



MEMORANDUM

TO: Chairperson: Portfolio Committee on Transport [Hon Ms N R Bhengu MP]

COPY: Secretary to Parliament

FROM: Constitutional and Legal Services Office [Adv F S Jenkins, Senior Parliamentary Legal Adviser]

DATE: 7 February 2011

REF. NO.: 44 / 2011

SUBJECT: Purpose of clause 3 of the Merchant Shipping (Safe Containers Convention) Bill [B31 – 2010]

Background

1. Your request for advice on the purpose of clause 3 of the Merchant Shipping (Safe Containers Convention) Bill [B31 – 2010] (the Bill) refers.
2. Clause 3 of the Bill provides as follows:

“3. (1) This Act extends to the Prince Edward Islands as defined in section 1 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948).
(2) In its application to those islands, transport between the Republic and the Prince Edward Islands is not international transport.”
3. The crisp issue is whether either or both of the subclauses are necessary.

Application of the Bill / Act to Prince Edwards Islands

4. Section 4 of the Prince Edward Islands Act provides that “[n]o Act of the Union Parliament passed after the date of commencement of this Act shall apply to the



Territory, unless by such Act it is specifically expressed so to apply or unless it is declared to apply by proclamation of the Governor-General.”

5. Section 4(1)(a) of the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003) provides, similarly that the “Act also applies in the Prince Edward Islands referred to in section 1 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948)”. There is thus precedent for the drafting of clause 3(1) of the Bill.
6. Item 2(1) of Schedule 6 to the Constitution provides that all law that was in force when the new Constitution took effect, continues in force, subject to any amendment or repeal, and consistency with the new Constitution. Item 3(1)(a) further provides that references in legislation that existed when the new Constitution took effect to the Republic of South Africa or a homeland - except when it refers to a territorial area – must be construed as a reference to the Republic of South Africa under the new Constitution. In other words, the exclusion of territorial areas such as the reference to the Prince Edward Islands must be read as it stands.
7. It follows that it is necessary to comply with section 4 of the Prince Edward Islands Act if Parliament intends to legislate for that area. Subclause 3(1) of the Bill is thus necessary for the purpose of making the regulatory framework set out in the Bill applicable in the Prince Edward Islands.

Transport between the Republic and the Prince Edward Islands is not international transport

8. Section 1 of the Prince Edward Islands Act defines the territory known as Prince Edward Islands and declares this territory to be part of the then Union of South Africa.



9. When the Union of South Africa became the Republic of South Africa in terms of the Republic of South Africa Constitution Act, 1961, the reference to the Union of South Africa had to be construed as a reference to the Republic (see section 3(a)). Although the Republic of South Africa Constitution Act 110 of 1983 repealed the 1961 Constitution, and the Constitution of the Republic of South Africa Act, 1993 (Act No. 200 of 1993) repealed the 1983 Constitution, the existing laws continued in force (see section 229 of the 1993 Constitution). It follows that the territory of the Prince Edwards Islands is part of the Republic of South Africa.
10. Therefore subclause 3(2) of the Bill is superfluous.

A handwritten signature in black ink, appearing to read 'F S Jenkins', written in a cursive style.

Adv F S Jenkins

Senior Parliamentary Legal Adviser

BILL

To give effect to the International Convention for Safe Containers, and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. (1) In this Act, unless the context indicates otherwise—

“**Authority**” means the South African Maritime Safety Authority established by section 2(1) of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998); 5

“**container**” means a container as defined in the Convention and to which the Convention applies;

“**Contracting State**” means a state specified in a notice under section 4; 10

“**inspector**” means a person appointed as an inspector under section 6;

“**Minister**” means the Minister of Transport;

“**organ of state**” has the same meaning assigned to it in section 239 of the Constitution of the Republic of South Africa, 1996;

“**the Convention**” means the International Convention for Safe Containers set out in Part 1 of the Schedule; 15

“**the Republic**” includes the Prince Edward Islands referred to in section 3;

“**this Act**” includes the regulations.

(2) In this Act, unless the context indicates otherwise, any word or expression to which a meaning has been assigned by the Convention, has the same meaning as in the Convention. 20

Act binds State

2. This Act binds the State and every organ of state.

Application of Act

3. (1) This Act extends to the Prince Edward Islands as defined in section 1 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948). 25

(2) In its application to those islands, transport between the Republic and the Prince Edward Islands is not international transport.

Declaration of Contracting States

4. (1) The Minister may, by notice in the *Gazette*, declare a state, other than the Republic, specified in the notice as a State Party to the Convention. 30

(2) A notice under subsection (1) is evidence that a state specified in such notice is a State Party to the Convention.

the laws of the Union, the Territory shall be deemed to be situated within the Magisterial district which includes the City of Cape Town and to form part of the electoral division which includes the harbour of the City of Cape Town.

Application of common law.

2. The Roman-Dutch Law, as existing and applied in the Province of the Cape of Good Hope, whether as judicially interpreted, or as modified by statute, shall be in force in the Territory, as the common law of the Territory.

Application of statute law.

3. (1) The laws set out in the Schedule to this Act, with any amendments that may be made thereto from time to time, shall be in force in the Territory, in so far as they are applicable.

(2) The Governor-General may further, by proclamation in the *Gazette*, declare any law in force in the Province of the Cape of Good Hope to be in force in the Territory, with such modifications as he may deem fit, and may repeal, amend or modify any such law, or make new laws applicable to the Territory.

(3) (a) Any proclamation issued in terms of sub-section (2) shall be laid on the Tables of both Houses of Parliament within fourteen days after publication if Parliament is then in ordinary session, or if it is not then in ordinary session, within fourteen days after the commencement of its next ensuing ordinary session, and shall remain on the said Tables as aforesaid for a period of at least twenty-eight consecutive days. If Parliament is prorogued before the necessary twenty-eight days have elapsed, such proclamation shall again be laid on the said Tables as aforesaid within fourteen days after the commencement of its next ensuing session.

(b) If both Houses of Parliament have by resolutions passed in the same session (being a session during which any proclamation referred to in paragraph (a) has been duly laid on the Tables) disapproved of any such proclamation, or of any provision in any such proclamation, such proclamation shall thereafter cease to be of force and effect to the extent to which it has been so disapproved, but without prejudice to the validity of anything that has been done in terms of such proclamation, up to the date from which it so ceases to be of force and effect, or to any right, privilege, obligation or liability acquired, accrued or incurred under or by virtue of such proclamation as at the said date.

Limitation on future application of laws.

4. No Act of the Union Parliament passed after the date of commencement of this Act shall apply to the Territory, unless by such Act it is specifically expressed so to apply or unless it is declared to apply by proclamation of the Governor-General.

Short title.

5. This Act shall be called the Prince Edward Islands Act, 1948.

Schedule.

The Administration of Estates Act, 1913.

How does this fit into Constitution?