

MEMORANDUM

TO: Ms N Bhengu, MP
Chairperson: Portfolio Committee on Transport

SUBMISSION ON MERCHANT SHIPPING (SAFE CONTAINERS CONVENTION) BILL [B31 OF 2010]

1 Introduction

1.1 The Portfolio Committee on Transport has invited public comment on the Merchant Shipping (Safe Containers Convention) Bill [B31- 2010]. This memorandum draws attention to several matters in the present Bill that the Committee might wish to consider during its further deliberations. References in this memorandum to "the previous Bill" are to an earlier version of the Bill gazetted by Government Notice 440 of 2006 in Government Gazette No. 28651 of 31 March 2006.

1.2 The author of this memorandum was a member of the original team that developed this Bill and is acquainted with much of its earlier history. The author has no material interest in the subject matter of the Bill or any current relationship with a stakeholder likely to be affected by the Bill. This submission is made in the author's private capacity. The author does not intend to make any oral submissions.

2 Clause 3(2): containers used in transport between SA mainland and Prince Edward Islands

2.1 The previous Bill, in clause 3(2), treated transport between the South African mainland and the Prince Edward Islands as international transport within the meaning of the Convention. The effect of this provision was to extend the application of the Bill and Convention also to domestic transport between the mainland and islands; by default the Convention covers only containers used in international transport (Art III para 1 read with Art II, para 6). At the time, consideration was also given to extending the regulatory scheme to *all* domestic transport, but this did not find its way into the published Bill and appears not to have been pursued subsequently. The safety case for extending coverage to domestic transport between the mainland and islands is obvious and compelling, and is supported by long-standing precedent in the *Merchant Shipping Act* 1951 (s 3(2)). Curiously, then, clause 3(2) of the present Bill does the complete opposite, effectively excluding from the Bill's scope all containers used in transport between the mainland and islands. No reason or explanation for this change of approach appears from either the Bill or its objects memorandum. The Committee might wish to examine this aspect further.

2.2 The Committee might also wish to consider a more flexible alternative to the blanket declaratory exclusion found in present clause 3(2) by providing instead for ministerial power to exempt in appropriate cases. This would require a different approach: first, transport between the mainland and islands would have to be brought within the scope of the present Bill, as was done in clause 3(2) of the previous Bill; secondly, new provision would have to be made empowering the Minister (or a ministerial delegate) to grant exemption in appropriate cases, subject to appropriate safeguards. The benefit of this approach is that it would better contribute towards achieving safety (and perhaps other desired) outcomes by facilitating better control and supervision of participants, operations and products in the transport system.

2.3 If, however, the Committee is convinced of the case that domestic transport (which would include transport between the mainland and islands) should not be brought within the scope of the Bill, then it might wish to consider whether present clause 3 is necessary at all. Does this clause serve any useful purpose by extending the application of the Bill to the remote and inhospitable Prince Edward Islands when the intention in any case, evidenced by present clause 3(2), is not to cover transport between the mainland and islands? The answer appears to be no. Moreover, if domestic transport is not to be covered, present clause 3(2) is in fact superfluous and, in any case, should either be omitted altogether in its present declaratory form or become a "for avoidance of doubt" provision: it is unnecessary to include provision specifically excluding transport between the mainland and islands (i.e. domestic transport) from the Convention definition of international transport when it is excluded by default in any case (Art II, para 6).

3 Clause 7(3): limitation of inspection powers

This provision raises several questions. Is this limitation necessary or appropriate in the context of regulatory inspections carried out in workplaces and operational areas? If the limitation, framed as it is, is sound in law, then why does it apply only to premises and not also to ships, vehicles and other transport units? How do clauses 7(3) and 8(1) operate in relation to each other? For example, if clause 7(3) applies because a person refuses entry to an inspector, does the person contravene clause 8(1)? Does the reason for refusing entry matter? One can easily imagine situations where entry to premises is refused simply to frustrate inspection. The point being made is this: if the present clause 7(3) limitation, or any similar limitation, applies, what alternative track or guidance does the Bill offer or point to? What can an inspector do in such a case? These are important questions for compliance and enforcement personnel that the Bill does not appear to answer adequately. The Committee might wish to examine this aspect further.

