NATIONAL PARLIAMENT OF SOLOMON ISLANDS

Bills and Legislation Committee

Report on the

Maritime Safety Administration Bill 2009

NP-Paper No. 14/2009

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National Parliament Office

Contents

1 Introduction

This is the report of the Bills and Legislation Committee on its review of the Maritime Safety Administration Bill 2009 introduced in the House by the Ministry of Infrastructure Development. The Bill was submitted to the Speaker through the Clerk to Parliament as required under the *Standing Orders*[1]. The Speaker has examined the Bill[2] and cleared it to be introduced in the current Parliament.

According to government business for the current (9th) meeting of Parliament, the Bill has been set down for first reading on 24 March 2009. It is also proposed that the Bill goes through the remaining stages – second reading, committee and third reading – on the same day. By 24 March 2009, however, the Bill had yet to be considered by the Bills and Legislation Committee ("the Committee"). On that date, the Committee considered the Bill and following its review, the Committee makes this report to Parliament, with recommendations, for the information of Members and for Parliament's consideration.

Terms of Reference

Pursuant to its mandate under the *Standing Orders* the terms of reference of the Committee in this instance is to examine the **Maritime Safety Administration Bill 2009** and to report its observations and recommendations on the Bill to Parliament.

Functions of the Committee

The Bills and Legislation Committee is established under *Standing Order* 71, an Order made pursuant to the *Constitution*[3], and has, under that Order has the functions, together with the necessary powers to discharge such, to:

(a) examine such matters as may be referred to it by Parliament or the Government;
(b) review all draft legislation prepared for introduction into Parliament;

[1] *Standing Order* 44 (1).
[2] As required by *Standing Order* 45 (1).
[3] Section 62, *Constitution of Solomon Islands* 1978.

(c) examine all subsidiary legislation made under any Act so as to ensure compliance with the Acts under which they are made;

(d) monitor all motions adopted by Parliament which require legislative action;

(e) review current or proposed legislative measures to the extent it deems necessary;

(f) examine such other matters in relation to legislation that, in the opinion of the Committee require examination; and

(g) make a written report to each Meeting of Parliament containing the observations and recommendations arising from the Committee's deliberations.

Membership

The current members of the Bills and Legislation Committee (9th Parliament) are:

Hon. Severino Nuaiasi, MP (Chair)
Hon. Manasseh Sogavare, MP
Hon. Siriako Usa, MP
Hon. Isaac Inoke Tosika, MP
Hon. Augustine Taneko, MP
Hon. Nelson Ne'e, MP
Hon. Japhet Waipora, MP

2 Policy Background

Purpose of the Bill

The policy objectives for the current government introducing the Marine Safety Administration Bill 2009 may be summarised as follows:

(a) to implement regulatory and operational reforms to the maritime sector;
(b) to establish the Solomon Islands Maritime Safety Administration;
(c) to regulate shipping franchise schemes; and
(d) to facilitate implementation of maritime conventions and agreements[4].

These objectives were explained further before the Committee in the following terms:

> The Bill implements a range of regulatory and operational reforms to the maritime sector in Solomon Islands. It reforms the existing Marine Division of the Ministry of Infrastructure and Development by providing for the recognition and empowerment of the Solomon Islands Safety Administration (SIMSA). It implements other reforms to facilitate the provision of safer and economically viable shipping services in Solomon Islands and the effective management of maritime infrastructure. It empowers MID to administer franchise shipping schemes to ensure that shipping services are provided to less economically viable routes to remote areas of Solomon Islands. It provides a basis for the better management of maritime infrastructure, such as wharves, piers, jetties and slipways. It vests responsibilities and powers in the new SIMSA to ensure that Solomon Islands achieves compliance with the many international and regional maritime conventions and agreements. These relate to a range of matters such as a marine pollution prevention and response[5].

Background

Since the colonial era the maritime sector of Solomon Islands has been problematic in terms of administration and operation. This is partly because of the laws governing this area. Prior to independence, six United Kingdom statutes governed maritime – the *Carriage of Goods Act* 1926, the *Light Dues and Harbours Act* 1923, the *Merchant Shipping (Fees) Act* 1913, the *Seamen Discipline (Admiralty Transport) Act* 1918, the

[4] 'Objects and Reasons', page 29, Maritime Safety and Administration Bill 2009.
[5] See the Explanatory Memorandum attached to the Bill.

Ports Act 1956 and the *Shipping Act* 1957. Thus, decades before Solomon Islands became independent its entire maritime sector depended on these laws and regulations made under them. Despite two revisions of law prior to independence, the first in 1961 and the second in 1969 none of these statutes were updated or consolidated. Instead, all six were preserved and remained in force[6]. No further action was taken on these laws until Solomon Islands attained independence.

As a transitional measure, the *Constitution* ensured that until Solomon Islands was in the position to enact its own laws, UK statutes of general application existing as at 1961 were to remain part of Solomon Islands laws[7]. These of course included the six statutes relating to the maritime sector. Hence, at independence, the country was left to regulate and administer its own maritime affairs with statutes drafted in England as early as 1913. Following independence successive governments did attempt to drive the enactment more appropriate legislation to, by now, replace the archaic maritime laws from the colonial era. These continued in force until 1996 when the first post-independence revision of law was carried out. However, besides making minor changes, that revision simply incorporated the six statutes as local Acts[8]. Thus, since independence the maritime sector of Solomon Islands continued to be plagued by the same problems that existed since the colonial days. Governments strived to improve the systems in place through constant restructuring of those responsible for maritime affairs but with such a severely limited and outdated legal framework, there was not much room for improvement.

