to apply to a court of competent jurisdiction for an order for the return of the thing. Under subclause 89(2), the court application must be made within 30 days after the notice of Commonwealth ownership is given.

Subclause 89(3) provides that a court may order the return of a thing if the court is not satisfied that the Commonwealth owns the thing. The court may not make such an order if the thing has been seized under another Australian law or if it has been disposed of under Division 5 of Part 4 or another Australian law.

Clause 90: Seizing under other Australian laws

This Bill does not repeal all other Australian laws that may also provide powers to seize things in the maritime context. If a thing is retained, detained or seized under this Bill, it may then be seized under that other Australian law under subclauses 86(3) and 87(3).

The purpose of paragraphs 90(1)(a) and 90(2)(a) is to confirm that seizure, retention or detention of a thing under this Bill does not constitute seizure under the other Australian law. Paragraphs 90(1)(b) and 90(2)(b) also provide that seizure, retention or detention under this Bill does not remove the need to fulfil certain requirements under the other law (such as obtaining a warrant). These subclauses mean that, if a thing is to be seized under another

Australian law, the requirements of that other law will need to be followed. For example, if a maritime officer retains a thing under this Bill believing that it could be seized under section 203T of the *Customs Act 1901* (which provides for seizure of objects protected under the *Protection of Movable Cultural Heritage Act 1986*), then he or she could subsequently seize it under section 203T. In doing so, the maritime officer would still need to comply with any requirements for seizure of section 203T. Another example would be where a maritime officer seizes a border controlled drug under the Bill and then wishes to subsequently seize the drugs under another regime (e.g. section 203C of the *Customs Act 1901*).

Subclause 90(3) provides that another Australian law with an express provision to the contrary may override subclauses (1) and (2). This subclause thus permits another Australian seizure law to provide for this Bill to have effect in relation to a seizure under the other law. For instance, the other seizure law may expressly provide that a seizure conducted under this Bill in compliance with the procedures in this Bill could be deemed to fulfil the requirements for a seizure under the other law.

Subject to subclause 90(3), if a thing is seized, retained or detained under this Bill, and then it is subsequently seized under another Australian law, the provisions of this Bill will cease to apply and the provisions of the other Australian law will determine the relevant procedures.

Division 5—Disposing of things

The ordinary position under the Bill will be that things seized, retained or detained will be returned to their owner in accordance with Division 4 of Part 4. However, this Division sets out limited circumstances in which the Minister (or the Minister's delegate) will have the power to dispose of a thing instead of returning it.

The list of circumstances in which a disposal will be permissible reflects the potential health, safety, environmental and financial costs of keeping and transporting items that have been seized, detained or retained. For instance, if a customs boat intercepted a suspected irregular entry vessel at sea, and it was unable to tow or otherwise manoeuvre the vessel because it was unseaworthy, this Division will permit the disposal of the boat. Another example is if a maritime officer intercepted a boat illegally catching marine animals such as turtles, then this clause would permit the officer to return the animals to the sea if returning the animals would give them a better chance of survival. This clause prevents the maritime officer from putting the environment or the safety of Australian officers at risk in order to transport a thing or vessel.

This clause also sets out the permissible methods of disposal, and requires a notice to be given as soon as practicable after the disposal.

Clause 91: Reasons for disposal

This clause permits the Minister to dispose of seized, retained or detained things (including vessels and aircraft) in four circumstances. Significantly, clause 125 permits the Minister to delegate his or her functions under this Bill, and it is anticipated that this power will primarily be exercised by Ministerial delegates.

The first circumstance in which the Minister is permitted to dispose of a thing is where its custody or maintenance (including any necessary movement or transport) creates serious difficulties (paragraph 91(1)(a)). Subclause 91(2) enumerates circumstances in which the custody or maintenance of a thing is automatically taken to create serious difficulties. These include where the thing is perishable or where it poses a serious risk to navigation, public health, property or the environment. Unseaworthy vessels fall within this category (section 207 of the *Navigation Act 1912* lists some factors indicating when a vessel will be seaworthy). However, the examples given in subclause 91(2) are examples only, and there are no limitations on what may constitute ‘serious difficulties’ (subclause 91(3)).

