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Mr Stephen Palethorpe
Committee Secretary
Senate Rural and Regional Affairs of Transport Legislation Committee
PO Box 6100
Parliament House
Canberra, ACT 2600

Dear Mr Palethorpe

Re: Enquiry into the Biosecurity Bill 2012 and Inspector-General Biosecurity Bill 2012

1. Shipping Australia appreciates the opportunity of making a submission on this important legislation given that its members (copy attached) are involved with over 70% of Australia's container and car trade and over 60% of our break bulk and bulk trades.
2. Shipping Australia has been closely involved in consultations leading up to the release of the draft legislation. It is noted that some later chapters, including chapter 13, for example, were only released a few months ago and yet that chapter contains serious legal issues as far as SAL are concerned.
3. Overall, SAL supports the direction these Bills are taking and the modernisation of the 1908 Quarantine Act.
4. SAL would like to refer initially to chapter 4, Managing Biosecurity Risks; Conveyances, Part 2, Division 4, Section 201 regarding the movement of containers where a Biosecurity Officer may give a number of directions to a person in charge or operator of the conveyance such as a vessel and whilst we understand the reasons for these provisions, we believe there should be an exception included if there is a serious risk to the safety of life or property that necessitates entry into a port, for example as provided under the Maritime Emergency Provisions in the Navigation Act.

5. Turning specifically to chapter 13, Miscellaneous and Part 3, Cost Recovery and in particular Division 3, Unpaid Fees, for example Section 639 provides that a biosecurity fee is a charge on the conveyance and the fee, plus any late payment fee in relation to the fee, is due and payable by the owner or operator of the conveyance and there is a note that the agent or the owner may be liable to pay the fee or late payment fee on behalf of the owner or operator.
6. Section 640 provides that a charge on a conveyance created by Section 639 has priority over any other interest in the conveyance, including security interest within the meaning of the Personal Property Security Act 2009. It also provides that Sub Section 73 (2) of the PPSA applies to the charge.
7. Section 641 gives the Director of Biosecurity the power to detain a conveyance where the conveyance is subject to a charge but a fee has not been paid. The Director of Biosecurity must give a written notice to the owner and operator of the conveyance informing the owner that if the fee is not paid the vessel may be sold. No mention is made here of an agent acting on the owner or operator's behalf.
8. The Director may also give directions relating to the movement of the conveyance, requiring the conveyance to be left at a specified place in a specified manner or requiring goods on board the conveyance to be unloaded at a specified place in a specified manner.
9. Under section 642, this does not apply if a person is authorised to engage in the conduct in terms of moving, dealing with or interfering with the conveyance if it is carried out in accordance with an approved arrangement. Section 642 (2) states that an exception will apply if the person is authorised to engage in the conduct under another Australian law which we assume would permit a Harbourmaster, for example, to carry out his lawful duties in relation to the vessel but would not permit a stevedore, to continue loading or discharging a vessel where the Director has made such directions.
10. Section 644 relates to the sale of the detained conveyance, and under subsection 2, the conveyance may be sold if the Director of Biosecurity has given notice to the owner of the conveyance. However, under subsection 3, it may still be sold if the Director of Biosecurity has not been able to give notice to the owner of the conveyance, despite making reasonable efforts and has certified in writing to that effect and at the end of 30 days after the Director first attempted to give the notice, the fee has not been paid.
11. It is noted that in section 645, subsection 2, the Director of Biosecurity may sell the conveyance and give full and effective title to the conveyance free of all other interests, which are extinguished by force of this section at the time title is given.
- 12. Shipping Australia is of the view that such powers are draconian, certainly in circumstances which are not likely to involve very large sums of money, at least relative to the value of the ships involved. For example, a \$10,000 fee may be unpaid and the Bill provides for the sale of a vessel worth \$50-\$80 million. Even one day's delay of many vessels would cost around \$25,000.**