In the specific area of shipping, the most essential aspect of maritime affairs, the provisions of Cap. 163, drafted in 1956, did not match development aspirations of local administrators and operators. Restructuring the Ministry responsible for the maritime sector only served to address bureaucratic issues but had little impact on actual delivery of services demanded. Further, because of the lack of up-to-date regulations, shipping operators had no appropriate guidance from the law to assist them in improving or enhancing the service they provided. On their part,

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[6] As Chapters 103 (*Carriage by Sea*), 104 (*Light Dues and Harbours*), 105 (*Merchant Shipping (Fees)*), 106 (*Seamen Discipline (Admiralty Transport)*), 107 (*Ports*) and 108 (*Shipping*), Laws of British Solomon Islands Protectorate, 1961; and as Chapters 103 (*Carriage by Sea*), 100 (*Light Dues and Harbours*), 101 (*Merchant Shipping (Fees)*), 102 (*Seamen Discipline (Admiralty Transport)*), 99 (*Ports*) and 98 (*Shipping*), Laws of British Solomon Islands Protectorate, 1969.

[7] Schedule 3 (1), *Constitution of Solomon Islands* 1978.

[8] As Chapters 158 (*Carriage by Sea*), 159 (*Light Dues and Harbours*), 160 (*Merchant Shipping (Fees)*), 162 (*Seamen Discipline (Admiralty Transport)*), 161 (*Ports*) and 163 (*Shipping*), Revised Laws of Solomon Islands, 1996 (green volumes).

administrators and those responsible for operations had to turn to codes and rules of other countries to guide how they applied the archaic laws available to them. As a result, both shipping services and maritime administration have deteriorated over recent decades to the point where certain remote areas of Solomon Islands ceased to have any shipping service at all. Shipping services and its regulation however continued but at standards well below regional or international standards.

In recent years, the situation began to improve. Donors started showing interest in revamping shipping services and related areas such as maritime infrastructure. Locals also demonstrated a keen interest to set up and operate shipping companies despite rapidly increasing costs. On its part, Parliament passed in 1998 the first local Act the *Shipping Act* 1998. This Act was meant to address key areas of shipping service and administration[9]. This was also the first attempt to consolidate existing rules relating to shipping. It however did not deal with the original six statutes of English origins which remain part of the laws of the country. Further, that Act did not address certain key areas of reform to modernise shipping service and administration.

During this time also, at the initiative of donors who saw poor shipping services as an obstacle to their development plans for the country, the Solomon Islands government began looking into more innovative means of dealing with the shipping problem. One such initiative, led by the Asian Development Bank, is a plan to establish a National Transport Fund into which donors could pool their resources and work with the government to develop transport services and infrastructure. Shipping services and maritime infrastructure have been identified as high priority areas. The plan is to overhaul the entire maritime sector through legal reform and administrative restructuring. The first phase of the plan would involve establishing the transport fund and passing new legislation to tidy up the laws relating to shipping. The fund has just been passed by Parliament[10] and the Maritime Safety and Administration Bill 2009 is the proposed 'tidy up' mechanism to improve maritime safety and its administration.

[9] Including registration of vessels, safety at sea, qualifications of seamen and captains, terms and conditions of seamen, marine navigation aids, handling wrecks and salvages and legal matters arising in the shipping industry.

[10] Through the *National Transport Fund Act* 2009, passed on 19 March 2009.

3 Review of the Bill

In its review of the Maritime Safety Administration Bill 2009, the Committee considered secondary materials and also heard from certain key witnesses.

Secondary Material

As the Bill is an integral part of a broader combined initiative of the government and donors, the Committee considered evidence it had previously gathered in relation to the National Transport Fund Bill 2009[11] and the Committee's report on review of that bill[12]. The Committee also received briefings from the Secretariat on the history of maritime laws based on the *British Solomon Islands Protectorate Laws* 1961 and the *British Solomon Islands Protectorate Laws* 1969.

Public Hearing

On Tuesday 24 March 2009 the Committee held a public hearing with view to hear from relevant officials of the Ministry concerned and key stakeholders. A number of witnesses were invited prior to the hearing but only the following appeared before the Committee at the hearing:

- Permanent Secretary, Ministry of Infrastructure Development; and
- Director of Marine, Marine Division

The Committee had hoped to hear from the drafters of the Bill or a representative of the Attorney-General's Chamber but that was not possible for a number of reasons, which the Committee accepted. The Committee also wished to hear from consultants who are driving reforms in the maritime sector, particularly those from the Asian Development Bank (ADB) but they were overseas and could not attend the hearing.

A list of witnesses who appeared at the hearing may be found in **Appendix 3**.

[11] Transcripts of a public hearing the Committee conducted on Friday 13 March 2009 in which officials of the Ministry of Infrastructure Development, consultants and technical assistants of the ADB and a representative of the Attorney-General's Chamber appeared and gave oral evidence.
[12] 'Bills and Legislation Committee: Report on the National Transport Fund Bill 2009', National Parliament Paper No. 4 of 2008, tabled in the House on Thursday 19 March 2009.

4 Issues Arising

From its preliminary research and evidence gathered at the public hearing the Committee identified a number of issues arising from its review of the Maritime Safety Administration Bill 2009. These are considered in this Chapter, together with responses from witnesses and, where necessary, recommendations of the Committee on a specific issue.