The second circumstance in which the Minister is permitted to dispose of a thing is where the expenses of custody or maintenance, including any necessary movement or transport, is likely to exceed the value of the thing (paragraph 91(1)(b)).

Paragraph 91(1)(c) provides for the option of disposing of a thing if it is a live plant or animal and its return to its native environment would be beneficial to its survival. This might apply, for instance, where a native fish is taken by officers and it is judged that return to the sea would enhance its chances of survival.

The final circumstance in which the Minister is permitted to dispose of a thing is where notice of Commonwealth ownership has been given and either the 30 day period for applications under clause 89 has expired, or, if an application to a court has been made, the proceedings were finally determined by that court without an order for the return of the thing (paragraph 91(1)(c)).

Clause 92: Methods of disposal

Subclause 92(1) confirms that the methods of disposal may include, without limitation, sale, destruction, or return of the thing to its native environment. This is similar to provisions in other Acts, such as the power to sell or otherwise dispose of goods under s 208DA of the *Customs Act 1901*.

Subclause 92(2) provides that the regulations may prescribe methods of disposal for certain things. It is proposed that the types of things that may be the subject of the regulations include certain types of protected species, or items of historical or cultural heritage.

Clause 93: Notice of disposal

Where a thing has been disposed of under this Division, subclause 93(1) requires the Minister (or delegate) to give written notice of the disposal to the person who owned the thing, or to the person who had possession or control of the thing immediately before it was seized, retained or detained. The notice must be given as soon as practicable, unless the person cannot reasonably be located, in which subclause (3) provides that subclause (1) will not apply. Subclause 93(2) requires that the notice must state that the thing has been disposed of, the reason for the disposal, and that compensation may be payable under clause 121. The note to subclause 93(2) highlights that compensation under clause 121 may apply where the disposal constitutes an acquisition of property otherwise than on just terms.

The Minister is not required to give written notice if the thing is disposed of under paragraph 91(1)(d), which permits disposal where a notice of Commonwealth ownership has been given and either no application under clause 89 has been made, or such an application has been finally determined and did not require the item to be returned.

Part 5—Dealing with persons held

Part 5 provides both substantive and procedural protections to individuals held by maritime officers. These protections strike a balance between, on the one hand, the necessity of treating held individuals in accordance with natural justice and human dignity and, on the other hand, recognising the unique circumstances facing law enforcement in a maritime environment.

This Part provides that all persons held are to be treated with humanity. It also affords other protections for persons who are arrested at sea, including requirements to inform an arrested person of the reasons for their arrest and to take them before a magistrate. However, the unique challenges of operating in the maritime environment necessitates that there are some qualifications to how these rights must be afforded. For instance, the necessity of informing people of the reasons for their arrest is not immediate and absolute in all circumstances. This reflects the increased likelihood that, in a maritime environment, situations will arise where the person does not speak any English and where obtaining translation services may be prohibitively difficult to obtain.

Division 1—Introduction

Clause 94: Guide to this Part

This clause provides a guide to Part 5 of the Bill, which sets out the procedures for dealing with people after they have been detained or arrested under Part 3 of the Bill.

Clause 95: Treatment of persons held

The clause is a safeguard that will help to ensure the proper treatment of persons. It provides that a person arrested, detained or otherwise held under this Bill must be treated with humanity and respect for human dignity and must not be subject to cruel, inhuman or degrading treatment. A reasonable interpretation of these standards would take into account the difficulties of operating at sea, such as being in remote and isolated situations a long way from assistance, as well as the often treacherous sea and weather conditions.

Clause 96: Doing things as soon as practicable

This clause lists factors that must be taken into account in determining whether a maritime officer has done things ‘as soon as practicable’ under subclauses 98(1), 101(a) and (b) and 102(a). These factors include the need to ensure the safety of a vessel, installation or aircraft, or the need to protect human life, animal life or the environment, or the need to aid a vessel in distress. This list does not prevent other factors from also being taken into account.

Division 2—Persons detained

This Division ensures that detention of a person by a maritime officer is an interim measure, ultimately leading to their release or detention under some other framework. .

