

41ST PARLIAMENT



Report 143

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

*Marine Safety (Domestic Commercial Vessel National
Law Application) Bill 2023*

Presented by
Hon Donna Faragher MLC (Chair)
August 2023

Standing Committee on Uniform Legislation and Statutes Review

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EXECUTIVE SUMMARY

- 1 The Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 (Bill) gives effect to the Intergovernmental Agreement on Commercial Vessel Safety Reform (IGA). It proposes to apply the national system for commercial vessel safety in Western Australia by applying Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) (National Law) as a law of Western Australia.
- 2 The Bill's application of the National Law will ensure national regulation of all domestic commercial vessels in Western Australia. This includes those not within the constitutional power of the Commonwealth.
- 3 The Bill also makes substantive amendments to the *Western Australian Marine Act 1982*, including applying compliance and enforcement provisions equally to recreational and commercial vessels.
- 4 Some provisions in the IGA, National Law and Bill may impact upon the Western Australian Parliament's sovereignty and law-making powers.
- 5 In particular:
 - the Bill contains:
 - a commencement clause providing that the majority of the Bill comes into operation on a day fixed by proclamation
 - four Henry VIII clauses.
 - the National Law contains five Henry VIII clauses.
- 6 The Committee has made a number of findings regarding these parliamentary sovereignty issues for the Legislative Council's consideration during debate on the Bill.

Findings

Findings are grouped as they appear in the text at the page number indicated:

FINDING 1

Page 10

Sections 7(4), 7(5) and 8(3) of Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth) are Henry VIII clauses and erode the Western Australian Parliament's sovereignty and law-making powers.

FINDING 2

Page 10

Sections 7(4), 7(5) and 8(3) of Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth) are justified.

FINDING 3

Page 11

Sections 165(2) and 165(3) of Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth) are Henry VIII clauses and erode the Western Australian Parliament's sovereignty and law-making powers.

FINDING 4

Page 11

Sections 165(2) and 165(3) of Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth) are justified.

FINDING 5

Page 12

The complementary applied scheme approach to uniform legislation adopted by the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 6

Page 13

The disallowance mechanism in Part 2 of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 provides a level of parliamentary oversight and scrutiny that reduces its impact on parliamentary sovereignty and law-making powers.

FINDING 7

Page 15

Clause 6(5) of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 would have a Henry VIII effect and thereby erode the Western Australian Parliament's sovereignty and law-making powers in the following circumstance:

- where regulations, rather than an Act of Parliament, delete an amendment to the Commonwealth domestic commercial vessel national law after it has become part of the law of Western Australia.

FINDING 8

Page 15

Clause 6(5) of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 facilitates parliamentary scrutiny of regulations providing that amendments to the Commonwealth domestic commercial vessel national law do not apply in Western Australia.

FINDING 9

Page 17

The application of Commonwealth interpretation, criminal and administrative laws in Western Australia by clauses 17, 21 and 24 of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 10

Page 17

Applying laws of another jurisdiction in Western Australia enables a nationally consistent application of these laws as part of a national uniform scheme.

FINDING 11

Page 18

Clauses 21(4) and 24(3) of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 may have a Henry VIII effect and thereby erode the Western Australian Parliament's sovereignty and law-making powers.

FINDING 12

Page 19

Clause 39, proposed subsection 3(2) of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 is a Henry VIII clause and erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 13

Page 19

Clause 39, proposed subsection 3(2) of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 is justified.

1 Introduction

- 1.1 On 22 June 2023 the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 (Bill) was introduced into the Legislative Council. It was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order 126.
- 1.2 The Committee must report by 8 August 2023, being the first Legislative Council sitting day following expiry of the 45 day reporting period.
- 1.3 The Bill's purpose is to:
 - apply Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) (National Law) as a law of Western Australia to regulate all domestic commercial vessels operating in the State
 - amend the *Western Australian Marine Act 1982* (Marine Act).

2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its webpage.¹
- 2.2 Under its terms of reference, the Committee is confined to investigating whether a Bill may impact upon the Western Australian Parliament's sovereignty and law-making powers. The Committee is not able to consider any other matter, including the policy of the Bill.
- 2.3 Given the Committee's terms of reference, no submissions were sought.

3 Supporting documents

- 3.1 The Committee received copies of the Bill, its second reading speech and Explanatory Memorandum (EM) when the Bill was introduced into the Legislative Council.
- 3.2 Standing Order 126(5) states:

The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 business days after referral...
- 3.3 The Committee thanks the Minister assisting the Minister for Transport (Minister) for providing the information required by Ministerial Office Memorandum 2022/01² within this timeframe.

4 Background

Intergovernmental Agreement on Commercial Vessel Safety Reform

- 4.1 The Intergovernmental Agreement on Commercial Vessel Safety Reform (IGA) established the national system for commercial vessel safety (National System). Under the IGA, all jurisdictions agreed to:

¹ Legislative Council, [Standing Committee on Uniform Legislation and Statutes Review](#), Parliament of Western Australia, 2023, accessed 5 July 2023.

² M McGowan, [Ministerial Office Memorandum, Uniform Legislation and Statutes Review Committee](#), Executive Government Services, 3 August 2022, accessed 5 July 2023 (MM2022/01).

- legislate to apply the National Law to all commercial vessels operating in Australian waters
 - establish one National Regulator (the Australian Maritime Safety Authority (AMSA)) to develop, maintain, monitor and enforce national standards for commercial vessels.
- 4.2 The IGA was entered into in 2011. The National Law commenced on 1 July 2013.
- 4.3 Before the National Law commenced, commercial vessels on interstate and overseas voyages were regulated by the Commonwealth under the *Navigation Act 1912* (Cth). The States and Territories regulated commercial vessels on intrastate voyages and fishing vessels on all but overseas voyages. There were, accordingly, significant inconsistencies across jurisdictions in safety requirements, duplicating administrative requirements and increasing costs.
- 4.4 In July 2009, the then Council of Australian Governments agreed to a national approach to regulating all domestic commercial vessels in Australian waters. This formed part of a national transport reform package to improve safety and reduce the regulatory burden on Australian rail, heavy vehicle and maritime industries.³
- 4.5 The *Navigation Act 2012* (Cth), which replaced the *Navigation Act 1912* (Cth) is complemented by the National Law providing a national scheme for commercial vessels operating domestically. These are either owned by constitutional corporations or engage in interstate voyages, which are within the Commonwealth's constitutional powers.
- 4.6 Under the IGA, the States and Territories agreed to apply the National Law to commercial vessels which are beyond the Commonwealth's jurisdiction.

The National Law

- 4.7 The National System established by the National Law applies to the domestic commercial vessel fleet operating in Australian waters across all States and Territories.⁴ It provides the regulatory framework to ensure the safe design, construction, equipping, crewing and operation of these domestic commercial vessels.
- 4.8 The National Law⁵ established:
- AMSA as the National Regulator
 - a system for the issue of national certificates relating to commercial vessel identification, survey, commercial operation and competencies of commercial seafarers
 - general safety requirements for individuals who have a role in the production and operation of commercial vessels
 - a system for compliance and enforcement activities
 - offences for non-compliance
 - the consistent application of nationally agreed standards across Australia.⁶

³ [Independent Review of Domestic Commercial Vessel Safety Legislation and Costs and Charging](#), Draft Interim Safety Report – phase 1, August 2022.

⁴ Australian Government, Australian Maritime Safety Authority, *Domestic Commercial Vessels*, accessed 5 July 2023.