Consultation

At the outset the Committee wishes to express its concern regarding this Bill in terms of consultation. It emerged during the public hearing that this Bill was formulated within the Ministry and forwarded to the Attorney-General's Chamber for drafting before it went to the Cabinet. Officers of the Ministry confirmed to the Committee that there was no consultation with key stakeholders, especially shipping operators; and that the Bill bypassed Caucus.

The Committee is very disappointed with the lack of consultation. The Committee recalls in respect of most bills introduced in recent years, proper consultation was undertaken prior to the drafting of a bill. There was also further consultation with those likely to be affected by that bill after it had been drafted. In most cases, it was only after there was wide acceptance in the relevant sector that the bill was forwarded to Cabinet for its approval. The Committee refers to the Secured Transaction Bill 2008, the Companies Bill 2009 and the Companies (Insolvency and Receivership) Bill 2009 as examples of the recent (and commendable) trend for wide consultation.

At the hearing, witnesses defended the lack of consultation on the basis that in the Ministry's view, this Bill an indirect *amendment* to the *Shipping Act* 1998 (to fill 'gaps' that Act does not address), and therefore did not require extensive consultation with shipping operators. The Committee was thus informed that the Ministry will organise workshops *after passage of the Bill* to assist shipping operators understand changes introduced in the Bill.

The Committee is surprised that the Ministry still has this kind of attitude towards important bills with potentially nationwide effects in light of the recent shift towards

prior consultation. The Committee recalls that in recent bills that involved the ADB, such as the Companies Bill 2009, extensive prior consultation with stakeholders was conducted. Consultation is a mechanism through which persons and businesses likely to be affected by a bill voice their concerns, which could result in major improvements to the bill. This mechanism however only works if it is used before drafting and passage of the bill. It is thus pointless to hold consultations following a bill becoming an Act of Parliament. The Committee is also concerned that this Bill may have been introduced only as a 'short-cut' to the longer process of overhauling the *Shipping Act* 1998. The Committee therefore calls for proper consultation with operators and other stakeholders in the maritime sector before the Bill is brought to Parliament. To that end the Committee calls on the government to provide adequate time for the Committee to hear from stakeholders before the government proceeds further with it.

Improvements Envisaged

At the outset, the Committee wished to know what improvements to the maritime sector the Bill envisages. This is of particular interest to the Committee given that as described earlier, the sector has always been problematic in terms of its laws and administration. The Committee thus sought further elaboration on the current state of maritime safety and administration and how, in general terms, the Bill would improve both.

Separation of functions

In response to these queries, officials of the Ministry informed the Committee that currently, maritime safety and administration in Solomon Islands is not functioning effectively. This is primarily because both regulatory and operational functions are vested in the Marine Division. Exercising both functions simultaneously has proven to be problematic as one function can compromise or undermine the other. It is therefore prudent to keep these two functions separate. This is part of the rationale behind the Bill. Through it, it is expected that the two functions will be separated. Regulatory functions will be transferred to a new body to be called the Solomon Islands Maritime Safety Administration ("SIMSA") whilst operational functions will be transferred from what used to be the Marine Division to the Ministry of Infrastructure

Development. The Bill thus sets the framework for a major restructuring within the Ministry in respect of maritime and marine affairs.

In terms of maritime safety, the witnesses were not as certain of the expected outcomes of the Bill. The Committee is of the view that safety remains an area in urgent need of improvement given that existing rules or regulations on safety are out-of-date or non-existent in some instances. On that basis the Committee strongly supports any substantive action to increase passenger safety which has been ignored for too long. The witnesses commented that because the Bill aims to set off reform at the higher level, simply having it in place or establishing the Administration will not necessarily guarantee improvements in terms of maritime safety. The officers were however optimistic that setting up an improved body with clearer regulatory functions would pave the way for future improvements, which they hope to realise through educating shipping operators by way of workshops and the likes.

In view of the history of the maritime sector, the Committee does not doubt that at present maritime administration and safety in Solomon Islands, under the Marine Division, is in a state of disarray and certainly requires reform. The Committee is however yet to receive concrete evidence that the Bill proposes the kind of reform needed.

Restructuring

The Committee also questioned the witnesses on the proposed restructuring of maritime safety and administration. While the Bill seeks to replace the Marine Division with SIMSA, the Committee was unclear on how this will occur administratively, particularly in terms of abolition and replacement of offices. The Permanent Secretary and Director of Marines however could not offer any clarity on this issue. These officers only outlined that part of the plan to restructure is that SIMSA will replace the Marine Division. Beyond that, the officers could not provide further information since the restructuring exercise is set to take place after SIMSA is formally established through passage of the Bill and set up administratively.

The Committee notes the explanation offered but is of the view that seeking to establish SIMSA before settling on a new and reformed structure may be jumping the

gun. SIMSA should be ready – resource-wise and in terms of staffing – to take over such extensive regulatory functions by the time its establishing Bill commences. The approach taken however suggests that even if the Bill is passed in the current meeting, SIMSA will not start operating until a potentially prolonged period of reform action is completed.

Assistance to Local Shipping Operators

Asked whether the improvements envisaged in the Bill include assistance to local shipping operators in terms of meeting statutory requirements and maritime infrastructure, the officers advised that no immediate change is envisaged in that regard. Thus, the same procedures and requirements of local operators, such as inspection and certification, will continue and where current standards are not met, the local operator concerned is still required to rectify the defect or error at his or her own cost. The officers however noted that if funds are available in the future the Ministry might consider utilising such to assist operators with their needs.

