

LEGISLATION POLICY SCRUTINY COMMITTEE

Written Questions

Department of Infrastructure, Planning and Logistics

Ports Legislation Amendment Bill 2019

1. **Clause 5:** the proposed s 20A allows the harbourmaster for a designated port to delegate any of their powers and functions to 'a person'. There is no qualification as to who 'a person' might be. By s 24AA of the Interpretation Act, a person generally 'includes a reference to a body politic and body corporate as well as an individual'. While such a broad power does exist in other legislation, under the Bill there is not even a requirement that such delegation be in writing. Nor is writing or an instrument of delegation required by s 46A of the *Interpretation Act*, which deals generally with the power of delegation. Compare, for example, s 27A(3) of the *Acts Interpretation Act (Qld)*, which requires any delegation to be evidenced in writing signed by the delegator. See also, for example, s 31 of the Victorian *Transport Integration Act*, which allows the Secretary 'by *instrument*' to delegate any power, duty or function to any person.

On that basis, how is any delegation to be evidenced? That is important not only for certainty as to who has the delegated power, but also in relation to any assessment as to the appropriateness of any delegation.

Department Response

Agree to amend through Assembly Amendment

Clause 5 of the Bill will be amended to require the regional harbourmaster's delegation to be in writing, and limited to a person employed in an Agency, to mirror the restriction in the Minister's appointment power in section 19 of the *Ports Management Act 2015*.

2. **Clause 7:** by proposed s 38(1A), the port operator of a designated port may give certain directions for regulating the positioning, mooring etc. of vessels. Directions can be given by publication on the port operator's website. By proposed s 38(1B), such a direction must be addressed to the owner or other specified person and is taken to have been given to the person to whom it is addressed. By proposed s 38(1B)(2) an offence arises where a person fails to comply with the direction. A number of issues arise in relation to the operation of this provision (see also, for example, proposed s 50(1A)):
 - i. Given that the provision operates in relation to a wide range of vessels, can it be assumed that all operators of vessels will have ready access to a computer and the web page and, if so, will be regularly monitoring it? (though the present s 38(4) allows the defence of reasonable excuse).

- ii. As anticipated by proposed s 39(3), there may not be a person on board the relevant vessel and the location of any responsible person may be such that they cannot reasonably respond to a direction (again, there is a defence of reasonable excuse).
- iii. There is no specified time frame (or reference to a 'reasonable time') within which a person must respond to a direction before liability is attracted. There should be certainty as to when liability arises.

Department Response

It is proposed that no amendment is necessary.

- i. and ii.

Proposed subsection 38(1A) will replace subsection 38(1)(c) which currently allows the port operator to give directions regarding the positioning, mooring, unmooring, placing or anchoring of a vessel and the removing of a vessel from one place to another within the port, by means of a notice on the port operator's website. It will allow service on an occupier, or owner in addition to the master of a vessel.

Proposed subsection 38(1B) elaborates on the formalities of the notice and clarifies that a notice is to be given even if the name of the master or owner or occupier is unknown, which is often the case with recreational vessels that are not subject to a registration requirement.

The current section 38, and proposed amended section 38, require the port operator to make an attempt, by any one of a number of means, to notify the owner, master or occupier before taking action. Giving notice under section 38 is a necessary step before the port operator can exercise its powers under section 39 for the repositioning of a vessel.

No form of service of a notice other than personal service, can be guaranteed to be effective. Publishing notices in a local newspaper is generally not effective for vessels that arrive in the port from outside the Northern Territory. No form of notice is likely to be effective for an unknown owner who does not reside in the Northern Territory. Service of a notice on a webpage is an accepted form of notice for port operations particularly for commercial mariners.

The inclusion of a reasonable excuse defence in the current and proposed sections 38 and 39 reflect the wide range of circumstances where the port operator has a need to provide a notice, and where it is possible that the owner, master or occupier may not reasonably be able to respond. A vessel owner, master or occupier will not be prosecuted unless the prosecution can prove that the relevant person received the notice and failed to comply with it.

- iii. What is a reasonable amount of time within which to comply with a direction will vary, depending on the urgency of the direction, and whether it is given to someone on board the vessel who can immediately reposition the vessel, or to an absentee owner who has to arrange for someone in Darwin to move the vessel. For this reason no time limit has been fixed.

The type of directions given would, in the ordinary course of events, be complied with immediately. An issue is only likely to arise in the situation of a direction to reposition a vessel when there is no one on board to carry out the direction.

If there is a good reason why someone could not comply with a direction within the time allowed, they have the benefit of a reasonable excuse defence. This negates any need to specify that the time allowed to comply with a direction must be “reasonable”.

3. **Clauses 8 and 10:** proposed s 39 allows for the removal of a vessel by a port operator, while proposed s 40A(8) allows for the removal of a vessel in an emergency. It is not clear why, where action is taken under s 40A(8), the port operator must publish the action taken on the website and, where known, give written notice of the action to the owner etc., whereas there is no such requirement in relation to s 39.

Department Response

It is proposed that no amendment is necessary.

Section 39 has only been repealed and inserted to reflect the changes made to section 38, rather than amend each subsection. Apart from cross referencing changes, and the addition of an occupier as a person to whom a direction might be given, nothing has changed.

Steps are taken under section 39 only after a failure to follow a direction under section 38.

Proposed section 40A deals with the removal of vessels or wrecks specifically in an emergency. Steps may be taken under subsection 40A(8) without a direction being given which gives a rise to a need to inform the vessel owner, master or occupier after action has been taken.

There is no requirement under section 40A to give any further notice after action has been taken by the port operator, where a direction was first given under subsection 40A(2). This is consistent with the approach taken under section 39.

4. **Clause 10:** proposed s 44 deals with the sale of a vessel by a port operator, while s 44A deals with a sale by a regional harbourmaster. It is not clear why under s 44A there is protection given to a person who has a registered interest in the vessel, while where there is a sale under s 44 protection is given to a person who has an interest, whether registered or not. Sub-section 44(3) provides that (after paying prescribed costs) the balance is paid into a trust account.

Sub-section 44(9) then allows for payment, out of any balance in the trust account, to a person who 'had an interest in the property before the sale'. On the other hand, under s 44A(3)(d) there may be payment 'of the amount owing to the holder of a registered interest in the property'. There is no reference to a person having a non-registered interest. In relation to sale by both the port operator and the harbourmaster, there must be pre-sale notification to any person who has a registered interest and to any person known to have an interest that is not registered: see s 42(11)(b) and s 43(11)(b).

Department Response

Agree to amend through Assembly Amendment

Clause 10, proposed subsection 44A will be amended to provide protection for a person with a known interest in the vessel (as well as a person with a registered interest), consistent with the pre-sale notification requirement under subsection 43(11)(b).