



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

**Legal and Constitutional Affairs Committee
performing the functions of the
Subordinate Legislation and Publications Committee**

Report on the Ports Management Regulations

Subordinate Legislation No. 13 of 2015

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Chair's Preface

The Committee routinely scrutinises all rules, regulations and by-laws tabled in the Assembly that are subject to disallowance to ensure that they are fit for purpose. With the assistance of its independent legal counsel, Professor Ned Aughterson, the Committee considers whether subordinate legislation keeps within the purpose and power of the laws under which they are made; whether they unduly affect people's rights and liberties; or whether they call for elucidation. Any questions or concerns the Committee may have are forwarded to the responsible Minister for consideration and comment, and are generally resolved by the Minister's clarification about the intended operation of the regulations, or undertakings to make amendments or correct any errors.

However, in accordance with its Terms of Reference, where the Committee is of the opinion that an instrument, or a provision of such, ought to be disallowed it is bound to report the matter to the Assembly within the disallowance period. In considering the Ports Management Regulations, the Committee formed the view that Regulation 10 is a case in point. Consequently, this report sets out the grounds for the Committee's opinion and subsequent recommendation.

It is important to note that the role of the Committee is not to consider the policy merits of a Regulation, but whether it conforms to the principles outlined under Standing Order 176(3). These principles are to ensure that Assembly's delegated law-making power is used appropriately and in accordance with our democratic system of government.

On behalf of the Committee, I would like to thank Professor Aughterson for his attention to detail and diligence in advising the Committee. I also thank the Minister for Transport and the members of the Committee for their bipartisan approach in seeking to ensure that regulations in the Northern Territory are of the standard the Assembly requires under Standing Orders.



Nathan Barrett MLA

Chair

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Terms of Reference

Standing Order 176: Subordinate Legislation and Publications Committee

- (1) A Subordinate Legislation and Publications must be appointed at the commencement of each Assembly to examine and report upon all instruments of a legislative or administrative character and other papers which are required by statute to be laid upon the Table.
- (2) The committee must consist of five Members.
- (3) The committee will, with respect to any instrument of a legislative or administrative character which the Legislative Assembly may disallow or disapprove, consider:
 - (a) whether the instrument is in accordance with the general objects of the law pursuant to which it is made;
 - (b) whether the instrument trespasses unduly on personal rights or liberties;
 - (c) whether the instrument unduly makes rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
 - (d) whether the instrument contains matter which in the opinion of the committee should properly be dealt with in an Act;
 - (e) whether the instrument appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
 - (f) whether there appears to have been unjustifiable delay in the publication or laying of the instrument before the Assembly; and
 - (g) whether for any special reason the form or purport of the instrument calls for elucidation.
- (4) The committee, if it is of the opinion that an instrument ought to be disallowed or disapproved –
 - (a) will report that opinion and the grounds thereof to the Assembly before the end of the period during which any notice of the motion for disallowance of that instrument may be given to the Assembly
 - (b) if the Assembly is not meeting, may refer its opinion and the grounds thereof to the authority by which the instrument was made.
- (5) The committee, if it is of the opinion that any matter relating to any paper which is laid upon the Table of the Assembly should be brought to the notice of the Assembly, may report that opinion and matter to the Assembly.
- (6) The committee will inquire into and report, from time to time, on the printing, publication and distribution of publications or such other matters as are referred to it by the Speaker or the Assembly.
- (7) For the purposes of this Standing Order, “instrument of a legislative or administrative character” has the same meaning as that defined in the *Interpretation Act*.

Recommendations

Recommendation 1

That the Assembly agrees that:

- a) as far as practicable the validity of regulations should be clear;
- b) regulations should not purport to create penalties without explicit legislative authority to do so; and
- c) given that Regulation 10 of the Ports Management Regulations [No. 13 of 2015] conflicts with these principles it should be disallowed if the Minister has not arranged for its repeal by the April 2016 sittings.

1 Disallowance of Subordinate Legislation

- 1.1 Subordinate legislation is any regulation, rule or by-law made under an Act.¹ Subordinate legislation takes effect from the time it is notified in the *Northern Territory Government Gazette*, or from the time specified in the legislation. However, where any Act confers the power to make or amend statutory rules, regulations and by-laws subject to disallowance, there is a statutory requirement for all such instruments to be presented to the Assembly within three sitting days of its notification in the *Gazette*.²
- 1.2 Pursuant to clause 3 of the Committee's Terms of Reference, after examining subordinate legislation tabled in the Assembly and obtaining advice from its independent legal counsel, the Committee may raise any questions or issues of concern with the responsible Minister.
- 1.3 However, if the Committee is of the opinion that an instrument, or a provision of an instrument, ought to be disallowed or disapproved, clause 4 of the Committee's Terms of Reference require that the Committee:
 - a) report that opinion and the grounds thereof to the Assembly before the end of the period during which any notice of the motion for disallowance of that instrument may be given to the Assembly
 - b) if the Assembly is not meeting, may refer its opinion and the grounds thereof to the authority by which the instrument was made.
- 1.4 As provided for under s 63(8) of the *Interpretation Act*, notice of a motion for disallowance can be given at any time within the 12 sitting days following the tabling of the instrument in the Assembly. Following consideration of the motion, the Assembly may pass a resolution disallowing subordinate legislation, or provisions of subordinate legislation, which has the effect of repealing the legislation or provisions.³ In the case of subordinate legislation amending or repealing other legislation, the disallowance restores the other legislation from the date of the disallowance.⁴
- 1.5 Where the Assembly passes a resolution of disallowance there are restrictions on the making of subordinate legislation that is the same in substance, or has the same effect as the disallowed legislation, within six months of the disallowance, unless the Assembly rescinds its resolution. Subordinate legislation made in contravention of this provision is of no effect.⁵