Financial Implications

As with any other government bill, the Committee was also interested in what financial implications implementation of the Bill would have on public funds and donor monies. At the hearing, the Committee queried the witnesses on the Ministry's assessment of likely costs.

The officers informed the Committee that since operational functions will be transferred to the Ministry, it will partly bear the costs of operations. The Committee was further informed that a management office is already set up within the Ministry to deal with the initial implementation of the Bill – i.e., transfer of functions. As such, the Ministry is expected to utilise its human resources and budget to that end. The officers however could not give any estimate of the likely additional costs to the government and the taxpayer.

In terms of regulatory functions, the officers advised that since these will be carried out by a body yet to be established (SIMSA), no cost analysis can be carried out at this stage. The Committee was informed that reform of the Marine Division is in

progress and that the ADB is assisting in this regard. The officers also confirmed that the ADB is the only donor involved in the reform but it is expected that once the National Transport Fund is in operation, more donors would join. While they could not estimate likely costs for implementing the Bill, the witnesses explained that the said fund will most likely bear a considerable portion of such costs. In that regard the officers informed the Committee that two donor-funded projects are ready to be implemented through the Fund as soon as it is fully set up: a franchise shipping service project funded by the ADB and an EU funded project to build wharves in certain parts of the country. These projects are expected to be in operation later this year or at the latest by mid 2010.

The Committee is concerned that adequate financial modelling appears not to have occurred and is surprised that it was not part of the supporting ADB project and assistance. Public funds for service delivery are extremely stretched and will become more so in the next year or two. In this environment the Committee believes that it is incumbent on the government to outline the financial implications of all policy proposals and proposed bills that come before this Committee.

Ship Construction

The Committee also questioned the witnesses on ship construction standards. Clause 7 of the Bill outlines the functions of SIMSA and one such is to set and enforce standards of constructing ships or vessels. The Committee noted that there are communities in Solomon Islands who build their own ships and thus sought further explanation on how SIMSA will deal with such communities and effectively monitor them to ensure that ships built meet prescribed standards.

The officers acknowledged that communities in some parts of the country have been building ships for many decades. The Committee was advised that to date the Marine Division still has no ship construction code. However, in respect of ships built so far, Marine officers carried out inspection but had to rely on an Australian ship construction code to guide such inspection. Locally built ships were thus passed as safe and seaworthy in accordance with Australian an assessment against standards. The officers also informed the Committee that there is a budget allocation within the

Ministry which has been used in the past to provide workshops for local ship builders to increase their skills in ship construction.

While the Committee applauds the Marine Division for trying to apply some standards to ship construction, it has reservations about the use of a code developed in another country in the context of commercial or mass construction. The Committee also wonders why the Division or Ministry could not simply adapt appropriate features of the Australian code as local regulations to give such binding effect. If a ship builder questions the results of an inspection, it would be difficult for the Division to justify such results on the basis of foreign codes not even mentioned in any local law.

Emergency and Disaster

In terms of the detailed functions of SIMSA under the Bill, the Committee noted that under Clause 7 (2), SIMSA is given the power to take necessary actions during "periods of emergency" or "natural disaster" to protect shipping and maritime infrastructure and safety of life at sea. This sub-clause raises a few questions. First, what event amounts to a "period of emergency"? Second, how do the powers of SIMSA conferred by this sub-clause relate to the overarching powers of the National Disaster Council (NDC)? The Committee was aware prior to the hearing that under the *National Disaster Council Act*[13] the NDC is empowered to assume control during disaster periods[14] and has powers that even extend to ships[15].

At the hearing, officers were of the opinion that both "periods of emergency" and "natural disasters" refer to maritime accidents. Thus, in their view, when a maritime accident occurs, the first on the scene would be those from SIMSA. Following the initial period, SIMSA should liaise with the NDC in the latter's wider operation in respect of the accident.

The Committee acknowledges the essential role of the Marine Division, and under the Bill, of SIMSA, in maritime accidents. However, the Committee does not share the view that a "period of emergency" or "natural disaster" refer only to accidents. These

[13] Chapter 148, Revised Laws of Solomon Islands, 1996
[14] Section 13, *National Disaster Council Act* (Cap. 148)
[15] For instance, the power to requisition vessels: Section 14, Cap. 148

are legal terms with specific definitions and scope. Emergency for instance is used in the *Constitution* to refer to state of emergency[16]. Natural disaster on the other hand is clearly intended to disasters of nature such as earthquakes, tsunami, volcanic eruption, cyclones and floods, to name a few. The Committee is therefore not satisfied with the answers supplied and still believes that the relationship between the respective functions of the NDC and SIMSA should be thought out more carefully; otherwise, this Bill may well cause jurisdictional disputes in the future which could affect the urgent delivery of assistance to victims of natural disasters.

Criminalising Defective Service

Another area of concern stems from Clause 7 (7) of the Bill under which a person who is contracted by SIMSA to undertake certain work[17] but who provides "*defective*" work/service commits an offence and if found guilty, is liable to a maximum fine of $100,000 (1,000 penalty units x $100 per unit). The offence that the Bill seeks to create here gives rise to serious questions. The effect of Clause 7 (7) would be to *criminalise* what is really a *breach of contract*. Defective service or delivery occurs in the commercial world on a daily basis. Contracting parties aggrieved by such would normally resort to contract law for remedies including specific performance or reduced payment based on work done satisfactorily.