Clause 97: Persons on, or from, detained vessels or aircraft taken to other places

This clause outlines what happens to persons who are detained and taken to another place under clause 72. Once the detained person reaches the other ‘place’, his or her detention

under the Bill will end. A ‘place’ for the purposes of this clause refers to the ultimate destination that the maritime officer has in mind (even if this may change on the journey), rather than any stopover or transit points that may occur along the way (see also paragraph 97(2)(a)). Also, detention under this Bill does not necessarily end at the low water mark of the ‘place’. The detention can continue, for example, until the person is taken to a building at that place, where they are transferred to other responsible officers acting under another Australian detention law. The clause also clarifies that the end of detention under this Bill does not prevent further actions from taking place (e.g. arrest) (see subclause 97(2)).

Clause 98: Persons detained under detention provisions

This clause sets out the procedures for dealing with people after they have been detained under clause 73 of the Bill. Clause 73 permits the detention of persons only where the detention is pursuant to a ‘detention provision’ prescribed in subclause 73(2) or in the regulations. It is a detention power separate from the more general detention powers (such as clause 72).

Each of the other Acts containing detention provisions prescribed under subclause 73(2) identify certain persons or types of persons who are officers able to exercise those powers of detention. Subclause 98(1) provides that the maritime officer empowered to detain a person under clause 73 must deliver the detained person, or make arrangements for the detained person to be delivered, into the custody of an officer (however described) within the meaning of the relevant detention provision in the other Australian law.

The maritime officer must deliver, or arrange delivery, of the person as soon as practicable (see clause 96).

Under subclause 98(2), when a detained person is delivered to an officer under another Act in accordance with subclause 98(1), the provisions of the other Act will take effect as if that other officer had detained the person at the time the detained person was delivered to them.

Division 3—Persons arrested

The circumstances in which maritime officers will need to arrest individuals at sea are limited. Even if a person has committed a crime, a maritime officer can usually hold the person until an opportunity arises to transfer that person to officials on land who can arrest the person where necessary. However, it is important that maritime officers do have the power to arrest individuals for rare circumstances in which it may be more appropriate to perform an arrest immediately.

This Division affords protection to arrested persons, by requiring that they are given information about their arrest, and obligating the arresting officer to bring them before a magistrate. However, like other Divisions in Parts 4 and 5 of the Bill, this Division achieves a balance between the rights of the arrested person, and the practical realities of the maritime environment. One such balance is that there is an exemption for informing a person of the reason for arrest where they do not speak English and it is not practicable to obtain access to a translator. While many arrested persons at sea will speak English, or a language for which a translator is accessible, it may be difficult or impossible to access a translator in remote

locations, or, considering the huge variety of foreign nationals on fishing and other vessels, it may be impossible to access a translator in a timely manner. Such persons would still need to be informed of the reasons for their arrest once translation becomes available.

Clause 99: Application of this Division

This clause clarifies that the Division applies to persons arrested under the Bill.

Clause 100: Persons to be informed of reasons for arrest

This clause sets out the procedures that apply after a person has been arrested by a maritime officer in accordance with clauses 76 or 77 of the Bill. Clause 76 permits a maritime officer to arrest a person if the maritime officer suspects the person has committed an indictable offence, and clause 77 permits a maritime officer to arrest a person for whom an arrest warrant has been issued.

Subclause 100(1) requires the maritime officer to inform the person, at the time of the arrest, of the offence for which the person is being arrested. However, this subclause does not apply if the exceptional circumstances listed in subclause 100(3) apply, with the consequence that the maritime officer is not required to inform the person of the reasons for arrest.

Subclause 100(2) provides that the requirement in subclause 100(1) is satisfied if the person is informed of the substance of the offence, and it is not necessary that this be done in a precise or technical way. Under subclause 100(3), an officer is not required to inform a person of the reasons for arrest at the time of the arrest (under subclause 100(1)) where the person should know the substance of the offence, where the person's actions make it impracticable to inform them, or where the officer believes on reasonable grounds that the person does not speak English and it is not practicable for the officer to inform the person, in a language she or he understands, of the offence for which she or he is being arrested. These provisions reflect the need for some flexibility in applying the arrest requirements in the maritime operational environment, where maritime officers are more likely to encounter individuals who do not speak English and obtaining translation services can be difficult or impossible due to the geographic isolation of vessels.