¹ *Interpretation Act* (NT), s 17

² *Interpretation Act* (NT), s 63(1)

³ *Interpretation Act* (NT), s 63(9)

⁴ *Interpretation Act* (NT), s 63(10)

⁵ *Interpretation Act* (NT), s 64(2)(3)

2 Ports Management Regulations

- 2.1 The Ports Management Regulations [No. 13 of 2015], support the operation of the *Ports Management Act* which commenced on 9 June 2015. In conjunction with the Act, the regulations establish the regulatory framework for the control, management and operation of designated ports within the Northern Territory. Tabled in the Assembly on 25 August, the Committee subsequently considered the regulations and associated advice (Appendix 1) from its independent legal counsel, Professor Ned Aughterson, at its meeting of 17 September 2015.
- 2.2 Professor Aughterson advised that the legislative authority for Regulation 10 is unclear. Regulation 10 (Appendix 2) creates offences where a licensed pilot demands or receives any reward in relation to pilotage services or where a person associated with a vessel offers or provides such a reward. While s 81 of the *Ports Management Act* (Appendix 3) sets out the offences that might be committed by or in relation to pilots, it does not include the offences in Regulation 10. As such, Professor Aughterson notes that Regulation 10 effectively extends the range of offences beyond those provided for in s 81 of the Act and does not appear to fall within any of the specific matters in relation to which regulations may be made under the Act.
- 2.3 The Committee referred the advice to the Minister for Transport for comment (Appendix 4). In his reply to the Committee (Appendix 5) the Minister noted that:
- The purpose of the Act is to provide for the control, management and operations of ports and related purposes. The regulation power under section 155(1) is broad and allows regulations to be made to deal with a myriad of issues that ensure the safe operation of the Port without fear or favour, and needs to be read in the context of sub-section 65(1) and 65A of the *Interpretation Act*. The *Interpretation Act* provides that a regulation making power enables subordinate legislation to be made with respect to any matter that is necessary or convenient, to give effect to the intent of the Act and that the power may be exercised by prohibiting the matter or any aspect of the matter.
- 2.4 Professor Aughterson also raised a number of issues regarding relying on Section 156 to make Regulation 10, but as the Minister advised that this section was not the source of the power, the Committee did not consider that issue further.
- 2.5 The Committee sought Professor Aughterson's advice on the Minister's comments (Appendix 6). Professor Aughterson raised two related issues:
- A general regulation power is confined to the fields of operation to the Act; and
 - A penalty cannot be imposed for a breach of subordinate legislation unless it is authorised by the empowering Act
- 2.6 Professor Aughterson suggested the Committee seek the advice of the Parliamentary Counsel, whose response is at Appendix 7.
- 2.7 The Committee also received correspondence from the Solicitor General expressing the view that "the Regulation is not obviously invalid" (Appendix 8).

Scope of a general regulation power

2.8 Explaining the limited nature of the general regulation power supported by section 65(1) of the *Interpretation Act*, Professor Aughterson stated:

3 Section 155(1) of the Act provides:

‘The Administrator may make regulations under this Act’.

Section 65(1) of the Interpretation Act provides:

If an Act authorises or requires the making of subordinate legislation under the Act, the power enables subordinate legislation to be made with respect to any matter that:

- (a) is required or permitted to be prescribed by the Act; or
- (b) is necessary or convenient to be prescribed for carrying out or giving effect to the Act. (emphasis added)

Section 65A of the Interpretation Act simply provides that where an Act authorises a matter to be regulated by subordinate legislation, the matter may also be prohibited.

4 The highlighted words in s 65(1), ‘for carrying out or giving effect to the Act’, are limited in effect. In *Carbines v Powell* (1925) 36 CLR 88 at 91-92, Isaacs J stated:

To ‘carry out’ the Act means to enforce its provisions. To ‘give effect’ to an Act is to enable the provisions to be effectively administered. There is little, if any, difference between the two expressions. They both connote that the Governor-General’s regulations are to be confined to the same field of operations as that marked out in the Act itself. It cannot be supposed that Parliament gave permission to the Executive to enlarge legislatively that field at discretion.

It was added, at 92, that a regulation “may for weighty reasons be necessary”, but “the question for the Court is not whether the power should, but whether it does exist”. It was further stated, at 92: “In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power”. Rich J noted, at 96, that a provision in terms of s 65(1) of the Interpretation Act NT “does not give carte blanche to enact independent legislation”. See also at 95, per Higgins J; 97 per Starke J; 90 per Knox J.

5 Also, in *Shanahan v Scott* (1957) 96 CLR 245 at 250, the High Court stated that a general provision such as in the present case:

does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a provision will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.

See also *Willocks v Anderson* (1971) 124 CLR 293 at 299; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 380; *Shine Fisheries Pty Ltd v The Minister for Fisheries* [2002] WASCA 11 at [51]-[55].

6 As set out in my note of 9 September 2015, regulation 10 creates offences where a licensed pilot demands or receives any reward in

relation to pilotage services or where a person associated with a vessel offers or provides such a reward. Unrelated offences that might be committed by pilots are set out in s 81 of the Act. Regulation 10 does not simply 'carry out' or 'give effect to' provisions of the Act' rather it creates a new offence that might be committed by or in relation to pilots, effectively extending the range of offences beyond those set out in s 81 of the Act. There is no express power to do so.

2.9 Having considered this advice, the Solicitor General formed the view that the Regulation was "not obviously invalid" and that:

My ultimate conclusions were that no unfairness would arise if the regulation commenced because it would be open to any person charged with the offence to challenge the validity of the regulation at that stage; and that it is highly unlikely that any charge would be brought under that regulation in the foreseeable future given the very unusual circumstances in which it would have operation.