4 **Clause 10(2): incorporation by reference of health and safety standards**

The present Bill introduces the term "health and safety standard"; the previous Bill referred to "any document that the Minister or the Authority considers relevant from time to time". The present term (apparently borrowed from the field of standards regulation) is used presumably to introduce greater precision by circumscribing the kind of material that may be incorporated by reference into the regulations. The Committee might wish to consider the benefit of inserting an appropriate definition of "health and safety standard" in clause 1 to capture more precisely the kind of material intended.

5 **Bill Schedule, Part 2: 1993 Amendments**

5.1 The purpose of Part 2 of the Schedule is unclear. Part 2 is a carry-over from the previous Bill, but companion clauses have been so amended in the present Bill as to remove all linkages with Part 2. As a result, Part 2 stands disconnected from the operative provisions of the present Bill and appears to serve no purpose. To illustrate, the provisions of the previous Bill are given below showing the linkages (in ***bold italics***) omitted from the present Bill:

"the Convention" means the International Convention for Safe Containers set out in Part 1 of the Schedule ***and, after the commencement of Part 2 of the Schedule, as amended by that Part;***

(Clause 1)

This Act commences on a day fixed by the President by proclamation in the *Gazette*; ***but the day so fixed in relation to Part 2 of the Schedule may not be a day before the day on which the amendments to the Convention set out in that Part enter into force for the Republic in accordance with Article IX, paragraph 2(c) of the Convention.***

(Clause 15(2)/Clause 14)

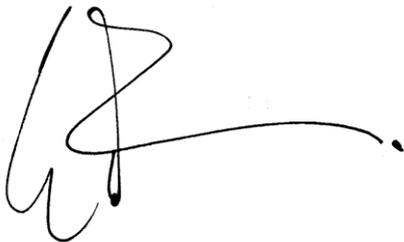
5.2 Part 2 sets out the 1993 Amendments to the Convention; these amendments are not yet in force. The original intention behind including the 1993 Amendment in the Schedule to the Bill was to anticipate three things: (1) South Africa accepting the amendments, (2) the amendments entering into force internationally, and (3) conveniently translating the amendments into domestic law. The approach at the time envisaged two processes – (1) the Bill process and (2) the constitutional process for the acceptance of international agreements – running in parallel to produce a Bill that incorporated the 1993 Amendments into domestic law but delayed domestic implementation until the amendments had entered into force for South Africa at the international level. The benefits of a combined process seemed obvious at the time. That was the approach then; what it is now is unclear. The Committee might wish to consider either properly integrating Part 2 into the present Bill or, since Part 2 has no

evident function as it currently appears in the Bill, omitting it completely and leaving it for a later amendment Bill.

6 Bill's relationship with regulatory scheme for national standards

6.1 The Committee's attention is drawn to this aspect because the regulatory scheme for national standards has changed significantly since the Bill was originally conceived some 10 or more years ago. The scheme's intent and approach now might be very different from what it was then.

6.2 This Bill has a high risk of overlap with the national standards scheme. If the risk is not managed effectively, ending up with overlapping, unnecessarily complex and potentially conflicting regulatory schemes becomes more likely. Mitigating this risk requires effective inter-departmental consultation and cooperation, particularly between Transport and DTI, to ensure a common understanding and coordinated approach. The Committee, if it has not already done so, might wish to satisfy itself (1) about the extent and quality of inter-departmental consultation and cooperation around this Bill and, in particular, (2) that the subject matter of the Bill is not already covered, or cannot more appropriately be covered, under the prevailing regulatory scheme for national standards. There would appear to be no sense establishing a completely new regulatory scheme if an adequate enabling framework already exists under the national standards scheme.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a long horizontal stroke that ends in a small dot.

C BRIESCH

15 February 2011