⁵ *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* – Schedule 1 *Marine Safety (Domestic Commercial Vessel) National Law*, https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/mscvnla2012494/sch1.html.

⁶ Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, [Explanatory Memorandum](#), Legislative Council, p 1.

- 4.9 Vessels regulated by the *Navigation Act 2012* (Cth) and outside the scope of the National Law include:
- vessels operating internationally
 - foreign vessels
 - vessels maintaining certification under the International Convention for Safety of Life at Sea
 - defence vessels
 - recreational vessels.

The Western Australian Marine Act 1982

- 4.10 The Marine Act is the principal legislation regulating navigation and shipping in Western Australia. Before the commencement of the National Law it regulated all domestic commercial vessels operating in the State.
- 4.11 The Marine Act governs all Western Australian based vessels relating to:
- waterways management rules, including speed restrictions, navigation aids, wreck removal and water closures
 - drug and alcohol controls
 - management of ports, harbours and moorings, including harbour master powers to direct commercial vessels in ports
 - emergency and environmental management.⁷
- 4.12 The types of vessels governed includes pleasure vessels and those outside the Commonwealth's jurisdiction, including those owned by a sole trader rather than a corporation.

Changes to marine vessel safety proposed by the Bill

- 4.13 The EM explains how the Bill will apply the National Law to ensure it covers all domestic commercial vessels in Western Australia:

The National Law does not apply to certain commercial craft that have until now been covered by Part II of this Act, either because:

1. they are not covered by the constitutional reach of the National Law. These vessels are currently in the legislative 'gap' and are the reason for this Application Bill which will apply the National Law to them;
2. they do not meet the National Law definition of 'vessel' or 'domestic commercial vessel'.

The National Law definition expressly provides that certain vessels are not domestic commercial vessels, including school vessels and community group vessels unless they are used for a prescribed purpose or activity. In addition, regulations made under the National Law provide that specified things are not vessels or are not domestic commercial vessels, and they are therefore not subject to the National Law.

The second group will become 'prescribed vessels' under this Act because they cannot meet its definition of 'pleasure vessel' due to their commercial nature. The

⁷ Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, [*Explanatory Memorandum*](#), p 3.

following craft may be prescribed if used for hire or reward: surf skis; sit-on-top kayaks; motorised surfboards and body boards; sailboards; electric hydrofoils; and non-motorised inflatable craft. The following may also be prescribed: State Government-owned boats used only for training primary or secondary school students; and vessels owned by community groups which are used for hire, charter or training for a fee by people who are not members of the community group. These lists are not exclusive and other vessels or craft may be prescribed in the future.⁸

4.14 In summary, after the Bill's commencement, the following regulatory regime will apply:

- The National Law will apply to domestic commercial vessels:
 - covered by the Commonwealth's constitutional power, as is currently the case
 - within the responsibility of the State, such as those owned by an individual, partnership or unincorporated association, to close the legislative gap referred to in the EM
- The State can make regulations to:
 - apply the National Law to certain craft that cannot meet the definition of *pleasure vessel* due to their commercial nature
 - define novel and emerging craft as vessels, making them subject to regulation by the Marine Act.

5 Structure of uniform legislation

5.1 The Bill implements a complementary applied scheme. This approach involves one jurisdiction enacting legislation which is then applied in all other jurisdictions, achieving high consistency. It has the greatest impact on parliamentary sovereignty of all uniform schemes by future amendments coming into effect without the requirement for an amendment bill.⁹

5.2 Despite this, the Bill's process for disallowance of Commonwealth amending Acts and instruments provides some protection of parliamentary sovereignty. This process is similar to that contained in the Legal Profession Uniform Law Application Bill 2021, though includes improvements following the adoption of recommendations in the Committee's 136th report.¹⁰ This is discussed in paragraphs 7.28 to 7.32.

6 Committee scrutiny

6.1 The Committee has identified a number of parliamentary sovereignty issues in the IGA, National Law and Bill, including Henry VIII clauses,¹¹ and made a number of findings.

6.2 The Committee thanks:

- the Minister for Transport for identifying and providing some justification in the EM for some of the Henry VIII clauses in the Bill and National Law (such as clause 39, proposed subsection 3(2))

⁸ Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, [Explanatory Memorandum](#), p 56.

⁹ Standing Committee on Uniform Legislation and Statutes Review, report 89, [Gene Technology \(Western Australia\) Bill 2014](#), Western Australia, Legislative Council, 10 March 2015, pp 13-16.

¹⁰ Standing Committee on Uniform Legislation and Statutes Review, report 136, [Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application \(Levy\) Bill 2021](#), Western Australia, Legislative Council, 12 October 2021, p 13.

¹¹ Henry VIII clauses or clauses that have a Henry VIII effect.

- the Minister for his responses to the Committee's questions on various clauses, which assisted its scrutiny of the Bill.
- 6.3 It is important EMs identify and justify each and every clause in a bill that may impact on parliamentary sovereignty and law-making powers, including Henry VIII clauses.¹²

Henry VIII clauses

6.4 The Committee has identified the following Henry VIII clauses in the National Law and Bill:

- The National Law:
 - Section 7(4)
 - Section 7(5)
 - Section 8(3)
 - Section 165(2)
 - Section 165(3)
- The Bill:
 - Clause 6(5)
 - Clause 21(4)
 - Clause 24(3)
 - Clause 39, proposed subsection 3(2).

6.5 In the Committee's 139th report it made the following observations on Henry VIII clauses:

A Henry VIII clause gives the Executive power to amend the operation of the Act through delegated legislation, such as regulations, or other Executive action.

The Committee's position on Henry VIII clauses has been well documented. They are objectionable as they offend the principle of the separation of powers, give insufficient regard to the institution of Parliament and delegate to the Executive the Parliament's sovereign function to legislate.

The Committee's approach is that Parliament should not enact Henry VIII clauses without sound reason. The purpose of a proposed Henry VIII clause should be clearly explained and justified in the Government's explanatory materials in support of a bill. This enables the Legislative Council to weigh the desirability of such a clause in the particular circumstances against its impact on the institution of Parliament.¹³

6.6 The Committee assesses on a case by case basis whether sound reasons exist for a Henry VIII clause. The subject matter of the bill can be an important factor in this assessment. The Committee has recognised and in some cases found justified, Henry VIII clauses where there is need:

¹² Standing Committee on Uniform Legislation and Statutes Review, report 136, [*Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application \(Levy\) Bill 2021*](#), Western Australia, Legislative Council, 12 October 2021, pp 21-23.

¹³ Standing Committee on Uniform Legislation and Statutes Review, report 139, [*Working with Children \(Criminal Record Checking\) Amendment Bill 2022*](#), Western Australia, Legislative Council, 15 November 2022, pp 7-8.

- for flexibility¹⁴
- for a quick regulatory response¹⁵
- to take account of evolving regulation¹⁶
- to refine a national scheme to suit Western Australia's requirements.¹⁷

6.7 The Committee has considered each Henry VIII clause in the National Law and Bill in section 7.

7 Provisions that may impact upon parliamentary sovereignty and law-making powers

The Intergovernmental Agreement on Commercial Vessel Safety Reform

7.1 The Committee draws the following paragraphs of the IGA¹⁸ to the attention of the Legislative Council based on their potential impact on parliamentary sovereignty and law-making powers.

Paragraph 7

7.2 Paragraph 7 states:

This Agreement will commence as soon as it is signed by all Parties, and will operate indefinitely unless the parties by unanimous agreement in writing revoke it.