Imposition of penalties without explicit statutory authority

2.10 In regards to imposing a penalty without explicit statutory authority, Professor Aughterson advised:

7 There is another relevant factor here. Without clear words to that effect, it is unlikely that parliament intended the Executive "to create a wider sphere of substantive criminal law": see Carbines at 94. It is generally accepted that a penalty cannot be imposed for breach of subordinate legislation unless it is authorised by the empowering Act: see, for example, The Australian Senate Standing Committee on Regulations and Ordinances, 'Delegated Legislation Monitor No 17 of 2014', at 38. It is there stated that provisions dealing with offences are not authorised by a general regulation-making power and that if such provisions "are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation making power that expressly authorises the provisions". See also the 'Queensland Legislation Handbook', Queensland Government at 6.9. See further AGS Legal Briefing No 102 of 26 February 2014 at 5.

8 As stated in Pearce and Argument's 'Delegated Legislation in Australia', 3rd ed. at p 201:

As might be expected, the courts have shown considerable reluctance to hold delegated legislation to be valid where it imposes a penalty or some other liability upon an individual and there is no clear authorisation for such a provision in the empowering Act ...

... the cases do show that the general attitude of the courts will be that penalties and forfeitures may only be imposed when permitted by the empowering Act and then must accord with the provisions of the Act.

Reference is made to *Re Port Adelaide Corporation; Ex parte Groom* [1922] SASR 35; *Bishop v MacFarlane* (1909) 9 CLR 370; *Coleman v Marine Board of Victoria* (1899) 5 Argus LR 138.

The precedent of former By-law 47 under the Darwin Port Authority Act

2.11 In his letter to the Committee the Minister said that:

It should be noted that [Regulation 10] is not a new provision. Rather, it is a provision that has been carried over from the Port By-laws.

2.12 This refers to the former By-law 47 of the Port By-laws under the *Darwin Port Authority Act*. However, those By-laws were not made under a general regulation power. The *Darwin Port Act* included specific By-law making provisions 'for the control, regulation and management of the Port', particularly in relation to the 'control of the conduct and behaviour of persons within the Port' and the 'imposition of penalties ... for a contravention or failure to comply with the By-laws'. By-law 47 was therefore supported by a regulation power relating to the conduct and behaviour of persons and an express power for By-laws to impose penalties. No similar express regulation powers exist under the *Ports Management Act*.

Committee's consideration

2.13 The advice received by the Committee raises a number of issues for the Committee to consider under Standing Order 176(3):

- (d) whether the instrument contains matter which in the opinion of the committee should properly be dealt with in an Act;
- (e) whether the instrument appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;

2.14 The advice received indicates that the legislative authority for Regulation 10 is unclear, and it is arguable, although not obvious, that the Regulation goes beyond the power conferred by the Act.

2.15 The Committee is of the view that reasonable certainty in the validity of laws is important for the confidence in the legal system. The Committee also considers that the better remedy for doubtful laws is to remove the doubt rather than the opportunity to challenge the provision in court. The burden should be on the regulating body to ensure reasonable certainty of validity, not on a person who is subject to the regulations. The Committee therefore recommends that the Assembly not allow regulations of doubtful validity.

2.16 The Committee also agrees with the principle behind the reasoning outlined in Professor Aughterson's advice that the power for the Executive to impose penalties should only be expressly conferred by Parliament and should not arise from a general regulation making power. The Territory's power to impose penalties on a person should be subject to the highest democratic controls. It should not arise simply from the Minister's belief that it would be convenient to create penalties.

2.17 The Legislature may find it convenient to authorise the Executive to create penalties by regulation, but the Committee is strongly of the view that the Executive should not assume to have such an authority without express provision from an Act of Parliament.

2.18 As Regulation 10 purports to provide penalties without the Administrator having an explicit power to do so the Committee is of the view that the Regulation contains matter that should properly be dealt with in an Act so should be disallowed.

2.19 It is axiomatic from the above reasons that the instrument appears to make an unusual and unexpected use of the powers conferred by the statute under which it is made. On this basis the Committee also holds the view that the Regulation should be disallowed. The Committee notes that it is not its function to consider the policy merits of a Regulation, but the need for a law only increases the need for it to be made properly.

2.20 Having formed the view that the Regulation's lack of clear authority and purported creation of penalties by regulation without explicit legislative authority to do so warranted a recommendation to disallow the Regulation under Standing Order 176(3), the Committee wrote to the Minister to convey its concerns and seek his advice on how he will address the Committee's concerns with the Regulation with a view to avoiding unwanted gaps in the regulatory regime for ports (Appendix 9).

2.21 In his reply to the Committee (Appendix 10), the Minister stated:

Considering the conflicting advice with regard to this matter, the ongoing concern of the Committee and to provide certainty as to the validity of the regulation, I have asked the Department of Transport to make the necessary amendments to the *Ports Management Act* as soon as reasonably practicable.

While the Department of Transport will sponsor amendment to the Act, taking into account the Solicitor General's views that regulation 10 is not obviously invalid and that no unfairness would arise if the regulation commenced, amending the Act seems as much a cautionary approach as a necessary one. On this basis, I submit that the Committee allow the regulation until the Act is amended. This would allow any benefit from the regulation to be realised without unfairness until the amendment is effected.

2.22 The Minister made no comment regarding the Committee's concerns about the importance of the reasonable certainty in regulations, nor regarding the Executive creating penalties without explicit legislative authority to do so.