Clause 101: Person to be brought before a magistrate

This clause provides that an arrested person must, 'as soon as practicable' (see clause 96), be taken before a magistrate; delivered to the Australian Federal Police, or State or Territory police; or, if the arrest relates to an offence against another law, delivered to a person with the power to arrest, or the power to deal with a person who has been arrested, under that law.

Clause 102: Enforcing arrest warrants

This clause applies where a person has been arrested under a warrant pursuant to clause 77. In such cases, the officer must, 'as soon as practicable' (see clause 96), comply with any requirements in the warrant that would have to be complied with by a person executing the warrant. The officer need not comply with clause 101 (bringing a person before a magistrate) to the extent that it is inconsistent with the warrant's requirements.

Part 6—Failing to comply with requirements

Clause 103: Offence

It is necessary to include a range of offences in the Bill to support the exercise of powers by maritime officers and help ensure compliance with requirements made under the Bill. For maritime officers to be able to effectively enforce and monitor compliance with Australian laws, there must be some consequence for a failure to comply with the requirements made by a maritime officer. The inclusion of the offence provisions sends a strong signal that a failure to comply with the requirements under the Bill, such as the requirement to cease conduct, is unacceptable.

This clause sets out when offences will be made out for the failure to comply with requirements under the Bill. It provides that a person will commit an offence if a requirement is made under a provision listed in the table and, as a result of the person's conduct, the requirement is not complied with.

The table in clause 103 (displayed below) lists the clauses of the Bill and the specific requirements in relation to which offences apply. The table also lists the penalties that are associated with each offence. Listing the requirements and penalties in table form ensures clarity in expressing the penalties for each offence. Each offence carries its own penalty.

The level and type of penalties in this clause provide appropriate deterrence to the commission of the relevant offences and are adequate to punish a worst case offence. The penalties are broadly comparable with penalties for similar offences in other legislation (e.g. section 245F of the *Migration Act 1958* which imposes 100 penalty units for similar offences) and are expressed as a maximum only.

Fines are expressed in terms of penalty units. This clause adopts the standard Commonwealth fine to imprisonment term ratio of 5 penalty units per 1 month.

| Penalties | | |
|------------------|--|--|
| Item | If the requirement is made under ... | The penalty is ... |
| 1 | Subclause 39(1) (requiring assistance) | Imprisonment for 2 years or 120 penalty units, or both |
| 2 | Subclause 53(1) (requirement to facilitate boarding) | Imprisonment for 2 years or 120 penalty units, or both |
| 3 | Clause 54(1) (additional powers—vessels) | Imprisonment for 2 years or 120 penalty units, or both |
| 4 | Subclause 55(1) (additional powers—aircraft) | Imprisonment for 2 years or 120 penalty units, or both |
| 5 | Subclause 55(7) (additional powers—aircraft) | Imprisonment for 2 years or 120 penalty units, or both |
| 6 | Subclause 57(1) (requiring answers, records and documents) | Imprisonment for 2 years or 120 penalty units, or both |
| 7 | Clause 58 (obtaining readings) | Imprisonment for 2 years or 120 penalty units, or both |
| 8 | Subclause 61(3) (searching persons) | Imprisonment for 2 years or |

Penalties

| Item | If the requirement is made under ... | The penalty is ... |
|-------------|--|--|
| | | 120 penalty units, or both |
| 9 | Subparagraph 69(2)(b) (vessels and aircraft) | Imprisonment for 2 years or 120 penalty units, or both |
| 10 | Subclause 72(3) (persons on detained vessels and aircraft) | Imprisonment for 2 years or 120 penalty units, or both |
| 11 | Clause 78 (requiring conduct to cease) | Imprisonment for 2 years or 120 penalty units, or both |

Part 7—Miscellaneous

This purpose of this Part is to outline who is a ‘maritime officer’ and when they will benefit from immunity under the Bill. It also deals with a range of issues incidental to the operation of the Bill, such as evidentiary certificates, recovery of costs, compensation for acquisition of property, delegations and regulations.

Division 1—Maritime officers

Clause 104: Maritime officers

Under this clause, members of the Australian Defence Force, Customs officers and members or special members of the Australian Federal Police are automatically made maritime officers for the purposes of the Bill. These three classes represent the primary maritime enforcement officers in Australia.