7.3 The Committee notes, as the Minister advises, that 'there is no mechanism to opt out of the National Law scheme which all States and Territories are parties to'.¹⁹

Paragraph 21(a)

7.4 Paragraph 21(a) states:

Where the Standing Council is required to decide on matters set out in paragraph 20:

- (a) a recommendation will be proposed through the AMG and the Senior Official's Committee, and will be carried upon unanimous agreement of the Standing Council members representing parties to this Agreement.²⁰

¹⁴ Standing Committee on Uniform Legislation and Statutes Review, report 136, *Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application (Levy) Bill 2021*, Western Australia, Legislative Council, 12 October 2021, p 20.

¹⁵ Standing Committee on Uniform Legislation and Statutes Review, report 139, *Working with Children (Criminal Record Checking) Amendment Bill 2022*, Western Australia, Legislative Council, 15 November 2022, pp 10, 14.

¹⁶ Standing Committee on Uniform Legislation and Statutes Review, report 138, *Health and Disability Services (Complaints) Amendment Bill 2021*, Western Australia, Legislative Council, 9 August 2022, p 6.

¹⁷ Standing Committee on Uniform Legislation and Statutes Review, report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, Western Australia, Legislative Council, 15 September 2020, findings 18 and 20.

¹⁸ Intergovernmental Agreement on Commercial Vessel Safety Reform. https://federation.gov.au/sites/default/files/about/agreements/Maritime_IGA-19August2011.pdf. Accessed 13 July 2023.

¹⁹ Information from Hon David Michael MLA provided pursuant to Ministerial Office Memorandum MM2022/01 (MM2022/01).

²⁰ AMG is the Australian Maritime Group.

7.5 The matters listed in paragraph 20 are:

- (a) approve the primary legislation and any changes to it;
- (b) approve the scope of the National Law and any changes to it, including those which arise as a consequence of amendments to other legislation;
- (c) approve the principles that will underpin the development and maintenance of the national system;
- (d) approve national maritime safety standards.

7.6 The requirement for unanimous agreement is a constraint on the Parliament's ability to legislate on these matters. For instance, should Western Australia wish to amend its legislation, it may not obtain the unanimous approval of the Standing Council.

Paragraph 24

7.7 Paragraph 24 states:

In the event of an objection by any jurisdiction to a piece of subordinate legislation once it has been drafted, the following steps will be taken:

- (a) the jurisdiction objecting to the legislation will endeavour to resolve the concern through discussions with the National Regulator.
- (b) should discussions not resolve an objection, the jurisdiction may refer the matter to AMG.
- (c) should two-thirds or more of AMG members vote in support of the objection, the objection will be referred to the Senior Officials' Committee, and if necessary, the Standing Council, for resolution.
- (d) should two-thirds or more of Standing Council members vote in support of the objection, the National Regulator, or as appropriate, the Commonwealth Minister, will take steps to withdraw, rescind or amend the legislative proposal or piece of subordinate legislation, or part thereof, subject to the objection, to the satisfaction of the objecting jurisdictions.
- (e) where the objection relates to a piece of subordinate legislation already made, the making and consideration of an objection in accordance with this paragraph will not, of itself, cease the operation of the relevant piece of subordinate legislation.

7.8 The Committee notes the potential impact on parliamentary sovereignty and law-making powers by any failure by Western Australia to secure two-thirds support to any objection to subordinate legislation. However, this impact may be reduced by the disallowance mechanism in Part 2 of the Bill discussed below.

Paragraph 46(d)

7.9 Paragraph 46(d) states:

State and Territory responsibilities with respect to commercial vessel safety regulation include:

- (d) Not submitting a Bill or Bills to their legislature for the purpose of departing from, altering the effect of, or repealing the legislation to implement the national system or this Agreement without the prior agreement of the Standing Council;

- 7.10 The requirement for the Standing Council's agreement is a constraint on the Parliament's ability to legislate on these matters.

Paragraph 62

- 7.11 Paragraph 62 states:

A Party to the Agreement may terminate their participation in the Agreement at any time with 12 months' notice by notifying all the other Parties in writing.

- 7.12 The Committee notes the requirement of 12 months' notice is a significant lead time.

- 7.13 The Committee is also of the view that the Parliament of Western Australia should be notified of any withdrawal from the IGA by Western Australia or any party to the IGA.

The National Law

Sections 7(4), 7(5) and 8(3)

- 7.14 Section 7 governs the definition of the term *domestic commercial vessel*.²¹ It states:

7 Definition of *domestic commercial vessel*

- (1) In this Law:

domestic commercial vessel means a vessel that is for use in connection with a commercial, governmental or research activity.

- (2) The use of a vessel in connection with an activity that is not a commercial, governmental or research activity at the same time as the vessel is used in connection with a commercial, governmental or research activity does not prevent the vessel from being a domestic commercial vessel.

- (3) Despite subsection (1), a vessel is not a ***domestic commercial vessel*** if the vessel:

(a) is a regulated Australian vessel; or

(b) is a foreign vessel; or

(c) is a defence vessel; or

(d) is owned by:

(i) a primary or secondary school; or

(ii) a community group of a kind prescribed by the regulations.

- (4) Despite subsection (3)(d), a vessel covered by that subsection is a domestic commercial vessel at any time when it is being used for:

(a) a purpose prescribed by the regulations; or

(b) an activity prescribed by the regulations.

- (5) Despite subsections (1) and (2), the regulations may provide as follows:

(a) that a specified thing, or a thing included in a specified class, is a domestic commercial vessel;

²¹ *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, [Schedule 1, s 7](#).

(b) that a specified thing, or a thing included in a specified class, is not a domestic commercial vessel.

(6) Regulations made for the purposes of subsection (3)(d)(ii) may prescribe a kind by reference to a decision of the National Regulator.

(7) A vessel in the course of construction is a **domestic commercial vessel** if the vessel is, after completion, for use as a domestic commercial vessel.

(8) For the purposes of subsection (7), a vessel that has been launched, but has not been completed and delivered under the relevant building contract, is taken to be a vessel in the course of construction.

7.15 Section 8 governs the definition of *vessel*. It states:

8 Definition of vessel

(1) In this Law:

vessel means a craft for use, or that is capable of being used, in navigation by water, however propelled or moved, and includes an air-cushion vehicle, a barge, a lighter, a submersible, a ferry in chains and a wing-in-ground effect craft.

(2) Despite subsection (1), none of the following is a **vessel**:

(a) an aircraft;

(b) a thing that is a facility for the purposes of Schedule 3 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* of the Commonwealth.

(3) Despite subsections (1) and (2), the regulations may provide as follows:

(a) that a specified thing, or a thing included in a specified class, is a vessel;

(b) that a specified thing, or a thing included in a specified class, is not a vessel.

7.16 Section 7(4) enables regulations to prescribe a vessel owned by a school or community group as a domestic commercial vessel if used for a prescribed activity or purpose.²²

7.17 Section 7(5) enables regulations to specify whether particular vessels or types of vessels, referred to as *things*, are or are not domestic commercial vessels.²³

7.18 Section 8(3) provides that regulations may provide that a specified thing, or a thing included in a specified class, is or is not a vessel.²⁴

7.19 These sections are Henry VIII clauses because they qualify or expand the operation of the Act. For instance, section 7(4) enables regulations to prescribe activities or purposes of vessels which would not otherwise be captured by that provision. They are similar in effect to clause 39, proposed subsection 3(2) of the Bill, as explained in the EM, which is examined below.

