



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Legislation Scrutiny Committee

**Inquiry into the Ports Legislation
Amendment Bill 2019**

March 2020

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Chair's Preface

This report details the Committee's findings regarding its examination of the Ports Legislation Amendment Bill 2019. This Bill was introduced in response to issues raised in a general review of the *Ports Management Act 2015*, the *Ports Management Regulations 2015*, and the 2018 Utilities Commission *Ports Access and Pricing Review*.

The Committee did not receive any submissions to its inquiry on the Bill. However, given the technical nature of the Bill, the Committee sought advice from its independent legal counsel, Professor Ned Aughterson.

As detailed in this report, Professor Aughterson commented on a number of provisions in the Bill. In particular, Professor Aughterson questioned why proposed section 20A allows a harbourmaster to delegate any of their powers and functions to a person without requiring the delegation to be in writing. Concern was raised that this could lead to uncertainty as to who has the delegated power as well as the assessment of the appropriateness of the delegation.

Professor Aughterson also highlighted inconsistencies in the protections provided to a person with a known interest, or a registered interest, in a vessel in situations where a vessel is sold by a harbourmaster or port operator as set out in clause 10 of the Bill, and questioned why the protections are not afforded consistently.

Following consideration of the subsequent advice provided by the Department of Infrastructure, Planning and Logistics, the Committee has recommended that the Assembly pass the Bill with the amendments proposed in recommendations 2 and 3. In both cases, these amendments seek to ensure that the Bill is unambiguous and drafted in a sufficiently clear and precise manner.

On behalf of the Committee, I would like to thank Professor Aughterson and the Department of Infrastructure, Planning and Logistics for their advice on the Bill. I also thank my fellow Committee Members for their bipartisan support in the examination of this Bill.



Ms Ngaree Ah Kit MLA

Chair

Committee Members

	Ms Ngaree Ah Kit MLA Member for Karama	
	Party:	Territory Labor
	Parliamentary Position:	Acting Deputy Speaker
	Committee Membership	
	Standing:	Standing Orders and Members' Interests, House
	Sessional:	Legislation Scrutiny
	Ms Sandra Nelson MLA Member for Katherine	
	Party:	Territory Labor
	Parliamentary Position:	Acting Deputy Speaker
	Committee Membership	
	Sessional:	Legislation Scrutiny
	Mrs Lia Finocchiaro MLA Member for Spillett	
	Party:	Country Liberals
	Parliamentary Position:	Leader of the Opposition
	Committee Membership	
	Sessional:	Legislation Scrutiny
	Mrs Robyn Lambley MLA Member for Araluen	
	Party:	Independent
	Parliamentary Position:	Acting Deputy Speaker
	Committee Membership	
	Sessional:	Legislation Scrutiny
	Mr Tony Sievers MLA Member for Brennan	
	Party:	Territory Labor
	Committee Membership	
	Sessional:	Legislation Scrutiny

Committee Secretariat

Committee Secretary: Julia Knight

Senior Research Officer: Elise Dyer

Administration/Research Officer: Melissa Campaniello

Administration Assistant: Kim Cowcher

Contact Details: GPO Box 3721 DARWIN NT 0801

Tel: +61 08 8946 1485

Email: LSC@nt.gov.au

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The Committee acknowledges Professor Ned Aughterson and the Department of Infrastructure, Planning and Logistics for the advice provided to the Committee.

Terms of Reference

Sessional Order 13

Establishment of Legislation Scrutiny Committee

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints a Legislation Scrutiny Committee.
- (3) The ordinary membership of the scrutiny committee will comprise three Government Members, one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.

The Committee's membership will be supplemented by alternate members who may be nominated to participate at meetings and undertake a role on the committee in the place of ordinary committee members. The nomination of alternate committee members will be in writing by the ordinary member to the committee chair.

Alternate Committee members must be from the same category of Members of the Assembly as the ordinary member nominating them such as the same political party or a non-party aligned Member.

- (4) The functions of the scrutiny committee shall be to inquire and report on:
 - (a) any matter referred to it:
 - (i) by the Assembly;
 - (ii) by a Minister; or
 - (iii) on its own motion.
 - (b) any bill referred to it by the Assembly;
 - (c) in relation to any bill referred by the Assembly:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
 - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (B) is consistent with principles of natural justice; and
 - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

- (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (F) provides appropriate protection against self-incrimination; and
 - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
 - (H) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (I) provides for the compulsory acquisition of property only with fair compensation; and
 - (J) has sufficient regard to Aboriginal tradition; and
 - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) The Committee will provide an annual report on its activities to the Assembly.