2.23 The Committee disagreed with the Minister's view that "amending the Act seems as much a cautionary approach as a necessary one." The Committee is not only concerned about the likelihood of a person being prosecuted under the regulation but also the regulatory standards in the Northern Territory, the proper use of the Assembly's delegated legislative power, and respect for the proper constitutional roles of the Legislature and Executive within our system of government.

2.24 At its meeting of 2 December 2015, the Committee subsequently resolved to write to the Minister to clarify the timeframe for the proposed amendment of the *Ports Management Act* and to advise of the Committee's intention to report on the matter to the Assembly and give notice of a motion to disallow Regulation 10 on Tuesday 9 February 2016 (Appendix 11).

2.25 As detailed in Appendix 12, on 27 January 2016 the Minister advised that given the Committee's on-going concerns it was his intention to recommend that the Executive Council repeal regulation 10 and that this should occur by March 2016. The Minister further noted that:

To ensure the provisions dealt with in regulation 10 are appropriately addressed, the matter will be dealt with in the Technical and Safety Standards for Pilotage, as made by the Pilotage Authority, (Regional Harbourmaster in this instance).

2.26 While the Committee welcomes the Minister's proposed course of action to remedy the matter, it considers that as a matter of principle it should not allow its jurisdiction of the regulation to expire before the matter is finally resolved. Consequently at its meeting of 8 February 2016 the Committee resolved that:

- a) the Committee accept the Minister for Transport's proposal that Regulation 10 of the Ports Management Regulations [No. 13 of 2015] be repealed at the Executive council meeting of March 2016, on the grounds that it lacks sufficiently clear authority for its creation and inappropriately purports to impose penalties without explicit legislative authority to do so, as an alternative to recommending its disallowance;
- b) the Chair, on behalf of the Committee, give notice of a motion to disallow to be moved on 19 April to 2016 to ensure that the regulation's disallowance period does not expire prior to its repeal; and
- c) the Committee advise the Minister for Transport accordingly and request that the Committee be provided with confirmation when Regulation 10 of the Ports Management Regulations [No. 13 of 2015] has been repealed as proposed.

Recommendation 1

That the Assembly agrees that:

- a) **as far as practicable the validity of regulations should be clear;**
- b) **regulations should not purport to create penalties without explicit legislative authority to do so; and**
- c) **given that Regulation 10 of the Ports Management Regulations [No. 13 of 2015] conflicts with these principles it should be disallowed if the Minister has not arranged for its repeal by the April 2016 sittings.**

Appendix 1: Independent Legal Advice

Ports Management Regulations [No 13 of 2015]

Legal Advice from Professor Ned Aughterson

Reg. 10: this regulation creates offences where a licensed pilot demands or receives any reward in relation to pilotage services or where a person associated with a vessel offers or provides such a reward. The legislative authority for this regulation is not clear. Offences that might be committed by pilots are set out in s 81 of the Act. The offence in regulation 10 is not included. Regulation 10 does not simply provide a penalty for breach of a permissible regulation; rather it creates a new offence that might be committed by or in relation to pilots, effectively extending the range of offences beyond those set out in s 81 of the Act. Regulation 10 does not seem to fall within any of the specific matters in relation to which regulations may be made under the Act.

To the extent that the regulation depends on the so called Henry VIII clause in s 156 of the Act it is of concern. Section 156(1) provides: 'The Administrator may make a regulation that amends this Act (other than this section) in relation to any matter'. In other words, such clauses allow legislation to be overridden by the executive and have earned their name because they were used by the autocratic King Henry VIII. Because such provisions effectively transfer unfettered legislative power to the executive they should be used only in very special circumstances. For example, they were used in New Zealand for a period following the Christchurch earthquake to enable appropriate measures to be set in place. Sometimes they are used for a transitional period (in the present case s 156 does expire after one year) in order to allow for an immediate response to unanticipated eventualities that might arise in relation to new legislation. However, such regulations should be used sparingly and it is difficult to see the urgent need for intervention by the executive in the context of regulation 10, particularly given that it creates an offence and carries sanctions.

There is also a question of whether regulation 10 is a valid exercise of the power under s 156 of the Act. One issue is whether the power to 'amend' allowed by s 156 includes the power to extend the scope of the Act. For example, such clauses have sometimes been used to allow waiver of the operation of certain provisions of an Act for an initial period because of uncertainty as to how new legislation might operate in practice. On the other hand, regulation 10 serves to add to the provisions of the Act, including beyond the transition period.

Regulation 10 might also be held to be an invalid use of s 156 of the Act because of the general principle that a penalty cannot be imposed under subordinate legislation unless authorised by the empowering Act. There is no such express authorisation under s 156 and, despite the potentially broad nature of such clauses, it is not clear that such a power would be implied.

The courts have indicated a dislike for such clauses and it is likely that it will be strictly construed. As noted by Dennis Pearce and Stephen Argument in 'Delegated Legislation in Australia', 3rd ed. 2005, with reference to Henry VIII clauses:

The questionable nature of this practice leads one to think that legislation that affects the operation of an Act will be interpreted narrowly to achieve the least change in the Act that the language permits. However, there appears to be no authority for this principle. The closest one comes to it are observations in the House of Lords decisions of *R v Secretary of State for Social Security; Ex parte Britnell* [1991] 1 WLR 198 at 204 and *R v Environment Secretary; Ex parte*

Spath Holmes Ltd [2001] 2 AC 349 at 382. They suggest that a power permitting the making of delegated legislation that will amend an Act should be restrictively interpreted if there is any doubt about the scope of the power. It would seem that the same approach would be applicable to the interpretation of the delegated legislation made under such a power.

See also *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v State of New South Wales* [2014] NSWCA 116 at [103]; *Keri & Wilfred* [2012] Fam. CA 1114 at [60-80]. In *Public Service Association* at [107] Basten JA stated: "It follows that there can be no reason in principle not to follow the English approach of caution with respect to the scope of Henry VIII clauses".