²² Regulation 7 of the *Marine Safety (Domestic Commercial Vessel) National Law Regulation 2013* prescribes a number of purposes, including the use of a vessel by a volunteer search and rescue organisation. This regulation applies by clause 6(1) of the Bill. See Marine Safety (Domestic Commercial Vessel) National Law Bill 2012, *Explanatory Memorandum*, Commonwealth of Australia, p 8.

²³ Marine Safety (Domestic Commercial Vessel) National Law Bill 2012, *Explanatory Memorandum*, p 24.

²⁴ Marine Safety (Domestic Commercial Vessel) National Law Bill 2012, *Explanatory Memorandum*, p 25.

FINDING 1

Sections 7(4), 7(5) and 8(3) of Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth) are Henry VIII clauses and erode the Western Australian Parliament's sovereignty and law-making powers.

- 7.20 The Committee is of the view these Henry VIII clauses are justified because, with evolving technology, it is not possible to articulate everything that might be classified as a vessel in the future and required to be regulated by the National Law. There is a need for flexibility and quick regulatory action to enable regulations to be made to govern vessel safety.²⁵
- 7.21 Further, any regulations will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation. This is because they are legislative instruments for the purposes of the disallowance mechanism in Part 2 of the Bill.²⁶

FINDING 2

Sections 7(4), 7(5) and 8(3) of Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth) are justified.

Sections 165(2) and 165(3)

- 7.22 Under section 165(1) of the National Law, regulations may prescribe transitional matters. It states:
- (1) The regulations may prescribe matters of a transitional nature (including matters of an application or saving nature):
 - (a) arising out of the enactment of this Law; or
 - (b) relating to the transition from the application of provisions of laws of the States and the Territories to the application of provisions of this Law.
- 7.23 Sections 165(2) and 165(3) state:
- (2) The regulations have effect despite anything else in this Law.
 - (3) The regulations may provide that certain provisions of this Law are taken to be modified as set out in the regulations. Those provisions then have effect as if they were so modified.
- 7.24 Sections 165(2) and 165(3) are Henry VIII clauses as they enable regulations to override anything else in, or modify, the National Law.
- 7.25 In its 136th report the Committee commented upon a similar transitional provision:

Clause 329 – Transitional regulations

Clause 329(3) provides:

The local regulations in relation to transitional matters may provide that specified provisions of the Act, the *Legal Profession Uniform Law (WA)* or another written law

–

- (a) do not apply to or in relation to any matter; or
- (b) apply with specified modifications to or in relation to any matter.

²⁵ Legislative Assembly, *Debates*, 20 June 2023, p 40.

²⁶ Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, cl 12 to 15.

Clause 329(3) has a Henry VIII effect as it permits the modification of the operation of primary legislation by local regulation. In report 129, the former Committee found that clause 329(3) erodes the Western Australian Parliament's sovereignty and law-making powers but is justifiable in order to effect a smooth transition to the new regulatory scheme and acceptable by reason of its focused operation. The Committee agrees with findings 22 and 24 in report 129.²⁷

7.26 Findings 22 and 24 were:

FINDING 22

Clause 328(3) of the Legal Profession Uniform Law Application Bill 2020 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 24

Clause 328(3) of the Legal Profession Uniform Law Application Bill 2020 is justifiable in order to effect a smooth transition to the new regulatory scheme and acceptable by reason of its focused operation.

7.27 The Committee is of the view this commentary and findings apply to sections 165(2) and 165(3).

FINDING 3

Sections 165(2) and 165(3) of Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth) are Henry VIII clauses and erode the Western Australian Parliament's sovereignty and law-making powers.

FINDING 4

Sections 165(2) and 165(3) of Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth) are justified.

The Bill

Disallowance mechanism in Part 2 of the Bill

7.28 Part 2 of the Bill contains a similar mechanism for the disallowance of Commonwealth amending Acts and Commonwealth and Western Australian instruments as the Legal Profession Uniform Law Application Bill 2021 (Legal Profession Bill) and the Fair Trading Amendment Bill 2021. The EM contains a useful overview.²⁸

7.29 The Committee considered this mechanism in its 133rd and 136th reports.²⁹ The Committee highlighted the parliamentary sovereignty issues in clause 9 of the Legal Profession Bill (which provided for the disallowance of amending Commonwealth Acts) as follows:

²⁷ Standing Committee on Uniform Legislation and Statutes Review, report 136, *Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application (Levy) Bill 2021*, Western Australia, Legislative Council, 12 October 2021, p 23. The transitional regulations were contained in clause 328 when this bill was first introduced on 18 March 2020, which became clause 329 when re-introduced on 23 June 2021.

²⁸ Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, *Explanatory Memorandum*, pp 8- 13.

²⁹ Standing Committee on Uniform Legislation and Statutes Review, *Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application (Levy) Bill 2021*, pp 7-15.

There are two Parliamentary sovereignty matters in clause 9:

- Once a disallowance motion is moved, there is nothing in the Bill to trigger a debate on the disallowance motion.
- The amending Act does not come within the terms of reference of any Legislative Council standing committee and thus will not be scrutinised.³⁰

7.30 These issues have since been addressed by:

- the Legislative Council amending Standing Order 67(1) by deleting the word 'statutory' to ensure amending Acts come within the definition of 'regulation' by being instruments made subject to disallowance by a written law
- ensuring that the tabling of amending Acts is taken to be 'publication' for the purposes of the Joint Standing Committee on Delegated Legislation's Joint Rule 10.5 so that it comes within its terms of reference and is scrutinised:

Upon its publication, whether under s41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.

7.31 The disallowance mechanism represents an approach to protecting parliamentary sovereignty which the Minister has described as follows:

the government considers that the application mechanism proposed by this bill is a necessary compromise between upholding parliamentary sovereignty, and the efficacy of the national law as applied to all domestic commercial vessels.³¹

7.32 The Committee acknowledges the Government's approach to finding this balance and observes:

- The adoption of the complementary applied scheme approach explained in section 5 erodes parliamentary sovereignty and law-making powers by future amendments coming into effect without the requirement for an amendment Bill.
- The disallowance mechanism:
 - provides a level of parliamentary oversight and scrutiny that reduces this erosion, especially considering amending Acts and instruments will not come into effect until parliamentary scrutiny has occurred³²
 - enables Western Australia to keep pace with future changes to national vessel safety regulation
 - enables the Joint Standing Committee on Delegated Legislation to scrutinise all relevant legislation to provide a level of parliamentary oversight.

FINDING 5

The complementary applied scheme approach to uniform legislation adopted by the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 erodes the Western Australian Parliament's sovereignty and law-making powers.

³⁰ Standing Committee on Uniform Legislation and Statutes Review, *Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application (Levy) Bill 2021*, p 11. See pp 12-15 for a detailed explanation of these issues.

³¹ Legislative Assembly, *Debates*, 20 June 2023, p 42.

³² Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, cl 8(2) and 13(2); Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, *Explanatory Memorandum*, pp 9-10, 12.

FINDING 6

The disallowance mechanism in Part 2 of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 provides a level of parliamentary oversight and scrutiny that reduces its impact on parliamentary sovereignty and law-making powers.

Clause 2 – Commencement

7.33 Clause 2 states:

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

7.34 Clause 2(b) provides that the entirety of the Act apart from Part 1 will come into operation on a day fixed by proclamation.

7.35 The Committee's well-established position is that this is an erosion of parliamentary sovereignty because the Executive controls the commencement date, not Parliament. The Committee has previously stated there should be sound reasons for Parliament to permit commencement by proclamation.³³

7.36 The Minister has advised:

It is anticipated that the provisions of the Bill to amend the *WA Marine Act 1982* and consequentially amend the eight other Acts will become operational in mid-2024, by proclamation.