This clause also enables the Minister to appoint particular persons and classes of persons as maritime officers in relation to specified laws, specified provisions of specified laws, specified international agreements, specified international decisions and subject to any other conditions specified in the appointment. 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*.

State or Territory officers could also be appointed as maritime officers if there is agreement between the Commonwealth and the relevant State or Territory. It may be appropriate to appoint State or Territory officers under the Bill where there is close cooperation between officers of the two levels of government.

In making an appointment under the clause, the Minister may limit the exercise of powers by maritime officer in question. For example, if a maritime officer has no need to arrest a person in the discharge of their duties, then that officer could be appointed on the condition that they do not have an arrest power. This is necessary to ensure that maritime officers exercise a range of powers under the Bill that is commensurate with their role and responsibilities.

Maritime officers will receive training and will be provided with operational guidance in relation to the Bill as part of its implementation.

Clause 105: Carrying and using arms

This clause avoids the duplication of Commonwealth provisions regulating the carrying and use of firearms by certain officers. It allows a maritime officer who is authorised in another capacity as an officer (however described) of the Commonwealth or a State or Territory to carry and use arms as a maritime officer under the Bill. For example, a member of the Australian Defence Force could carry and use arms as a maritime officer under the Bill.

This clause also provides that any conditions applying to the carriage or use of arms by the officer in the officer's other capacity apply in like manner to the carriage and use of arms by the officer as a maritime officer. For example, maritime officers that are Customs officers must abide by the conditions that apply to them as if they are carrying firearms in the exercise of powers under the *Customs Act 1901*.

Clause 106: Identity cards

Subclause 106(1) allows the Minister to issue an identity card to a maritime officer.

Subclause 106(2) provides that the identity card must contain a recent photograph of the officer and be in a form approved in writing by the Minister.

Subclause 106(3) makes it an offence for a person who has been issued with an identity card under subclause (1) to not return the identity card to the Minister or a person nominated by the Minister immediately on ceasing to be a maritime officer.

Clause 107: Protection from suit

This clause provides that authorising officers, maritime officers, 'persons assisting' maritime officers (see clause 38) and any other persons acting under the direction or authority of a maritime officer are not liable for 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.

It is necessary to provide immunity to maritime officers and relevant persons to protect them from suits that could arise out of any actions or decisions that they take in good faith in the course of exercising their functions under the Bill, which will often be made over short time periods and in extremely difficult and dangerous situations. This clause reflects provisions in existing maritime enforcement legislation such as section 90 of the *Fisheries Management Act 1991*.

Division 2—Evidentiary certificates

Evidentiary certificates are useful where it is necessary to prove in court a matter that is not necessarily in dispute, but which may be difficult to prove by producing evidence in the normal way. An evidentiary certificate will be prima facie evidence of the fact in question. Similar types of evidentiary certificate provisions can be found in sections 43 and 44 of the *Crimes (Aviation) Act 1991* and section 39B of the *Mutual Assistance in Criminal Matters Act 1987*.

Clause 108: Evidence of international agreements and decisions

This clause allows the Foreign Affairs Minister to certify that, at a particular time, an international agreement or decision provided for the exercise of powers by Australia in relation to a particular vessel, installation or aircraft. These certificates provide evidence relevant to the question of jurisdictional authority for Australia to exercise certain powers provided for in an international agreement or decision. These certificates would refer only to factual matters, such as the fact that an international arrangement was in force at the relevant time and the terms of that agreement.

The note to clause 108 points out that certificates under clause 108 relate to requirements set out in subclause 12(a) concerning international agreements and decisions.

Clause 109: Evidence of approvals

This clause allows the Minister (i.e. the Minister administering the Act) to certify in writing that the Minister had previously given approval of an exercise of maritime powers in relation to a vessel, installation or aircraft under an international agreement or international decision.

The note to clause 109 points out that certificates issued as evidence of approval are relevant to the operation of subclause 10(b) and paragraph 12(b)(iii), which deal with international agreements and decisions.