The Committee is concerned that despite existing contract law at common law, which applies in Solomon Islands[18], Clause 7 (7) seeks to override such principles and make every contract made with SIMSA subject to a criminal offence with a heavy fine. This problem is compounded by the lack of a definition for, or qualifications to, the term "defective". There is no distinction between minor, administrative or mistaken defects in services, and defective services which result from fraud or misrepresentation. Thus, as the clause currently stands, a contractor could be convicted and fined heavily even for the most minor defect in his or her service, without the usual contractual opportunity to remedy the defect.

[16] Section 16, *Constitution of Solomon Islands* 1978.
[17] Services covered include survey and inspection of vessels, installation and maintenance of marine navigation aids, inspection of other marine infrastructure, providing search and rescue operations and management, operation and maintenance of SIMSA assets: see Section 8 (3) of the Bill.
[18] By virtue of Schedule 3 (2) of the *Constitution of Solomon Islands* 1978.

The Committee raised these concerns with the officers of the Ministry, not so much on their legal interpretation of Clause 7 (7), but on the Ministry's policy rationale for introducing an offence that is not found in any other Act of Parliament. The officers however did not provide a clear policy rationale for the offence. They pointed out that perhaps the courts will only impose a fine closer to the maximum in cases that involve endangering the safety or life of others at sea. It appears that the department did not expect such a heavy fine.

On the basis that no clear answer was given to its questions, the Committee reiterates its concern here. Although the courts will only impose an amount that reflects the gravity of the defect but as long as a particular service is proven to be defective (as per contract), the contractor will be convicted and stigmatised with a criminal conviction. In the Committee's opinion, Clause 7 (7), if enacted as law, could discourage potential contractors from providing services to SIMSA.

Liabilities and Rights of the Marine Division

In considering the transition from the Marine Division to SIMSA, the Committee's attention was drawn to the way the Bill proposes to deal with liabilities of the Marine Division. Clause 11 (7) gives to SIMSA and its officers full immunity from any legal action in relation to fees or charges imposed or collected by the Marine Division prior to the commencement of this Bill. Seeing that immunity is to be granted in respect of liabilities of the Division as at the date of commencement, the Committee naturally expected that outstanding payments owed to the Division as at the said date would be written off as part of the transition.

On questioning the officers at the hearing, however, the Committee was informed that there is no intention for SIMSA, once it is in operation, to write off outstanding debts owed to the Marine Division. They based this view on the fact that the *Shipping Act* 1998 is still in force so fees or charges required under that Act should still be paid in full even after commencement of the Bill.

If the views of the officers reflect the policy objective, the Committee questions the very basis for such an objective. Since the *Shipping Act* 1998 will still be in force at the commencement of the Bill, both liabilities and rights of the Marine Division

should be given the same treatment. If liabilities under the Act are to be extinguished through legislative immunity, it is only equitable that any rights (to fees and charges) under the same Act should also be extinguished. Under such an arrangement, both the new body (SIMSA) and those subject to the 1998 Act are given a clean slate to start afresh under a reformed system.

Franchise Shipping Schemes

Perhaps the area of most interest in the Bill is Part 3 which deals with franchise shipping schemes – a new initiative supported by ADB. The concept of a franchise shipping scheme was first introduced to the Committee by ADB consultants at the Committee's earlier hearing on the National Transport Fund Bill 2009[19]. The Committee welcomes the idea of setting up schemes that subsidises operators in order that shipping services can be provided even to remote parts of the country. In outlining how such schemes will be legally set up and operated, however, the details of the Bill raised a number of issues that the Committee believes should be reconsidered.

Selection of Operators

The Bill makes provision for the selection processes that will be used to award franchise shipping scheme contracts to operators. One such provision is Clause 14 (1) and (2) which requires that in making its selection, the Ministry must comply with "financial procedures". These procedures should set out the tender processes and eligibility criteria to be used in selecting suitable operators[20].

The Committee questioned the officers whether these are to be created under the Bill or whether the reference is to the normal financial procedures of the Public Service contained in the *Financial Instructions* 2004. In response, the officers advised that the reference is to existing procedures contained in the *Financial Instructions*.

This Committee is not satisfied with this answer. The Committee recalls that in its consideration of the National Transport Fund Bill 2009 the issue of risks relating to

[19] Transcript of the Bills and Legislation Committee's hearing on the National Transport Fund Bill 2009, held on Friday 13 March 2009.
[20] Clause 14 (2) of the Bill.

the tender process for contractors to undertake projects was raised. In the hearings for that bill[21] ADB consultants acknowledged the risk of nepotism and favouritism which have plagued the government's normal tender processes for many years and gave assurance in the following terms (as earlier reported by this Committee):

> Advisors of the Ministry explained to the Committee that the Board will not be responsible for the tender process. While the Board will manage the Fund, awarding contracts and tenders will remain the responsibility of the SIG, through its Ministries. It is expected that the Ministries will discharge this responsibility in compliance with Financial Instructions and existing tender authorities. As an added measure, however, one of the functions of the Board could be to ensure that processes used to apply the Fund are adequate and to the satisfaction of those who provide funding (donors). Another safety measure is also the use of pre-qualifying criteria when assessing areas that the Fund could be used for. Such assessments, if carried out properly with the assistance of technical assistants, could provide a clearer picture of capacity of potential contractors or operators to undertake what is expected of them. This measure however requires further legislative reform, for instance in the area of shipping services, and a coordinated approach. Linking the various authorities and rules concerned with transport services and infrastructure in Solomon Islands would ensure that the proposed projects are implemented properly and by contractors with the necessary capacity[22].