Appendix 2: Regulation 10

PORTS MANAGEMENT REGULATIONS

Subordinate Legislation No. 13 of 2015

10 Offences relating to additional rewards or remuneration

- (1) A licensed pilot commits an offence if:
- (a) the pilot demands, or receives, any reward or remuneration in respect of pilotage services provided in respect of a vessel; and
 - (b) the demand is made to, or the reward or remuneration is received from, a person associated with the operation or navigation of the vessel.

Maximum penalty: 80 penalty units.

- (2) A person associated with the operation or navigation of a vessel commits an offence if:
- (a) the person offers, or provides, any reward or remuneration in respect of pilotage services provided in respect of the vessel; and
 - (b) the offer is made, or the reward or remuneration is provided, to a licensed pilot.

Maximum penalty: 80 penalty units.

- (3) This section does not apply to any reward or remuneration to which the licensed pilot is entitled under the terms of the pilot's employment or engagement by a pilotage services provider.

Appendix 3: Ports Management Act

81 Misconduct by licensed pilot

(1) A licensed pilot commits an offence if the licensed pilot:

- (a) has pilotage charge of a vessel; and
- (b) is under the influence of alcohol or a drug.

Maximum penalty: 500 penalty units.

(2) It is a defence to a prosecution for an offence against subsection (1) that the licensed pilot:

- (a) was, at the time of the alleged offence, under the influence of a drug taken by the pilot for medical purposes; and
- (b) either:
 - (i) the pilot took the drug on medical advice and complied with any direction given as part of that advice; or
 - (ii) the pilot had no reason to believe that the drug might have the influence it did.

(3) A licensed pilot commits an offence if the licensed pilot:

- (a) has pilotage charge of a vessel; and
- (b) engages in conduct; and
- (c) the conduct causes, or is likely to cause, the loss or destruction of, or serious damage to, the vessel or any other vessel, a port facility or any other property.

Maximum penalty: 500 penalty units.

(4) In this section:

drug, see section 19(1) of the *Traffic Act*.

Division 7 Regulations

155 Regulations

- (1) The Administrator may make regulations under this Act.
- (2) A regulation may:
 - (a) prescribe fees payable under this Act; or
 - (b) provide for an offence against a regulation to be an offence of strict or absolute liability.

156 Amendment of Act by regulation

- (1) The Administrator may make a regulation that amends this Act (other than this section) in relation to any matter.
- (2) A regulation made under subsection (1) may be expressed to have taken effect on a day earlier than the day on which it is made, other than a day earlier than the day on which this section commences.
- (3) This section expires 1 year after the day on which it commences.

Appendix 4: Letter to Minister for Transport 17/9/2015



DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.122

Hon Peter Chandler, MLA
Minister for Transport
Legislative Assembly of the Northern Territory
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Ports Management Regulations [No 13 of 2015]

The Subordinate Legislation and Publications Committee met on 17 September 2015 and considered the above regulations.

As highlighted in the attached enclosure from our independent legal counsel, it is argued that regulation 10 goes beyond the power conferred by ss 81 and 156 of the *Ports Management Act*. The Committee is of the view that a regulation purporting to impose laws that are beyond its power should be disallowed. The Committee therefore asks that you provide it with a response to the concerns raised in the attached advice by Friday, 16 October 2015 so, if necessary, it can report on this matter prior to the expiry of the disallowance period for this regulation.

I note that under Standing Order 20(3)(a), the Committee must report any opinion that an instrument ought to be disallowed before the end of the period during which any motion may be given, so the Committee must conclude its consideration of this issue before the December sittings. I would therefore be grateful for your urgent attention to this matter.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Nathan Barrett'.

Mr Nathan Barrett, MLA
Chair

17 September 2015

Enc: Legal Advice from Professor Aughterson

GPO Box 3721, DARWIN NT 0801
Telephone: 08 8946 1485 E-mail: slpc@nt.gov.au

Appendix 5: Response from Minister for Transport 9/10/2015



MINISTER FOR TRANSPORT

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minister.chandler@nt.gov.au

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Darwin NT 0801
Telephone: 08 8928 6553
Facsimile: 08 8928 6645

Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
GPO Box 3721
DARWIN NT 0801

Dear ^{Nathan} Mr Barrett

Thank you for your letter of 17 September 2015, raising concerns with the Port Management Regulations (No 13 of 2015).

I requested the Department of Transport to engage its legal counsel to review the *Port Management Act* and Regulations in the context of the issues raised in your letter.

The purpose of this Act is to provide for the control, management and operations of ports and related purposes. The regulation power under section 155 (1) is broad and allows regulations to be made to deal with a myriad of issues that ensure the safe operation of the Port without fear or favour, and needs to be read in the context of sub-section 65(1) and 65A of the *Interpretation Act*. The *Interpretation Act* provides that a regulation making power enables subordinate legislation to be made with respect to any matter that is necessary or convenient, to give effect to the intent of the Act and that the power may be exercised by prohibiting the matter or any aspect of the matter.

Section 156 of the *Port Management Act* is not relevant in this context. Section 156 is a Henry VIII clause and covers transitional issues that might have been overlooked and as such expires one year after commencement of the Act.

Regulation 10 ensures that a Pilot is not open to "incentives" that compromise the safe management of the port operations and thus is consistent with the purposes of the Act and does not go beyond power. It should be noted this is not a new provision. Rather, it is a provision that has been carried over from the Port By-laws. It is considered to be fit and proper in its current form and should not be disallowed.

I trust this addresses your concerns; however please do not hesitate to contact me if I can further assist.