Clause 110: Evidence of requests and agreements—geographical limits on exercise of powers

This clause allows the Foreign Affairs Minister to certify in writing that a particular country requested or agreed to the exercise of powers and the conditions or restrictions (if any) on which the request or agreement was made or given. This would provide evidence of factual issues. For example, it could be used in relation to the particular terms of an oral agreement with another country concerning the exercise of powers against a certain vessel flagged to that other country on the high seas.

Clause 111: Certificates are prima facie evidence

This clause makes it clear that for all purposes and in all proceedings, a certificate under Division 2 of Part 7 is prima facie evidence of the matters certified (this is a rebuttable presumption).

Division 3—Recovery of costs

The Bill allows the Commonwealth to recover the costs incurred as a result of chasing a vessel, or seizing items. Such costs can be substantial in some cases, and this clause will ensure that the Commonwealth can be appropriately reimbursed for these expenses.

Clause 112: Chase costs

This clause applies in relation to the chasing of a vessel under subclause 54(3) (which also includes a chase commenced under subclause 54(4)).

Subclause 112(2) provides that the owner of the vessel or, if the vessel is owned by the Commonwealth or a State or Territory, any person who purports to own the vessel, is liable to pay to the Commonwealth an amount equal to the reasonable costs incurred by the Commonwealth in conducting the chase.

Subclause 112(3) provides that if the vessel has more than one owner or purported owner, the owners or purported owners are jointly and severally liable.

Chase costs are recoverable under existing maritime enforcement legislation, such as section 106L of the *Fisheries Management Act 1993*.

Clause 113: Seizure costs

This clause applies if notice of Commonwealth ownership of a thing is given, an application for an order for the return of the thing is made under clause 89, and proceedings in relation to the application have been finally determined without such an order being made.

Subclause 113(2) provides that the person who made the application is liable to pay to the Commonwealth an amount equal to the sum of the costs reasonably incurred by the Commonwealth in relation to the custody, maintenance, transport and costs of disposing of the thing. For example, if an unsuccessful challenge is made to the seizure of a thing that is forfeited to the Commonwealth, then the costs of having to store and maintain the thing in the interim could be claimed. Recovery of seizure costs is provided for in existing legislation such as section 208DA of the *Customs Act 1901*.

Subclause 113(3) provides, however, that subclause (2) does not apply in relation to any costs met by the person who made the application and that were incurred with the agreement of the Commonwealth officer who has control of the thing.

Subclause 113(4) provides that for the purposes of meeting such costs, the thing may be released into the custody of the person on such conditions as the Commonwealth officer thinks appropriate.

Clause 114: Liability to pay costs is a debt to the Commonwealth

Subclause 114(1) provides that an amount payable by a person under Division 3 of Part 7 is a debt due by the person to the Commonwealth.

Subclause 114(2) provides that the amount may be recovered by action in a court of competent jurisdiction.

Subclause 114(3) provides that the Commonwealth's right to recover all or part of the amount may be waived by the Chief Executive Officer of Customs or the Secretary of the Department administered by the Minister who administers the *Naval Defence Act 1910*. At present, the Minister for Defence administers the *Naval Defence Act*, meaning that the relevant Secretary is the Secretary of the Department of Defence. Debts may also be waived under section 34 of the *Financial Management and Accountability Act 1997*.

Division 4—Gathering and sharing information

The purpose of this Division is to facilitate security agencies and other prescribed bodies to gather and share information in the national interest, in the interests of maritime safety and security, or to uphold Australian laws and particular international agreements and decisions.

The application of the *Privacy Act 1998* is not displaced by the provisions of Division 4.

Clause 115: Copying records or documents for other purposes

This clause allows a maritime officer to copy all or part of a record or document found or produced in the exercise of powers under this Bill, if the officer is satisfied that the record or document may contain information relevant to security agencies.

This clause enables officers to copy records or documents that contain information that may be of significant national interest, being information relevant to the functions of security agencies.

This clause reflects similar provisions in existing legislation such as section 186A of the *Customs Act 1901*.

Clause 116: Sharing information

This clause facilitates the sharing of information between agencies for certain maritime purposes, as currently done, for example, under sections 64ADA and 227AA of the *Customs Act 1901* and section 167B of the *Fisheries Management Act 1991*. This clause permits a maritime officer to give information, a record or document obtained in the exercise of powers under this Bill to a ‘cooperating agency’ for use by that agency in relation to matters concerning maritime security, maritime safety or maritime domain awareness or the exercise of the functions or powers of the agency. For example, information could be shared with the Commonwealth Director of Public Prosecutions for the purposes of prosecuting an offence under the *Migration Act 1958*.