As earlier noted by the Committee above, the Ministry made an undertaking that risks associated with the tender processes will be managed through clear pre-qualifying criteria and legislative reform in relevant areas. One such area is shipping and while, on the one hand, witnesses at hearing for the National Transport Fund Bill 2009 promised the introduction of additional measures for franchise shipping schemes through the Maritime Safety Administration Bill 2009, witnesses for hearings on this Bill appear to be under the impression that this Bill does not propose to introduce such new measures. There seems to be a contradiction in the evidence provided in the two hearings and the Committee urges the Ministry and their donor partners to be clear on what Clause 14 (1) proposes. Whatever the true intention of that sub-clause, the Committee is of the view that improvements need to be made to existing tender processes based on a risk management plan.

[21] Public hearing on Friday 13 March, 2009.
[22] Report of the Bills and Legislation Committee on the National Transport Fund Bill 2009, National Parliament Paper No. 4 of 2009, page. 11

Variation of Scheme Contracts

Following the selection of an operator for a particular franchise shipping scheme, the Ministry may then enter into a contract with that operator to undertake that scheme[23]. The Committee notes however by virtue of Clause 14 (1), that this contract can be *unilaterally* varied by the Ministry by giving written notice to that effect to the operator. Clearly variation can relate to any condition of the contract including the contract price, duration, route and the respective rights and duties of the two parties. There seems to be no room for negotiations under Clause 14 (1). If the operator accepts the variation, the variation takes effect[24]. If however the operator does not agree, Clause 14 (3) allows the operator to "elect to terminate" the contract.

Clause 14 (3) is of great concern to the Committee, particularly when read with Clause 26 (2) which stipulates that:

> The Government shall not be liable for any loss or damage arising from the operation of any franchise shipping scheme under this Act.

These two provisions appear to exclude the operator's contractual rights. The Committee is aware that under general principles of contract law, if one of the parties purports to unilaterally vary the contract (e.g., reduce the contract price), that is treated as an *anticipatory breach of contract* – that is, notifying the other party of the intention to repudiate the contract. The innocent party then has two options: first, he or she may elect to affirm the contract by accepting the variation or anticipatory breach; or elect to accept the repudiation or breach. If the innocent party elects to affirm the contract, the variation is considered to be mutually agreed to and takes effect. If however the innocent party elects to accept the repudiation, he or she may treat the contract as terminated and at that point he or she has the right to sue the other party for breach of contract. The innocent party may either seek damages for the breach or ask for specific performance of the contract (i.e., court order that the party in breach completes their part of the contract).

In light of the principles described above, the Committee is concerned that although Clause 14 (3) allows the innocent operator to treat the contract as terminated, any

[23] Clause 14 (4), Maritime Safety and Administration Bill 2009.
[24] Ibid, Clause 14 (2).

subsequent lawsuit he or she may institute for breach of contract and to claim damages or specific performance will be barred by Clause 26 (2). In other words, the Ministry would be immune from such lawsuits. If this reading is correct, the innocent operator will be completely deprived of any possible remedies for the Ministry's deliberate breach of contract. Surely an Act of Parliament cannot propose such an arbitrary rule and seek to exempt government instruments from well established rights and responsibilities under law. Every contracting party should be allowed to seek remedies where there is a breach under the contract.

The Committee raised these concerns with the officers of the Ministry but they were not in any position to respond to such legal issues. The Committee thus put the same questions to the government. If Clause 14 (3) and Clause 26 (2) are a result of a policy rationale, the government needs to justify that rationale given that these clauses seek to supersede principles of contract law at common law and equity, which are part of the laws of Solomon Islands[25]. Further discussion on this issue is in the next sub-issue.

Government Immunity for Loss or Damage

As mentioned above, Clause 26 (2) proposes to grant blanket immunity to the government (including the Ministry) from legal actions relating to any loss or damage arising from the operation of any franchise shipping scheme. The Committee interprets this sub-clause as immunity from loss of life, damage to property on board a ship, or damage to other ships in connection to a ship operating under a franchise shipping scheme. The words "*operation of a franchise shipping scheme under this Act*" however are so broad that they could relate to any part of operations such as contracts (a prerequisite to any operation). Thus, in addition to the kinds of loss or damage listed above, Clause 26 (2) could potentially provide immunity from all contract related lawsuits.

The Committee questions the basis for this type of blanket immunity. Such immunity should only be provided in an Act of Parliament if it is considered absolutely necessary *and more importantly* if the subject matter is not currently regulated by other existing laws. That is certainly not the case here. Every contract with an

[25] By virtue of section 76 and Schedule 3 (2) of the *Constitution of Solomon Islands* 1978.

operator will normally be made subject to acts of God (e.g., storms) and intervening events (e.g., accidents) and the negligence of third parties. Even if a contract does not expressly cover these potential incidents, the law of torts has extensive principles at common law and equity to deal with personal injury, death or loss or damage to property. Thus, even without Clause 26 (2), there are adequate laws to protect the government from accidents, storms and other incidents beyond its control in respect of a ship operating under a franchise shipping scheme. Without a clear explanation the Committee is concerned that Clause 26 (2) is unnecessary and unfair on operators and passengers who may be involved in a shipping scheme.