Yours sincerely

PETER CHANDLER

- 9 OCT 2015



Appendix 6: Additional Advice from Legal Counsel

**E P AUGHTERSON
BARRISTER**

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Fax: (61 8) 8941 1541
Mobile: 0438 280 030

WILLIAM FORSTER CHAMBERS

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Darwin NT 0801
26 Harry Chan Ave
Darwin NT 0800
Australia

22 October 2015

SUBORDINATE LEGISLATION AND PUBLICATIONS COMMITTEE

Re Regulation 10 *Ports Management Regulations No 13 of 2015*.

- 1 I refer to an email communication from the Committee Secretary, Ms Julia Knight, of 12 October 2015, and attached letter of 9 October 2015 from the Minister for Transport, requesting that I provide comment/advice on the response from the Minister for Transport regarding my previous advice in relation to regulation 10 of the *Ports Management Regulations*. In my earlier notes to the Committee I suggested that the legislative authority for regulation 10 was questionable. In part, I said:

Regulation 10 does not simply provide a penalty for breach of a permissible regulation; rather it creates a new offence that might be committed by or in relation to pilots, effectively extending the range of offences beyond those set out in s 81 of the Act. Regulation 10 does not seem to fall within any of the specific matters in relation to which regulations may be made under the Act.

I then raised the question of whether it was intended that regulation 10 depend for its validity on the so called Henry VIII clause under section 156 of the *Ports Management Act* (the Act), though it is noted that under the Tabling Note for the regulations, reliance is placed only on the general power to make regulations under s 155 of the Act.

- 2 In the letter of the Minister it is confirmed that section 156 is not relevant and that reliance is placed on the general power under s 155(1) of the Act. In that letter it is said that the power under s 155(1) "is broad and allows regulations to be made to deal with a myriad of issues that ensure the safe operation of the Port without fear

or favour, and needs to be read in the context of sub-section 65(1) and 65A of the *Interpretation Act*".

- 3 Section 155(1) of the Act provides:

'The Administrator may make regulations under this Act'.

Section 65(1) of the *Interpretation Act* provides:

If an Act authorises or requires the making of subordinate legislation under the Act, the power enables subordinate legislation to be made with respect to any matter that:
(a) is required or permitted to be prescribed by the Act; or
(b) is necessary or convenient to be prescribed for carrying out or giving effect to the Act. (emphasis added)

Section 65A of the *Interpretation Act* simply provides that where an Act authorises a matter to be regulated by subordinate legislation, the matter may also be prohibited.

- 4 The highlighted words in s 65(1), 'for carrying out or giving effect to the Act', are limited in effect. In *Carbines v Powell* (1925) 36 CLR 88 at 91-92, Isaacs J stated:

To 'carry out' the Act means to enforce its provisions. To 'give effect' to an Act is to enable the provisions to be effectively administered. There is little, if any, difference between the two expressions. They both connote that the Governor-General's regulations are to be confined to the same field of operations as that marked out in the Act itself. It cannot be supposed that Parliament gave permission to the Executive to enlarge legislatively that field at discretion.

It was added, at 92, that a regulation "may for weighty reasons be necessary", but "the question for the Court is not whether the power should, but whether it does exist". It was further stated, at 92: "In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power". Rich J noted, at 96, that a provision in terms of s 65(1) of the *Interpretation Act* NT "does not give carte blanche to enact independent legislation". See also at 95, per Higgins J; 97 per Starke J; 90 per Knox J.

- 5 Also, in *Shanahan v Scott* (1957) 96 CLR 245 at 250, the High Court stated that a general provision such as in the present case:

does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary

means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a provision will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.

See also *Willocks v Anderson* (1971) 124 CLR 293 at 299; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 380; *Shine Fisheries Pty Ltd v The Minister for Fisheries* [2002] WASCA 11 at [51]-[55].

- 6 As set out in my note of 9 September 2015, regulation 10 creates offences where a licensed pilot demands or receives any reward in relation to pilotage services or where a person associated with a vessel offers or provides such a reward. Unrelated offences that might be committed by pilots are set out in s 81 of the Act. Regulation 10 does not simply ‘carry out’ or ‘give effect to’ provisions of the Act’ rather it creates a new offence that might be committed by or in relation to pilots, effectively extending the range of offences beyond those set out in s 81 of the Act. There is no express power to do so.
- 7 There is another relevant factor here. Without clear words to that effect, it is unlikely that parliament intended the Executive “to create a wider sphere of substantive criminal law”: see *Carbines* at 94. It is generally accepted that a penalty cannot be imposed for breach of subordinate legislation unless it is authorised by the empowering Act: see, for example, The Australian Senate Standing Committee on Regulations and Ordinances, ‘Delegated Legislation Monitor No 17 of 2014’, at 38. It is there stated that provisions dealing with offences are not authorised by a general regulation-making power and that if such provisions “are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation making power that expressly authorises the provisions”. See also the ‘Queensland Legislation Handbook’, Queensland Government at 6.9. See further AGS Legal Briefing No 102 of 26 February 2014 at 5.
- 8 As stated in Pearce and Argument’s ‘Delegated Legislation in Australia’, 3rd ed. at p 201:

As might be expected, the courts have shown considerable reluctance to hold delegated legislation to be valid where it imposes a penalty or some other liability upon an individual and there is no clear authorisation for such a provision in the empowering Act ...

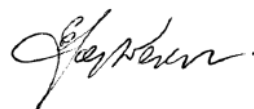
... the cases do show that the general attitude of the courts will be that penalties and forfeitures may only be imposed when permitted by the empowering Act and then must accord with the provisions of the Act.

Reference is made to *Re Port Adelaide Corporation; Ex parte Groom* [1922] SASR 35; *Bishop v MacFarlane* (1909) 9 CLR 370; *Coleman v Marine Board of Victoria* (1899) 5 Argus LR 138.