A staged commencement of the Bill is necessary to ensure that consequential amendments and subsidiary legislation is in place to facilitate commencement of the applied law in WA.³⁴

7.37 Although not a substitute for a specific commencement date to eliminate an erosion of parliamentary sovereignty, the Minister's feedback has provided some assurance about when the Bill will become operational. The Committee also considers there is minimal risk the Bill will not be proclaimed and become operational. This is especially given Western Australia is the last jurisdiction to apply the National Law.

7.38 The Committee draws the lack of an express commencement date to the attention of the Legislative Council for consideration during debate on the Bill.

Clause 6(5)

7.39 Clause 6(5) states:

- (5) Regulations made under section 33 may provide that the Domestic Commercial Vessel National Law applies under this section as if a specified amendment to the Commonwealth domestic commercial vessel national law made by a law of the Commonwealth had not taken effect.

³³ Standing Committee on Uniform Legislation and Statutes Review, [*Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application \(Levy\) Bill 2020*](#), 12 October 2021, p 6.

³⁴ Information from Hon David Michael MLA provided pursuant to MM2022/01.

7.40 The EM provides the following information:

Clause 6(5) provides that regulations made under section 33 may provide that the National Law applies as if amendments made to that law had not taken effect. This allows the Western Australian Parliament to have control over whether to apply amendments that the Commonwealth Parliament may make to the National Law in Western Australia.³⁵

7.41 This regulation-making power does not appear in the Legal Profession Uniform Law Application Bill 2021 or the Fair Trading Amendment Bill 2021.³⁶

7.42 On its terms, it is unclear whether it applies to an amendment to the National Law before or after it comes into effect under clause 8.

7.43 The Committee therefore asked the Minister:

- how any regulations would operate in conjunction with the tabling, disallowance and commencement provisions in clauses 7, 8 and 9
- whether the regulations would apply to amendments to the National Law before or after they came into effect in Western Australia, or both
- in what circumstances would any regulations be made.

7.44 The Minister's response is attached as Appendix 1. Specifically, the Minister advised:

It is possible that regulations could apply to amendments to the National Law both before or after they come into effect in Western Australia.

The policy intent of clause 6(5) is to uphold Parliamentary sovereignty and to provide for local amendments to the National Law as applied in Western Australia in instances where an amending provision may not be in the best interests of the State.

There is no intent to make regulations under clause 33 at the time of commencement of clause 6 of the Bill to disapply any amendments that have been made (or are proposed to be made) by the Commonwealth.

It may be unlikely that Western Australia's Parliament would choose to disallow an amendment to a legislative instrument, given that this would result in slightly different subsidiary legislation applying to small subset of commercial vessels in Western Australia, not all of which are known to or identifiable by the government.

However, the ability to disallow amendments is required to respond to any unforeseen amendments to National Law regulations which may cause a detriment to Western Australia, as it will allow Parliament to restrict the impact of such an amendment on certain Western Australian based vessels, many of which are owned by the government.

Committee comment

7.45 Regulations authorised by clause 6(5) would have a Henry VIII effect in circumstances where a Commonwealth amending Act has been tabled and become part of the law of Western Australia. This is because it will effectively be deleting an amendment to the National Law by regulation.

³⁵ Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, *Explanatory Memorandum*, p 9.

³⁶ A similar power appears in section 212A(3) of the *Health Practitioner Regulation National Law (WA) Act 2010*.

- 7.46 If regulations apply to an amending Act before this occurs they would prevent it from becoming an amending Act for the purposes of the Bill.

FINDING 7

Clause 6(5) of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 would have a Henry VIII effect and thereby erode the Western Australian Parliament's sovereignty and law-making powers in the following circumstance:

- where regulations, rather than an Act of Parliament, delete an amendment to the Commonwealth domestic commercial vessel national law after it has become part of the law of Western Australia.

- 7.47 The Committee considers that, for the reasons the Minister states, clause 6(5) is a useful mechanism to ensure the Parliament can scrutinise any regulations providing for Commonwealth amendments not to apply in Western Australia.

FINDING 8

Clause 6(5) of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 facilitates parliamentary scrutiny of regulations providing that amendments to the Commonwealth domestic commercial vessel national law do not apply in Western Australia.

Clauses 17, 21 and 24

- 7.48 Clauses 17, 21 and 24 apply Commonwealth interpretation, criminal and administrative laws to any matter arising under the National Law as applied in Western Australia by the Bill.³⁷ They state:

17. Interpretation of applied provisions

- (1) The *Acts Interpretation Act 1901* (Commonwealth) applies as a law of the State in relation to the interpretation of the applied provisions and so applies as if the applied provisions were a Commonwealth Act or were legislative instruments under a Commonwealth Act, as the case requires.
- (2) The *Interpretation Act 1984* does not apply to the applied provisions.

21. Application of Commonwealth criminal laws to offences against applied provisions

- (1) In this section —

relevant Commonwealth criminal law means a law of the Commonwealth relating to a purpose referred to in section 20(2).

- (2) The relevant Commonwealth criminal laws apply as laws of the State in relation to an offence against the applied provisions as if the applied provisions were a law of the Commonwealth and not a law of the State.
- (3) For the purposes of a law of the State, an offence against the applied provisions —
 - (a) is taken to be an offence against the laws of the Commonwealth, in the same way as if the applied provisions were a law of the Commonwealth; and

³⁷ Interpretation: *Acts Interpretation Act 1901*; Criminal: As defined in clause 21(1) of the Bill; Administrative: *Administrative Appeals Tribunal Act 1975*; *Freedom of Information Act 1982*; *Ombudsman Act 1976* and the *Privacy Act 1988*.

(b) is taken not to be an offence against the laws of the State.

(4) Subsection (3) has effect for the purposes of a law of the State except as provided by the regulations made under section 33.

24. Application of Commonwealth administrative laws to applied provisions

(1) The Commonwealth administrative laws apply as laws of the State to any matter arising in relation to the applied provisions as if the applied provisions were a law of the Commonwealth and not a law of the State.

(2) For the purposes of a law of the State, a matter arising in relation to the applied provisions —

(a) is taken to be a matter arising in relation to laws of the Commonwealth in the same way as if the applied provisions were a law of the Commonwealth; and

(b) is taken not to be a matter arising in relation to laws of the State.

(3) Subsection (2) has effect for the purposes of a law of the State except as provided by the regulations made under section 33.

(4) A provision of a Commonwealth administrative law applying because of this section that purports to confer jurisdiction on a federal court is taken not to have that effect.

(5) For the purposes of this section, a reference in a provision of the *Administrative Appeals Tribunal Act 1975* (Commonwealth) (as that provision applies as a law of the State) to the whole or any part of Part IVA of that Act is taken to be a reference to the whole or any part of that Part as it has effect as a law of the Commonwealth.