The Committee, then, questions why there is a need for legislative intervention to protect the government when there are adequate existing laws that offer the same protection, but which, as it should, only apply on a case-by-case basis. Legislating for blanket immunity however is really a *directive to the courts in disguise*. The directive is that the courts are bound, no matter the circumstances or level of loss or damage involved, to dismiss every civil suit instituted by operators or passengers against the government for breach of contract, personal injury or negligence. From this perspective, the Committee strongly questions the constitutionality of Clause 26 (2) and calls for reconsideration of the same.

Maritime Infrastructures in Communities

Another area of interest to the Committee is Clause 18. That clause allows the Minister to declare a maritime infrastructure as public, private, national, provincial or community based. Clause 19 deals with the rights and powers that are attached to a maritime infrastructure so declared. The Committee appreciates the rationale behind these clauses and acknowledges that related provisions provide sufficient guideline to maritime infrastructures that may be the subject of a ministerial declaration. The Committee however sought further clarification on what the Minister may declare as "community maritime infrastructure". The Committee was keen to know how the Ministry proposes to deal with the risk of disputes relating to jurisdiction or ownership in this type of maritime infrastructure. This issue is particularly important and sensitive given that a provincial government and its communities (villages) may not necessarily agree on ownership and usage of new maritime infrastructure set up (and duly declared) in a village.

In response to the Committee's question, the officers only suggested that perhaps Clause 18 and related provisions create a process which would then allow land owning groups to sort themselves out in terms of ownership and usage before the Ministry becomes involved. The officers however did not offer any further explanation or outline any strategic or risk management plan to deal with the Committee's concerns. The Committee strongly believes that this is an area that the Ministry needs to look into before any projects are rolled out to the provinces. Experience has demonstrated that many useful initiatives in provincial areas failed or were delayed indefinitely because of ownership disputes and a struggle between the provincial government involved and land owning tribes.

Indemnity for Negligence

The Committee notes that under Clause 26 (1), the government and all other persons who are to implement this Bill are given complete *immunity* from any legal action for any thing or action or omission that was done or taken, if such were taken *in good faith, whether negligently or not*, in the discharge of a duty or function conferred by the Bill or other maritime written law. The Committee understands that public officers need protection from lawsuits for honest mistakes made in undertaking their functions or duties. However, extending the immunity to cover mistakes or intentional actions made *in good faith* even *negligently* is another matter altogether. In that regard the Committee asked whether it is fair on citizens to provide immunity even for *negligent* actions of public officers in the maritime sector; and how, in practice, a public officer or Ministry could take an action *in good faith* but *negligently*.

Again while not offering any legal interpretation of Clause 26 (2), the witnesses responded that public officers will only be covered by the immunity if they are carrying out their duties and functions under the Bill. As such, actions resulting in damage or loss, but which are taken outside normal duties or functions, do not fall under the ambits of the clause. The Committee accepts this explanation as standard but still feels that their question was not answered. The question relates more to the proposed sanctioning of *negligent actions* so long as such were taken good faith and in the discharge of duties/functions.

The Committee is of the opinion that in practice, it is not possible for a public officer (carrying out his or her function/duty) to make an honest mistake (*in good faith*) but negligently. These two concepts are mutually exclusive. An honest mistake is an error that arises even though the officer acted with all due care and diligence. A negligent action or omission resulting in loss or damage on the other hand involves recklessness or a lack of regard for the safety of other persons or their properties. It is therefore the Committee's view that only non-negligent actions/omissions taken/made in good faith should be given immunity. Negligence should not be given legislative sanction because that would only serve to deprive citizens of their rights to seek redress from the courts under the law of torts and encourage carelessness within the maritime sector – a proposal that no Act of Parliament should support.

Blanket Amendment to Regulation Penalties

In respect of transitional and saving provisions, the Committee is concerned with how the Bill treats some existing regulations. The Committee notes that Clause 30 (2) requires the Minister to later repeal the current *Shipping Act* (Cap. 163) by notice in the Gazette. Clause 31 (1) however saves certain regulations made under that Act[26] even if it is repealed. Clause 31 (4) goes further to *amend the penalties* in all named regulations so that the range for all four regulations is now **$30,000** (300 penalty units x $100 per unit) **or 3 months imprisonment**.

By way of example, the Committee refers to the two regulations made under the *Shipping Act* (Cap. 163): the *Shipping Regulations* and the *Shipping (Dangerous Goods) Regulations*. The Committee notes further that the Act (and its regulations) was enacted in 1957 and retained its form up to 1996 when it was incorporated into the Revised Laws of Solomon Islands. A comparison of the Act in 1969 and the same in 1996 indicates that the Act was preserved up until 1996 with only minor changes. Penalties in the regulations of the Act were thus the same in 1996 as they were in 1969. The penalties in the two named regulations as at 1996 are set out in "**Appendix 1**".

[26] These include the *Shipping Regulations* 1998, the *Shipping (Dangerous Goods) Regulations* 1998, the *Shipping (Notification) Regulations* 1997 (L/N 73/97), and the *Maritime Security Regulations* 2004 (L/N 145/06).

It can be seen from the Appendix that at present the penalties for most offences in the two named regulations is **$100 or 6 months imprisonment**. It is therefore clear that penalties in the regulations need to be amended through this Bill to modernise their values. The Committee's concern however is not with the proposed amendment but with the major increase proposed to *all* penalties without regard for the varying levels of severity of the offences involved. Such an approach can have startling results.