13. The Admiralty Act 1988 identifies as a general maritime claim in Sections 4(3)(p) and (q) the following:
 - "(p) A claim in respect of liability for port, harbour, canal, or light tolls, charges or dues, or tolls, charges or dues of a similar kind, in relation to a ship;
 - (q) A claim in respect of levy in relation to a ship, including a shipping levy imposed by the Protection of the Sea (Shipping Levy) Act 1981 being a levy in relation to which a power to detain the ship is conferred by a law in force in Australia or in a part of Australia;"
14. Subsection 4(3)(p) may not be interpreted by a Court as being wide enough to encompass such fees as are due to the Department and it is possible that such fees would not also come within the meaning of the word "levy" as it applies to the *Protection of the Sea (Shipping Levy) Act 1981*. (It is s.11 of the *Protection of the Sea (Shipping Levy Collection) Act 1981*, which contains a power to "enter upon the ship and detain goods or equipment belonging to the ship, and detain them until the levy is paid". We note that this does not seem to contemplate detention or sale of the ship itself.
15. There is however a precedent in the past for such provisions. In its report, which lead to the passage of the *Admiralty Act 1988* the Australian Law Reform Commission discussed the contents of the 1952 Arrest Convention, upon which the Australian Act was based, and noted that both the Convention and overseas legislation giving effect to it conferred jurisdiction in Admiralty over claims for dock and harbour dues. The Commission's report noted that the Acts, under which the various Public Port Authorities that operate in Australia, contain their own provisions for securing the payment of port charges. (Reference was made to the Port of Geelong Authority Act 1958 and the Fremantle Port Authority Act 1902) in that regard. Neither of those Acts are presently current. It is of interest to note however that New South Wales under the *Ports and Maritime Administration Act, 1995* there are no such protections provided to the Port Authority. It makes any sums payable a debt due to a Port Authority and recoverable in any Court of competent jurisdiction (Section 68).
16. The Australian Law Reform Commission questioned whether it was necessary in light of the power contained in such legislation to detain ships as security to attempt to duplicate such provisions in the proposed Admiralty Act. It was however felt desirable that the Court have power to deal with all claims involving the ship, including claims for dock and harbour dues which might help ease the conflict between the exercise of statutory powers and admiralty powers of detention and sale.
17. It is also of note that under Section 36 of the *Admiralty Act 1998* it is provided that where a ship has been detained under such a power and is arrested under the Admiralty Act the detention is suspended for as long as the ship is under arrest. It is also provided that where a ship that has been detained or would but for the provisions of Section 36(2) (the power to detain not being allowed to be exercised whilst a ship is under arrest) and is arrested and sold under the Act the civil claim is, unless the Court otherwise directs, payable in priority to any claim against the ship other than the claim of a marshal for expenses.
18. Such a provision therefore does give primacy to the rights of those that are given such powers of detention and would presumably give priority even as against claims by unpaid crew or secured creditors, such as a mortgagee.
19. The Australian Law Reform Commission dealt with the conflict between the rights of arrest and statutory rights of detention in paragraphs 265 and 266 of its report. It noted that there were no reported Australian decisions on how the statutory powers of detention relate to the admiralty

power for arrest and sale of the vessel, at that time. It determined that it would be appropriate to make some provision in the proposed legislation and suggested that *"the best solution is to give the Admiralty Court power to override any statutory right of detention already exercised, on condition that the claim underlining that right is given the appropriate priority, which should (unless the Court otherwise orders) be first priority after the expenses of sale in admiralty. In the converse (and less usual) situation, where a ship is arrested before a statutory right of detention is exercised, the power of detention should be excluded. This provision will have no application to rights of detention or seizure which exist for purposes other than the recovery of civil claims within admiralty jurisdiction. For example it will not affect powers of forfeiture or seizure pursuant to customs, quarantine or similar legislation."*

20. Under the Fisheries Management Act 1991 a forfeiture regime is in place, pursuant to which the catch, gear or the vessel itself can be forfeited where they have been used in the commission of an offence. That is within the discretion of the Judge hearing the criminal prosecution. There have been cases in Australia which have had to deal with the competing in rem claims and the Crown's entitlements pursuant to such legislation. This can give rise to issues as to whether a judicial sale of the ship could give good title when there was a concurrent claim of forfeiture available to the Crown. In one such case *Redhead v Admiralty Marshal*, Western Australia District Registry (1998) 157 ALR 660 Ryan J in the Federal Court held that Section 36 of the *Admiralty Act* did not apply in this case. Section 36 provides that where a power is given to persons to detain a ship in relation to a civil claim but proceeding on that civil claim could be commenced as an action in rem against the ship where the ship is under arrest the power to detain cannot be exercised. Ryan J held that at the time when the Fisheries Management Act was enacted in 1991 the legislature must be taken to have been aware of the wide powers, including the power of sale, possessed by the Admiralty Courts and it was significant that the Act had not provided for that power of sale to be suspended whilst a vessel was detained pursuant to Section 84 of the Fisheries Management Act. Ryan J therefore considered that the legislature intended to leave to the Admiralty Court, in the exercise of its discretion, the adjustment of competing rights of the authorised Fisheries' officer under the Fisheries Management Act and the plaintiff in the action in rem as well as other parties' interest in the resolution of that action.

Conclusion

It will be seen from the above that it is therefore not unique for a State or Federal body to seek to provide itself with wide ranging powers in relation to the detention and potential sale of a vessel. However, the best examples of such current powers seem to be those related to the Fisheries Industry where they are supportive of criminal activity and not civil debts. It might therefore be submitted, in response to this Bill that such powers are draconian and inappropriate.

We would draw to the attention of the Committee the existence of subsections 4(3)(p) and (q) in the *Admiralty Act*, and suggest that such powers ought to be sufficient for the Department, particularly if the sums of money are not going to be that substantial and Section 36 would also protect the creditor.

Other Submissions

SAL also supports the comments made by the Industry Working Group on Quarantine in relation to their submission to the Committee and in particular, the emphasis on industry being consulted on the draft regulations given their importance in terms of this legislation.

We would be pleased to provide further comment or elaborate on any of the points raised above if so required by the committee.

Yours sincerely

Llew Russell, AM
Chief Executive Officer