Adopted 27 November 2019

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Ports Legislation Amendment Bill 2019 with the proposed amendments set out in recommendations 2 and 3.

Recommendation 2

The Committee recommends that proposed section 20A of the Bill be amended to require the regional harbourmaster's delegation to be in writing, and limited to a person employed in an Agency.

Recommendation 3

The Committee recommends that proposed section 44A of the Bill be amended to provide protection for a person with a known interest in a vessel, consistent with the pre-sale notification requirement under proposed subsection 43(11)(b).

1 Introduction

Introduction of the Bill

1.1 The Ports Legislation Amendment Bill 2019 (the Bill) was introduced into the Legislative Assembly by the Minister for Infrastructure, Planning and Logistics, the Hon Eva Lawler MLA, on 28 November 2019. The Assembly subsequently referred the Bill to the Legislation Scrutiny Committee for inquiry and report by 24 March 2020.¹

Conduct of the Inquiry

1.2 On 29 November 2019 the Committee called for submissions by 29 January 2020. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.

1.3 The Bill, associated *Explanatory Statement*, and *Statement of Compatibility with Human Rights* was also forwarded to Professor Ned Aughterson for review of fundamental legislative principles under Sessional Order 13(4)(c). The Committee referred the issues raised by Professor Aughterson to the Department of Infrastructure, Planning and Logistics for comment.

1.4 The Committee did not receive any submissions to its inquiry. The Committee held a public briefing with the Department of Infrastructure, Planning and Logistics on 9 December 2019.

Outcome of Committee's Consideration

1.5 Sessional Order 13(4)(c) requires that the Committee after examining the Bill determine:

- (i) whether the Assembly should pass the bill;
- (ii) whether the Assembly should amend the bill;
- (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
- (iv) whether the bill has sufficient regard to the institution of Parliament.

1.6 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with proposed amendments as set out in recommendations 2 and 3.

¹ Hon Eva Lawler, Minister for Infrastructure, Planning and Logistics, *Draft Daily Hansard*, 28 November 2019, p. 9, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755088>.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Ports Legislation Amendment Bill 2019 with the proposed amendments set out in recommendations 2 and 3.

Report Structure

- 1.7 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.8 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Purpose of the Bill

2.1 The Bill addresses issues raised in two separate reviews: a general review of the *Ports Management Act 2015* and the Ports Management Regulations 2015 to assess operational efficiency of the legislation, and the 2018 Utilities Commission *Ports Access and Pricing Review* to assess the effectiveness of the access and pricing regime.

2.2 As noted by the Minister for Infrastructure, Planning and Logistics, the purpose of the Bill is to:

amend the *Ports Management Act 2015*, which together with the Ports Management Regulations 2015, provide the regulatory framework for the control, management and operation of all designated ports in the Northern Territory... The regulatory framework allows private port operators of designated ports to have the day-to-day management and control of their port operations, while government retain roles in relation to safety, access and price monitoring.²

² Hon Eva Lawler, Minister for Infrastructure, Planning and Logistics, *Draft Daily Hansard*, 28 November 2019, pp. 9-10, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755088>.

3 Examination of the Bill

Introduction

- 3.1 While no submissions were received, the Committee's independent legal advisor, Professor Ned Aughterson, raised a number of issues that were referred to the Department for Infrastructure, Planning and Logistics (the Department) for comment.

Harbourmaster Delegation of Powers

- 3.2 Proposed section 20A provides that 'the regional harbourmaster for a designated port may delegate any of the regional harbourmaster's powers and functions under this Act to a person.' However, Professor Aughterson noted that:

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.³

- 3.3 The Department subsequently advised that:

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*.⁴

Committee' Comments

- 3.4 The Committee acknowledges the Department's response and has recommended the Bill be amended to mirror the requirement in section 19 of the *Ports Management Act 2015* which provides that the Minister may only appoint a person 'employed in an Agency'.