7.49 The Committee referred to the parliamentary sovereignty implications of applying Commonwealth legislation in Western Australia in its 89th report:

The Committee notes the inability of the Parliament of Western Australia to amend the Commonwealth legislation described above that will apply to the regulation of gene technology in Western Australia and, as a consequence, its impact upon the sovereignty and law-making powers of the Parliament.³⁸

While the Committee acknowledges that one approach to achieving uniformity is to ensure the same laws apply across every Australian jurisdiction, its impact on parliamentary sovereignty remains. Applying the laws of another jurisdiction which the Parliament of Western Australia cannot amend or repeal and which may be inconsistent with the equivalent Western Australia legislation is inconsistent with state parliamentary sovereignty.³⁹

7.50 In its 136th report, when commenting on a provision that applied the *Interpretation of Legislation Act 1984* (Vic) to the Legal Profession Uniform Law (WA), the Committee stated:

The effect of clause 5(b) is that the *Interpretation of Legislation Act 1984* (Vic) will apply to the Legal Profession Uniform Law (WA). The Western Australian

³⁸ Standing Committee on Uniform Legislation and Statutes Review, report 89, *Gene Technology (Western Australia) Bill 2014*, Western Australia, Legislative Council, 10 March 2015, p 20. See also Standing Committee on Uniform Legislation and Statutes Review, *Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application (Levy) Bill 2021*, pp 6-7.

³⁹ Standing Committee on Uniform Legislation and Statutes Review, *Gene Technology (Western Australia) Bill 2014*, p 21.

Parliament is not able to amend the *Interpretation of Legislation Act 1984* (Vic). The Victorian Parliament may amend its *Interpretation of Legislation Act 1984* (Vic) in the future and the Western Australian Parliament will be bound by amendments in relation to the Legal Profession Uniform Law (WA). As a result, clause 5(b) is an erosion of the Western Australian Parliament's sovereignty and law-making powers.

However, the Committee considers that consistent interpretation of the legislation in each participating jurisdiction is important. For the sake of consistency, the *Interpretation of Legislation Act 1984* (Vic) will need to apply.⁴⁰

7.51 The EM recognises a need to ensure:

- a consistent reading of the National Law in applying the *Acts Interpretation Act 1901*⁴¹
- domestic commercial vessels and 'gap vessels' are subject to the same criminal and administrative laws.⁴²

7.52 The Committee's position remains that applying laws of another jurisdiction in Western Australia, which the Parliament cannot amend, erodes parliamentary sovereignty. Nevertheless, the Committee recognises the need for a consistent application of all laws as part of national uniform schemes.

FINDING 9

The application of Commonwealth interpretation, criminal and administrative laws in Western Australia by clauses 17, 21 and 24 of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 10

Applying laws of another jurisdiction in Western Australia enables a nationally consistent application of these laws as part of a national uniform scheme.

Clauses 21(4) and 24(3)

7.53 The EM describes these clauses as follows:

Clause 21(4) provides an exclusion to subclause (3). If regulations have been made by the Governor under section 33, offences against those provisions are not against the laws of the Commonwealth.

Clause 24(3) provides an exclusion to subclause (2) - it does not apply to matters arising in relation to regulations made by the Governor under section 33.

7.54 The Committee asked the Minister about what matters might regulations be made and for what purpose. The Minister advised:

At this stage, it is not intended to make any regulations under clauses 21(4) and 24(3) in relation to criminal or administrative laws, particularly as this would create

⁴⁰ Standing Committee on Uniform Legislation and Statutes Review, [*Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application \(Levy\) Bill 2021*](#), 12 October 2021, pp 6-7.

⁴¹ Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, [*Explanatory Memorandum*](#), p 13.

⁴² Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, [*Explanatory Memorandum*](#), pp 14 -16.

inconsistency in the law as applied to a small subset of commercial vessels in Western Australia, not all of which are known to the government. These provisions are included in the Bill to allow any unforeseen consequences of applying existing and future Commonwealth administrative and criminal laws as laws of the State to be dealt with, and to maximise parliamentary sovereignty.

- 7.55 Regulations made under clause 33 pursuant to clauses 21(4) and 24(3) may have a Henry VIII effect. This is because they could modify the application of clauses 21 and 24 by providing for any or all of the Commonwealth laws not to apply as laws of Western Australia.

FINDING 11

Clauses 21(4) and 24(3) of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 may have a Henry VIII effect and thereby erode the Western Australian Parliament's sovereignty and law-making powers.

Committee comment

- 7.56 The Committee agrees it is not possible to predict the circumstances in which it may be inappropriate for these Commonwealth laws to apply in Western Australia. Despite their Henry VIII clause effect, clauses 21(4) and 24(3) provide flexibility to cater for these circumstances should they arise.

Clause 39, proposed subsection 3(2)

- 7.57 Clause 39 of the Bill proposes a new subsection 3(2) in the Marine Act. It states:

(2) The regulations may specify that a prescribed class of thing is or is not a class of vessel for the purposes of the definition of **vessel** in subsection (1).

- 7.58 A proposed definition of **vessel** states:

vessel, subject to subsection (2) —

- (a) means, a craft for use, or that is capable of being used, in navigation by water, however propelled or moved; and
- (b) includes an air-cushion vehicle, a barge, a personal watercraft, a submersible and a wing-in-ground effect craft;

- 7.59 The EM correctly identifies this definition, read with subsection 3(2), as a Henry VIII clause and provides some justification:

The proposed definition of 'vessel' in section 3 of the WA Marine Act could be characterised as a 'Henry VIII clause' as it allows regulations to specify that a prescribed class of thing is or is not a class of vessel for the purposes of the definition of vessel.

This is also the case in the Commonwealth National Law definition of 'vessel' in section 8, which provides at (3) that regulations may provide that a specified thing, or a thing included in a specified class, is or is not a vessel. Due to this ability to regulate craft in or out of its vessel definition and therefore the scope of the Commonwealth National Law, it is necessary for Western Australia to also have this ability to ensure no craft are left in a regulatory gap.⁴³

- 7.60 The power in new subsection 3(2) enables the Executive, by regulation, to modify the definition of *vessel* by including, or excluding, 'a class of thing' from the scope of the

⁴³ Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, [*Explanatory Memorandum*](#), p 5.

definition. The Executive can expand or limit the operation of the proposed Act by categorising any *thing* it considers should, or should not, be a vessel.

- 7.61 The Committee is of the view this Henry VIII clause is justified because, with evolving technology, it is not possible to articulate everything that might be classified as a vessel in the future and required to be regulated by the Marine Act. There is a need for flexibility and quick regulatory action to enable regulations to be made to govern vessel safety.⁴⁴
- 7.62 Further, any regulations will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation. This is because they are legislative instruments for the purposes of the disallowance mechanism in Part 2 of the Bill.⁴⁵

FINDING 12

Clause 39, proposed subsection 3(2) of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 is a Henry VIII clause and erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 13

Clause 39, proposed subsection 3(2) of the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 is justified.



Hon Donna Faragher MLC

Chair

⁴⁴ Legislative Assembly, *Debates*, 20 June 2023, p 40.

⁴⁵ Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023, cl 12 to 15.

APPENDIX 1

MINISTER'S RESPONSE TO COMMITTEE QUESTIONS ON THE BILL



Minister for Ports; Local Government; Road Safety;
Minister Assisting the Minister for Transport

Our ref: 83-00636
Your ref: A1031161

Hon Donna Faragher MLC
Chair
Uniform Legislation and Statutes Review Committee
Email: unileg@parliament.wa.gov.au

Dear Chair

MARINE SAFETY (DOMESTIC COMMERCIAL VESSEL NATIONAL LAW APPLICATION) BILL 2023

Thank you for your correspondence dated 30 June 2023 requesting information on the above Bill. I am pleased to provide you with the following responses to your questions about the topics raised.

A. Clause 6(5), regulations providing Commonwealth national law amendments had not taken effect

You have asked:

- 1.1 How any regulations would operate in conjunction with tabling, disallowance and commencement provisions in sections 7, 8 and 9.