- 9 It is also noted in the Minister's letter that regulation 10 is not a new provision. Rather, it is a provision that has been carried over from the Port By-laws. Certainly, By-law 47 of the *Port By-laws* provided that 'A licensed pilot shall not demand or receive and a master shall not offer to any pilot any reward of remuneration in respect of pilotage services except as provided in these By-laws', while By-law 85 created an offence for breach of the By-laws. However, such provision was expressly allowed under the old *Darwin Port Authority Act*. Section 48(1) of that Act allowed for the making of By-laws 'for the control, regulation and management of the Port', and in particular in relation to:
- (zb) the regulation and control of the conduct and behaviour of persons within the Port and the conditions upon which persons may be admitted to or excluded from any part of the Port;
 - (zd) the imposition of penalties (not exceeding a fine of \$10,000) for a contravention of or failure to comply with the By-laws.

No such express power exists under the present Act.

- 10 It follows that in my view regulation 10 should be disallowed. However, given that my view is inconsistent with the advice evidently given by legal counsel for the Department of Transport, the Committee might consider it appropriate to refer the matter to Parliamentary Counsel for further advice, prior to reporting the matter to the Assembly.
- 11 Please advise if further clarification is required.



Ned Aughterson

Appendix 7: Response from Parliamentary Counsel

From: Sandra Markman

Sent: Friday, 30 October 2015 12:45 PM

To: Julia Knight

Subject: TRIM: RE: LCAC Request for Advice on Port Management Regulations

Thank you for your email asking for Parliamentary Counsel's advice.

After considering the matter, I have come to the conclusion that unfortunately, OPC cannot provide advice to the Committee. The Committee has its own counsel, whose role it is to advise the Committee on whether its report should contain an opinion that the regulation should be disallowed.

OPC's role is to advise the Government (in relation to Government Bills and subordinate legislation) and (as the Full Federal Court stated in *State of New South Wales v Betfair Pty Ltd* [2009] FCAC 160 at [23]) "...providing the draft legislation contains implicitly the advice of Parliamentary Counsel endorsing the draft legislation as being effective and valid."

Standing Order 20 provides that the Committee's role is to report as to whether regulations should be disallowed, after considering the matters in S.O. 20(2):

- (a) whether the instrument is in accordance with the general objects of the law pursuant to which it is made;
- (b) whether the instrument trespasses unduly on personal rights or liberties;
- (c) whether the instrument unduly makes rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
- (d) whether the instrument contains matter which in the opinion of the committee should properly be dealt with in an Act;
- (e) whether the instrument appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
- (f) whether there appears to have been unjustifiable delay in the publication or laying of the instrument before the Assembly; and
- (g) whether for any special reason the form or purport of the instrument calls for elucidation.

This appears to be a broader mandate. So, apart from the question of a potential conflict between the interests of the Committee and the interests of Government, it appears to me that the advice being sought would not be necessarily within OPC's particular expertise.

Regards

Sandra Markman

Parliamentary Counsel
Office of the Parliamentary Counsel
Department of the Attorney-General and Justice
Level 3 Parliament House, Mitchell Street,
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DARWIN NT 0801

Appendix 8: Correspondence from Solicitor-General NT

From: Michael Grant <Michael.Grant@nt.gov.au>
Date: 19 November 2015 11:41:02 am ACST
To: Nathan Barrett <Nathan.Barrett@nt.gov.au>
Subject: Regulation 10 of the Ports Management Regulations

Dear Mr Chairman

- 1 I refer to your enquiry this morning in relation to reg 10 of the Ports Management Regulations.
- 2 I was previously aware of the conflict of opinion between Prof Aughterson and the legal advisors to the Department of Transport concerning the validity of the regulation.
- 3 When the Chief Parliamentary Counsel became aware of that conflict of opinion she rang me to discuss the matter.
- 4 The view I expressed to her then, and the view I express to you now, is that the regulation is not obviously invalid. The Administrator has a broad power to make regulations under the Act. It is not necessarily a problem that a by-law creates a new offence because, as the courts have observed, the conferral of a power to make delegated legislation necessarily contemplates that it may be used to create an addition to the existing law.
- 5 Parliamentary Counsel expressed a similar view, which is implicit in the fact that they would not have drafted the provision had they considered it invalid.
- 6 My ultimate conclusions were that no unfairness would arise if the regulation commenced because it would be open to any person charged with the offence to challenge the validity of the regulation at that stage; and that it is highly unlikely that any charge would be brought under that regulation in the foreseeable future given the very unusual circumstances in which it would have operation.

Regards
Michael Grant

Michael Grant QC
Solicitor-General for the Northern Territory
GPO Box 1722, Darwin NT 0801

Appendix 9: Letter to Minister for Transport 20/11/2015



DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.136

Hon Peter Chandler, MLA
Minister for Transport
Legislative Assembly of the Northern Territory
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Ports Management Regulations [No. 13 of 2015]

Thank you for your letter of 9 October 2015 regarding the Port Management Regulations [No. 13 of 2015].

The Committee referred your letter to Professor Aughterson for further advice (Attachment A) and that advice to the Parliamentary Counsel, who declined to provide advice to the Committee (Attachment B). The Committee also received correspondence from the Solicitor-General on the matter (Attachment C).

Having considered that advice, the Committee has significant concerns with Regulation 10.

Validity of the Regulation

The first concern is that the authority for the Regulation, and therefore its validity, is unclear. Professor Aughterson has given substantial arguments to form his view that the Regulation goes beyond the power conferred by the Act.

The Solicitor General has expressed the view that the regulation is not obviously invalid and that no unfairness would arise from the Regulation because any person charged under the Regulation could challenge its validity in court.