Subclause 116(2) allows the information, record, document or copy to include personal information. The note to subclause 116(2) points out that the use or disclosure of personal information obtained under clause 116 is regulated under the *Privacy Act 1988*.

Subclause 116(3) allows a maritime officer who is an officer (however described) of the Commonwealth in another capacity to disclose or provide maritime information as if the maritime information had been obtained by the officer in that other capacity.

Subclause 116(4) lists the following agencies as cooperating agencies under the Bill: the Australian Defence Force; the Australian Federal Police; the police force of a State or Territory; any other Agency of the Commonwealth, or a State or Territory responsible for investigating contraventions of laws, administering or ensuring compliance with laws, gathering or evaluating intelligence, security or defence; an international body responsible for investigating contraventions of international agreements or international decisions or administering or ensuring compliance with international agreements or international decisions; or any other body or agency prescribed by the regulations. 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.

Division 5—Compensation for acquisition of property

This Division provides a basis for compensation to persons unjustly affected by the exercise of powers under the Bill.

It permits a person to apply to a court for compensation if that person is of the view that the use of powers under the Bill resulted in an acquisition not on just terms. It also provides for compensation on some other grounds.

Clause 117: Compensation for acquisition of property

Subclause 117(1) provides that if the operation of this Bill would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

Subclause 117(2) provides that the terms ‘acquisition of property’ and ‘just terms’ have the same meaning as in paragraph 51(xxxi) of the Constitution.

Clause 118: Compensation for damage to documents

This clause provides that the Commonwealth is liable to pay the owner of a document a reasonable amount of compensation if, as a result of the exercise of powers under this Bill, a document is lost, destroyed or damaged and that loss, destruction or damage occurred as a result of insufficient care being taken in selecting the person to exercise the powers or insufficient care being taken by the person exercising the powers.

Clause 119: Compensation for damage to equipment

Subclause 119(1) provides that the Commonwealth is liable to pay the owner of equipment or the user of data or programs a reasonable amount of compensation if, as a result of equipment being operated in the exercise of powers under this Bill with insufficient care, damage is caused to the equipment, any data recorded on the equipment or data access to which was obtained from the operation of the equipment. ‘Damage’, in relation to data, includes damage by erasing data or adding other data.

Subclause 119(3) provides that if equipment was moved or seized, then, in determining the amount of compensation payable, regard is to be had to whether a person responsible for the equipment at the time provided any appropriate warning or guidance on the operation of the equipment.

Clause 120: Amount of compensation—proceedings

This clause provides that if the Commonwealth does not agree with a person on the amount of the compensation to be paid under Division 5 of Part 7, the person may institute proceedings in a court of competent jurisdiction for the recovery of an amount of compensation that the court determines is reasonable.

Division 6—Delegations and regulations

Clause 121: Delegation

Subclause 121(1) allows the Minister (i.e. the Minister administering the Act) to delegate in writing any or all of his or her functions and powers under this Bill to:

- the Chief of the Defence Force, the Chief of Navy, the Chief of Army or the Chief of Air Force;
- the Commissioner or a Deputy Commissioner of the Australia Federal Police;
- an Agency Head (within the meaning of the *Public Service Act 1999*);
- an officer of the Australian Navy who holds a rank not below Commodore;

- an officer of the Australian Army who holds a rank not below Brigadier;
- an officer of the Australian Air Force who holds a rank not below Air Commodore; or
- an SES employee with a classification not below Senior Executive Band 1 (or equivalent).

In exercising functions or powers delegated, the delegate must comply with any directions of the Minister or the Secretary, as the case requires.

The delegation of functions and powers under the Bill is necessary to retain operational flexibility in the exercise of maritime powers. It also enables the Minister to delegate functions and powers to officers who have particular operational knowledge or experience. This clause ensures that functions and powers may only be delegated to senior government officers.

Clause 122: Regulations

This clause provides that the Governor-General will have a general regulation-making power in for the purposes of the Bill.