It is intended that State Regulations made under clause 33 will be made by the Governor in Executive Council. At publication they must be tabled before each House of Parliament and will be considered by Parliament's Joint Standing Committee on Delegated Legislation. They are disallowable by either House of Parliament, as provided for under the *Interpretation Act 1984* section 42.

The tabling, disallowance and commencement provisions in clauses 7, 8 and 9 are proposed in the Bill to apply to amending Acts, which is a term defined in section 4(1) to mean "a Commonwealth Act to the extent that it amends the Marine Safety (Domestic Commercial Vessel) National Law of the Commonwealth and that receives the Royal Assent on or after 15 May 2023".

Clause 4(2) provides that in the Bill a reference to a "legislative instrument" (including a regulation) under the "Scheduled Law" as defined in section 4(1) is a reference to a

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legislative instrument to the extent made or amended under the Scheduled Law or by a provision of a Commonwealth Act for the purposes of the Scheduled Law.

Commonwealth laws are not a law of Western Australia subject to the tabling and disallowance provisions set out in section 42 of the *Interpretation Act 1984*. The provisions set out in clauses 7, 8 and 9 are proposed to ensure that future amendments made to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (National Law), including legislative instruments made under the Scheduled Law, will be subject to Western Australian parliamentary scrutiny.

You have asked:

- 1.2 Whether the regulations would apply to amendments to the National Law before or after they came into effect in Western Australia, or both.

It is possible that regulations could apply to amendments to the National Law both before or after they come into effect in Western Australia.

Clause 8(2) provides an amending Act has effect if it does not receive a notice of a disallowance resolution in either House within the disallowance notice period or if at least one notice of a disallowance resolution is given within the notice period but the notice is withdrawn or discharged within the disallowance period or the resolution is lost or not agreed to within the disallowance period (as provided under clause 8(2)).

Clause 9 sets out the commencement provision of amending Acts and provides that if an amending Act has effect under clause 8(2), the Governor must declare that fact by proclamation as soon as practicable.

Therefore, if no regulations are made under clause 33 to come into effect immediately after proclamation of an amending Act then the amendments will come into effect in Western Australia subject to the tabling and disallowance provisions set out in clauses 6 to 9, until such time as regulations made under clause 33 come into effect in WA.

The policy intent of clause 6(5) is to uphold Parliamentary sovereignty and to provide for local amendments to the National Law as applied in Western Australia in instances where an amending provision may not be in the best interests of the State.

Future amendments to legislative instruments will be made in accordance with the Commonwealth Regulator Performance Guide, as well as the Minister's Statement of Expectations and the Australian Maritime Safety Authority (AMSA) Statement of Intent, which is a Statement of expectations for AMSA for the period to 30 June 2024.

Section 159(6) of the National Law itself provides that the relevant Coalition of Australian Governments (COAG) council must be consulted prior to making regulations under section 7(4) and (5) of the Act, which relate to prescribing vessels as domestic commercial vessels or activities to which the National Law applies.

The relevant COAG council must give unanimous agreement to the making of the proposed regulations. If a proposed amendment to regulations under section 7(4) or

(5) were to include something that Western Australia does not wish to adopt, then it would have both input to and advance knowledge of this and could proactively draft regulations pursuant to clause 33 to ensure that amendments to legislative instruments that Western Australia does not wish to apply to vessels in the gap are disapplied as soon as they commence, simultaneously.

If a regulatory proposal was identified to have significant policy issues for Western Australia, Ministerial approval could be sought to draft State regulations to provide that a specific amendment to the National Law made by the Commonwealth had not taken effect (in relation to 'gap' vessels), to be proclaimed immediately following the commencement of an amending Act in Western Australia (on a date set by proclamation as provided under clause 9), subject to the tabling and disallowance procedures as set out in clauses 7 and 8.

You have asked:

1.3 In what circumstances would any regulations be made (for instance, where a provision of an amendment to the National Law was not in the State's interests).

The Committee has cited the explanatory memorandum (EM) for clause 6(5) and stated that it is unclear whether any regulations made under clause 6(5) would apply to amendments to the National Law before or after they came into effect under clauses 8 and 9.

Clause 33 of the Bill would allow the Governor to make regulations for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act or the applied provisions. These regulations must not be inconsistent with this Act or the applied provisions.

Clause 6(5) specifies that regulations made under section 33 may provide that the National Law applies under this section as if a specified amendment to the Commonwealth domestic commercial vessel national law made by a law of the Commonwealth had not taken effect. 'Commonwealth domestic commercial vessel national law' is defined in clause 4 to include legislative instruments, which consist of Marine Orders and Regulations under the Commonwealth's National Law.

This means that regulations could be made under clause 33 to provide that an amendment made by the Commonwealth to the National Law's legislative instruments had not taken effect in relation to the Applied Law in Western Australia. This would have effect from the time these regulations were published on the WA legislation website. There may be a short period of time in which the amendments would have effect in Western Australia, as the Commonwealth legislative instruments apply in Western Australia automatically.

There is no intent to make regulations under clause 33 at the time of commencement of clause 6 of the Bill to disapply any amendments that have been made (or are proposed to be made) by the Commonwealth.

Any future amendments to legislative instruments will be made in accordance with the Commonwealth Regulator Performance Guide, as well as the Minister's Statement of Expectations and AMSA's Statement of Intent.

Section 159(6) of the National Law itself provides that the relevant COAG council¹ must be consulted prior to making regulations under section 7(4) and (5) of the Act, which relate to prescribing vessels as domestic commercial vessels or activities to which the National Law applies.

The relevant COAG council must give unanimous agreement to the making of the proposed regulations. If a proposed amendment to regulations under section 7(4) or (5) were to include something that Western Australia does not wish to adopt, but was nevertheless agreed to by the Western Australian COAG delegate then it would have advance knowledge of this, and proactively draft regulations pursuant to clause 33 to ensure that amendments to legislative instruments that Western Australia does not wish to apply to vessels in the gap are disapplied as soon as they commence, simultaneously.

While it is not guaranteed Western Australia would have advance knowledge of amendments to other legislative instruments under the National Law, AMSA and the Department of Transport consult regularly and it is very likely that any changes would be known in advance.

The Commonwealth's amendments to legislative instruments under the National Law already automatically apply to approximately 90% of domestic commercial vessels in Western Australian waters by virtue of the Commonwealth's Act's constitutional legislative reach, and this would continue irrespective of any Western Australian regulations to exclude the effect of those amendments on 'gap' vessels. For this reason, it may be unlikely that Western Australia's Parliament would choose to disallow an amendment to a legislative instrument, given that this would result in slightly different subsidiary legislation applying to small subset of commercial vessels in Western Australia, not all of which are known to or identifiable by the government.

However, the ability to disallow amendments is required to respond to any unforeseen amendments to National Law regulations which may cause a detriment to Western Australia, as it will allow Parliament to restrict the impact of such an amendment on certain Western Australian based vessels, many of which are owned by the government.

B. Clauses 21(4) and 24(3), application of Commonwealth criminal and administrative laws to applied provisions

You have asked about what matters regulations might be made for and for what purpose they may be made.

Such a provision allowing for regulations to affect this situation are included in the Australian Parliamentary Counsel's Committee model Bill, which was adopted by all other States and Territories. For example, sections 9(3) and 12(3) of the Victorian

¹ With the establishment of the National Cabinet, the relevant council is the Infrastructure and Transport Ministers Meeting.

Marine (Domestic Commercial Vessel National Law Application) Act 2013 include similar provisions, although no regulations have been made pursuant to these powers.