For instance, while it is understandable that a captain who takes to sea with more passengers than permitted[27] should be sentenced, on conviction, to a fine of up to $30,000 or 6 months imprisonment (as this offence endangers lives), it is difficult to see the logic for increasing to the same levels the maximum fine and imprisonment term in respect of the offence (for a seaman) of using indecent language to superiors[28]. Clearly, the first offence is designed to prevent actions that could endanger lives, cargo and the ship, whereas the other offence only seeks to maintain some degree of respect. It does not stand to reason that these offences should attract the same penalty.

At the hearing, the Committee asked the officers of the Ministry what the policy justification was for this blanket amendment to all the regulations which will see a sudden and major increase in penalties. The officers were however not in the position to answer. Despite that, the Committee still feels that this is an issue that the government should consider and provide clarity on. Perhaps each offence set out in any of the four regulations should be assessed and amended according to its seriousness.

[27] An offence under regulation 29 (2) of the *Shipping Regulations.*
[28] An offence under regulation 34 (1) (a) of the *Shipping Regulations.*

5 Recommendations

The Committee has reviewed the Bill and, while supporting the general intentions of the Bill and acknowledging the need for reform in the maritime sector, is of the view that:

(a) the Bill raises a number of important questions that need to be first considered by all stakeholders;

(b) no adequate consultation was undertaken by the Ministry prior to the drafting the Bill; and

(c) the Committee still needs to hear from donors and shipping operators.

Accordingly, the Committee strongly recommends that Parliament's consideration of the **Maritime Safety Administration Bill 2009** be delayed until all concerns listed above have been adequately dealt with.

Hon. Severino Nuaiasi
Chairman
Bills and Legislation Committee
2 April 2009

Appendix 1: Penalties in Regulations of Cap.163

A. Shipping Regulations – L/N 75/1967

Offences (read with s.29 of the Act, general penalty)

Reg.	Offence	Fine	Imprisonment term
15	Procuring certificate of competence by fraud or misrepresentation	$40	6 months
16	Attempted bribery (examinations)	$40	6 months
27	Taking to sea without prescribed number of crew on board	$40	6 months
29 (2)	Taking to sea with more passengers than prescribed number	$40	6 months
30	Taking to sea with lesser freeboard than prescribed or when ship is not marked as prescribed	$40	6 months
32	Procuring a safety certificate by bribery, fraud or misrepresentation	$40	6 months
34 (1) (a)	Seaman serving in a vessel: • Desserts or quits the vessel • Disobeys lawful order • Assaults another person on board • Joins others in a mutiny • Damages ship or embezzles its stores etc • Brings on board alcohol, drugs etc • Is drunk or intoxicated on board • Brings on board weapons • Uses indecent languages to superiors	$100	6 months
35	Failure to observe rules of Collision Regulations (lights, signals etc)	$40	6 months
36	Failure to report position as required	$40	6 months

B. Shipping (Dangerous Goods) Regulations – L/N 150/1967

Offences (read with s.29 of the Act, general penalty)

Reg.	Offence	Fine	Imprisonment term
17	Causing or allowing another to cause fire to vessel, its cargo or to dangerous goods	$100	6 months
18	Captain etc failing to take all prescribed precautionary measures before carrying dangerous goods	$100	6 months
19 (1)	Shipper of dangerous goods fails to take precaution under the Regulation	$100	6 months
19 (2)	Captain etc fails to comply with certain precautions under the Regulation	$100	6 months
19 (3)	Owner of vessel or another intentionally contravenes the Regulation	$100	6 months

Appendix 3: Formal Minutes

BILLS AND LEGISLATION COMMITTEE

NATIONAL PARLIAMENT OF SOLOMON ISLANDS

Minutes of Proceedings
Meeting No. 9

Tuesday 24 March 2009, Conference Room 2, Parliament House, 3:00am

1. Members Present

Hon. Hon. Severino Nuaiasi, MP
Hon. Manasseh Sogavare, MP
Hon. Agustine Taneko, MP
Hon. Japhet Waipora, MP

Secretariat:

Mr. David Luta Kusilifu, Committee Secretariat

Witnesses:

Mr. John Taaru, Permanent Secretary, Ministry of Infrastructure Development

Mr. Elliot Cortis, Director of Marine, Marine Division, Ministry of Infrastructure Development

2. Opening Remarks & Prayers

The Chair welcomed Members of the Committee and secretariat staff.

The Chair then gave his opening remarks.

3. Deliberation on Issues and Questions for the Public Hearing

The Chair and Members thanked the Secretariat for the preparatory work for the Public Hearing.

The Committee Secretariat (Legal) briefed the Committee.

4. Consideration of the Maritime Safety Administration Bill 2009

The Witnesses made their opening statements to their position on the Bill.

The Committee questioned the witnesses.

Discussion ensued.

Evidence Concluded.

5. Close

The Chair thanked the witnesses for their attendance. Mr. Cortis closed the Committee's deliberations with a word of prayer.

Meeting closed at 5:30 pm.

Appendix 3: Witnesses

Witnesses who appeared before the Bills and Legislation Committee on 24 March 2009 were:

1. **Mr. John Taaru**, Permanent Secretary, Ministry of Infrastructure Development

2. **Mr. Elliot Cortis**, Director of Marine, Marine Division, Ministry of Infrastructure Development