Recommendation 2

The Committee recommends that proposed section 20A of the Bill be amended to require the regional harbourmaster's delegation to be in writing, and limited to a person employed in an Agency.

³ Professor Ned Aughterson, *Legal Advice on the Ports Legislation Amendment Bill 2019*, (unpublished), 28 January 2020, p. 1.

⁴ Department of Infrastructure, Planning and Logistics, *Written Response to Issues Raised in Legal Advice*, 23 February 2020, p. 1, <https://parliament.nt.gov.au/committees/LSC/114-2019>

Directions by Port Operator

3.5 Proposed section 38 amends the requirements for directions given by a port operator and is intended to 'strengthen the ability of a port operator to give directions regulating the operation of the port and to increase the likelihood of compliance by providing that each person who fails to comply with a direction commits an offence.'⁵ Professor Aughterson noted that:

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.⁶

3.6 In response, the Department advised that it did not consider any amendments to clause 7 were necessary given that:

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

⁵ Explanatory Statement, Ports Legislation Amendment Bill 2019, p. 3
<https://parliament.nt.gov.au/committees/LSC/114-2019>

⁶ Professor Ned Aughterson, *Legal Advice on the Ports Legislation Amendment Bill 2019*, (unpublished), 28 January 2020, pp. 1-2.

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.

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".⁷

Committee's Comments

3.7 The Committee is satisfied with the Department's explanation.

Removal of a Vessel

3.8 Professor Aughterson sought clarification regarding the differing requirements of proposed sections 39 and 40A which allow for the removal of vessels under particular circumstances:

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 39.⁸

3.9 The Department advised the Committee that:

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.

⁷ Department of Infrastructure, Planning and Logistics, *Written Response to Issues Raised in Legal Advice*, 23 February 2020, pp. 2-3, <https://parliament.nt.gov.au/committees/LSC/114-2019>

⁸ Professor Ned Aughterson, *Legal Advice on the Ports Legislation Amendment Bill 2019*, (unpublished), 28 January 2020, p. 2.

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 39.⁹

Committee's Comments

3.10 The Committee is satisfied with the Department's response.

Sale of a Vessel

3.11 Professor Aughterson highlighted inconsistencies in the protections afforded to people with a known interest or a registered interest in a vessel sold by a port operator or a regional harbourmaster:

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).¹⁰

3.12 The Department agreed with Professor Aughterson that the provisions were inconsistent and advised that:

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).¹¹

Committee's Comments

3.13 The Committee notes the Department's response and has recommended that, to ensure the Bill is unambiguous and drafted in a sufficiently clear and precise manner, proposed section 44A be amended accordingly.

Recommendation 3

The Committee recommends that proposed section 44A of the Bill be amended to provide protection for a person with a known interest in a vessel, consistent with the pre-sale notification requirement under proposed subsection 43(11)(b).

⁹ Department of Infrastructure, Planning and Logistics, *Written Response to Issues Raised in Legal Advice*, 23 February 2020, p. 3, <https://parliament.nt.gov.au/committees/LSC/114-2019>

¹⁰ Professor Ned Aughterson, *Legal Advice on the Ports Legislation Amendment Bill 2019*, (unpublished), 28 January 2020, p. 2.

¹¹ Department of Infrastructure, Planning and Logistics, *Written Response to Issues Raised in Legal Advice*, 23 February 2020, p. 4, <https://parliament.nt.gov.au/committees/LSC/114-2019>

Appendix 1: Public Briefing

Public Briefing – 9 December 2019

Department of Infrastructure, Planning and Logistics

- Nick Papandonakis: Executive Director Strategy, Policy and Legislation
- Guy Riley: Senior Legal Policy Officer
- James Mathews: Senior Policy Officer

Note

The briefing transcript and the Department's response to issues raised in legal advice are available at: <https://parliament.nt.gov.au/committees/LSC/114-2019>

Bibliography

Department of Infrastructure, Planning and Logistics, *Written Response to Issues Raised in Legal Advice*, 23 February 2020, <https://parliament.nt.gov.au/committees/LSC/114-2019>.

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Hon Eva Lawler, Minister for Infrastructure, Planning and Logistics, *Draft Daily Hansard*, 28 November 2019, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755088>.

Professor Ned Aughterson, *Legal Advice on the Ports Legislation Amendment Bill 2019*, (unpublished), 28 January 2020.