The Committee is of the view that reasonable certainty in the validity of laws is important for confidence in the legal system. The Committee also considers that the better remedy for doubtful laws is to remove the doubt rather than the opportunity to challenge the provision in court.

Imposition of penalties without explicit legislative authority

The Committee is concerned that the Regulation creates penalties without explicit legislative authority to do so. The Legislature may find it convenient to authorise the Executive to create penalties by regulation, but the Committee is strongly of the view that the Executive should not assume to have such an authority without express

provision from an Act of Parliament. This is a line that should not be crossed in a democracy.

Disallowance of the Regulation

The Committee considers that these concerns with the Regulation warrant a recommendation for the Assembly to disallow it under Standing Order 20(2).

It is not the Committee's role to determine the merits of a regulation. The Committee would nevertheless like to avoid unwanted gaps in the regulatory regime for ports if possible while maintain appropriate legislative standards.

The Committee would therefore be grateful for your advice on how you will address the Committee's concerns with the Regulation before it reports to the Assembly with its recommendation.

Given the limited number of sitting days remaining in the Regulation's disallowance period, could you please provide any further advice to the Committee by 27 November 2015.

Yours sincerely



Mr Nathan Barrett, MLA
Chair

20 November 2015

Enc.

Appendix 10: Response from Minister for Transport 27/11/2015



MINISTER FOR TRANSPORT

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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
GPO Box 3721
DARWIN NT 0801


Dear Mr Barrett

Thank you for your letter of 20 November 2015, advising that the Subordinate Legislation and Publications Committee remains concerned about the validity of regulation 10 of the Ports Management Regulations, warranting recommendation that the Assembly disallow it under Standing Order 20(02).

In this regard, I note Professor Ned Aughterson's advice on the potential invalidity of regulation 10 and his suggestion that the Committee seek further advice from Parliamentary Counsel, as his advice is inconsistent with previous advice provided by the Department of Transport.

I also note that in response, Parliamentary Counsel advised the matter was outside its area of expertise, so the Committee sought further advice from the Solicitor-General of the Northern Territory. The Solicitor-General's view is that the regulation is not obviously invalid. In expressing his view, the Solicitor-General reiterates Parliamentary Counsel's similar view, which is implicit in the fact they would not have drafted the provision had they considered it invalid.

The Solicitor-General ultimately concluded that no unfairness would arise if the regulation commenced because it would be open to any person charged with the offence to challenge the validity of the regulation at that stage; and that it is highly unlikely that any charge would be bought under that regulation in the foreseeable future, given the very unusual circumstances in which it would have operation.

Considering the conflicting advice with regard to this matter, the ongoing concern of the Committee and to provide certainty as to the validity of the regulation, I have asked the Department of Transport to make the necessary amendments to the *Ports Management Act* as soon as reasonably practicable.

- 2 -

While the Department of Transport will sponsor amendment to the Act, taking into account the Solicitor General's views that regulation 10 is not obviously invalid and that no unfairness would arise if the regulation commenced, amending the Act seems as much a cautionary approach as a necessary one. On this basis, I submit that the Committee allow the regulation until the Act is amended. This would allow any benefit from the regulation to be realised without unfairness until the amendment is effected.

Yours sincerely



PETER CHANDLER
27 NOV 2015

Appendix 11: Letter to Minister for Transport 03/12/2015



DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.138

Hon Peter Chandler, MLA
Minister for Transport
Legislative Assembly of the Northern Territory
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Ports Management Regulations [No. 13 of 2015]

Thank you for your letter of 27 November 2015 regarding the Ports Management Regulations [No. 13 of 2015].

The Committee has not concluded that Regulation 10 is 'obviously invalid' but considers that it falls short of the standard the Committee expects for use of the Assembly's delegated legislative power due to both the lack of clarity for its authority and its creation of penalties without explicit legislative authority to do so.

Addressing these issues is not a mere cautionary matter but required to maintain regulatory standards, the appropriate use of the Assembly's delegated legislative power, and respect for the proper constitutional roles of the Legislature and Executive within our system of government.

The Committee is therefore of the view that the Assembly should not allow the period for disallowance of the regulation under s 63(9) of the *Interpretation Act* to expire while its deficiencies remain.

Consequently, the Committee has resolved to seek your clarification of the timeframe for amendment of the *Ports Management Act* and advise you that the Committee intends to report to the Assembly on the regulation under Standing Order 176(4) and give notice of a motion to disallow the Regulation on Tuesday 9 February 2016. Your advice on the timetable for addressing the Committee's concerns will then be pertinent to how to proceed with that notice.

Should you have any queries or wish to discuss the matter further, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'N Barrett'.

Mr Nathan Barrett, MLA
Chair

3 December 2015

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Appendix 12: Response from Minister for Transport 27/01/2016



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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
GPO Box 3721
DARWIN NT 0801

Nathan
Dear Mr Barrett

Thank you for your letter of 3 December 2015, in which you request clarification of the timing of any clarifying amendments to the *Ports Management Act* (the Act).

Given the Subordinate Legislation and Publications Committee's concerns and intention to give notice of a motion of disallowance of regulation 10, I write to advise that it is my intention to recommend that Executive Council repeal regulation 10. I hope to have draft regulations before Executive Council by March 2016.

To ensure the provisions dealt with in regulation 10 are appropriately addressed, the matter will be dealt with in the Technical and Safety Standards for Pilotage, as made by the Pilotage Authority, (Regional Harbourmaster in this instance). A minor change will be made to regulation 5 to allow the standards to be amended.

Yours sincerely


PETER CHANDLER
27 JAN 2016

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Ports Management Regulations [No. 13 of 2015]