The Bill has the effect that Commonwealth criminal laws (substantive and procedural) will apply as State law to the applied provisions, even if the matter is prosecuted in a State court, and whether or not the State court is exercising federal jurisdiction. Clause 21(4) has the effect that regulations made under section 33 can provide exceptions to this situation.

Similarly, clause 24(3) has effect that while certain Commonwealth administrative laws apply as laws of the State to the applied provisions, regulations made under section 33 can provide exceptions to this.

At this stage, it is not intended to make any regulations under clauses 21(4) and 24(3) in relation to criminal or administrative laws, particularly as this would create inconsistency in the law as applied to a small subset of commercial vessels in Western Australia, not all of which are known to the government. These provisions are included in the Bill to allow any unforeseen consequences of applying existing and future Commonwealth administrative and criminal laws as laws of the State to be dealt with, and to maximise parliamentary sovereignty.

C. Clause 39, section 3(1) proposed new definition - 'prescribed vessel'

You have asked why the types of craft referred to in the EM cannot be included in the Bill.

Regulation 12 of the Commonwealth *Marine Safety (Domestic Commercial Vessel) National Law Regulations 2013* specifies craft that are not vessels for purposes of the National Law. If regulation 12 is amended to specify that a particular new type of craft is not a vessel, that craft will be outside the scope of the National Law.

Unless that craft falls within the definition of 'pleasure vessel' in section 3 of the *Western Australian Marine Act 1982*, it would fall into a regulatory gap between the two regimes and will be effectively unregulated. Examples of such craft are those for hire by the public or owned by the State Government and used only for training primary or secondary school students. It is critical for safety reasons that such craft are subject to regulation, for example appropriate safety equipment requirements and speed limits.

The section 3 definition of 'prescribed vessel' will enable these craft to be prescribed and be regulated by the *Western Australian Marine Act 1982*. It is not possible to list these craft comprehensively in the Bill, as the list is subject to change as regulation 12 of the Commonwealth *Marine Safety (Domestic Commercial Vessel) National Law Regulations 2013* is added to. New types of craft are emerging more and more frequently.

There needs to be consistency between the operation of the *Western Australian Marine Act 1982* and the National Law, or there may be some high-risk craft in Western Australia's waters which are not regulated at all. It is important for the State to have a statutory framework to regulate such emerging craft, or craft that are excluded by National Law regulations, where desirable.

An ability to prescribe a vessel or class of vessel via regulations will not be used carelessly or without consideration. The Department regularly consults its stakeholders and peak bodies such as the Boating Industry Association of WA, Boating Western Australia, Yachting WA and the WA Police to ensure its compliance and enforcement tools are adequate, targeted and do not overreach.

In addition, the Minister responsible for the *Western Australian Marine Act 1982* would need to provide approval to prescribe any vessel and the resulting regulations will be tabled in Parliament and subject to normal disallowance provisions.

D. Clause 40, proposed new section 3A(2)(f)

You have asked for justification for this regulation-making power, given proposed sections 3A(2)(a) to (e) already list how the registration or ownership of vessels connect them to the State for the purposes of the Act.

Section 3A has been adapted from former section 6(6) of the *Western Australian Marine Act 1982* and section 6 of NSW's *Marine Safety Act 1998*. At this stage it is not intended to make regulations to declare vessels connected with the State, but it is proposed to retain paragraph (2)(f) to allow for unforeseen circumstances in the future.

For example, it may be considered desirable in future to extend the categories of connection with the State similarly to section 9(3)(b) of the Victorian *Marine Safety Act 2010* which provides that a vessel is connected with the State if, among other things, it is owned by a body corporate that is established under State law or is in the possession of such a body corporate by virtue of a charter.

We note that the power would be limited by:

- i) the scope of Western Australian Parliament's legislative powers - there needs to be some connection to the State before this regulation-making power could be exercised; and
- ii) the scope of the *Western Australian Marine Act 1982*.

E. Clause 72, proposed new sections 110(1)(c) and 110(2)(f)

You have asked why, given the two types of authority are already listed, this regulation-making power is required, and why additional persons or classes of persons cannot be included in the Bill.

The Bill's information sharing provisions were modelled on the *Road Traffic (Administration) Act 2008* and sections 110(1)(c) and (2)(f) were modelled on section 13A of the *Road Traffic (Administration) Act 2008*. In addition to the two types of authorities already listed, there may be other persons that may require the information set out in section 110(2) for the purpose of performing their functions.

It is intended that as such functions are identified and arise, these persons would be prescribed in regulations for transparency. Such persons may include but are not limited to Australian Federal Police, Australian Border Force, Australian Defence

Force, Local Governments, Port Authorities and Registered Training Organisations in relation to their functions of compliance, law enforcement and marine safety.

F. Clause 72, proposed new section 111(1)

You have asked whether it is possible to include the information which may be prescribed under proposed subsection 111(1) in the Bill.

Section 111(1) details the types of authorised purposes for which information may be required and subsection (2) details the types of information that may be required. At this stage, we foresee that Registered Training Organisations contracted for the purpose of assessing recreational skippers tickets may require information. We cannot foresee all the types of information which may be required in the future as the Chief Executive Officer may contract with new kinds of organisations or persons to undertake functions on their behalf.

As it is not possible to foresee all required authorised purposes and types of information, it is necessary to include a regulation-making power to provide flexibility. Further, as an example, it is possible that relevant stakeholders (including those in other jurisdictions) might change business names. This regulation-making power provides sufficient flexibility to prescribe relevant persons for the disclosure of information as and when required.

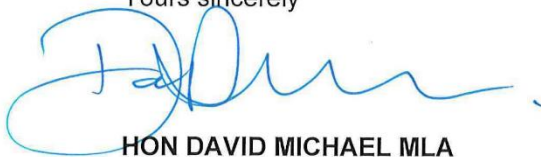
The impact on Parliamentary sovereignty must be balanced against the need to provide flexibility. This flexibility is particularly important when relevant stakeholders are located across jurisdictions.

Any additional authorised purposes or types of information prescribed will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by Parliament.

Section 111(1) aligns with section 14 of the *Road Traffic (Administration) Act 2008* to provide for regulations prescribing authorised purposes. Examples of such regulations include *Road Traffic (Administration) Regulations 2014* regulations 7 and 8A.

Thank you for the opportunity to provide further information on the Bill.

Yours sincerely



HON DAVID MICHAEL MLA
MINISTER ASSISTING THE MINISTER FOR TRANSPORT

12 JUL 2023

GLOSSARY

| Term | Definition |
|------------------------|---|
| AMSA | Australian Maritime Safety Authority |
| Bill | Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 |
| Committee | Standing Committee on Uniform Legislation and Statutes Review |
| IGA | Intergovernmental Agreement on Commercial Vessel Safety Reform |
| Minister | Hon David Michael MLA, Minister assisting the Minister for Transport |
| MM2022/01 | Ministerial Office Memorandum 2022/01 |
| National Law | Schedule 1 of the <i>Marine Safety (Domestic Commercial Vessel) National Law Act 2012</i> (Cth) |
| National System | National system for commercial vessel safety |

Standing Committee on Uniform Legislation and Statutes Review

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'6. Uniform Legislation and Statutes Review Committee

- 6.1 *A Uniform Legislation and Statutes Review Committee is established.*
- 6.2 The Committee consists of 4 Members.
- 6.3 The functions of the Committee are –
 - (a) to consider and report on Bills referred under Standing Order 126;
 - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
 - (c) to review the form and content of the statute book; and
 - (d) to consider and report on any matter referred by the Council.
- 6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.'



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