

# **Transport and Regional Services Legislation Amendment (Maritime Safety) (Application of the Criminal Code) Regulations 2001 2001 No. 351**

## **EXPLANATORY STATEMENT**

### **Statutory Rules 2001 No. 351**

Issued by the authority of the Minister for Transport and Regional Services

*Navigation Act 1912*

*Protection of the Sea (Oil Pollution Compensation Fund) Act 1993*

*Protection of the Sea (Prevention of Pollution from Ships) Act 1983*

*Shipping Registration Act 1981*

Transport and Regional Services Legislation Amendment (Maritime Safety) (Application of the Criminal Code) Regulations 2001

The Governor-General has the authority to make regulations for the above Acts by virtue of the following provisions: subsection 425(1) of the *Navigation Act 1912*; section 47 of the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993*; subsection 33(1) of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*; and section 83(1) of the *Shipping Registration Act 1981*.

The purpose of the Regulations is to ensure that the existing offence provisions in Transport portfolio regulations continue to operate in the same manner following the application of the Criminal Code to all Commonwealth legislation from 15 December 2001. The Criminal Code was enacted by the *Criminal Code Act 1995*. Chapter 2 contains the general principles of criminal responsibility that apply to the offence provisions contained in the Criminal Code and all other Commonwealth offence provisions.

The Regulations amend the Navigation (Collision) Regulations 1982, the Navigation (Construction) Regulations 1968, the Navigation (Fire Appliances) Regulations 1968, the Navigation (Orders) Regulations 1980, the Protection of the Sea (Oil Pollution Compensation Fund) Regulations 1994, the Protection of the Sea (Prevention of Pollution from Ships) (Orders) Regulations 1994, and the Shipping Registration Regulations 1981 to ensure:

- strict liability offences continue to operate as such;
- defences are separated from offences with the evidential standard of proof specified;
- physical elements of offences are clear;
- a knowledge of law problem is overcome;
- a global offence provision is amalgamated; and
- pecuniary penalties are updated by converting them into penalty units.

The Regulations commence on gazettal.

Details of the Regulations are set out in the Attachment.

**Transport and Regional Services Legislation Amendment (Maritime Safety)  
(Application of the Criminal Code) Regulations 2001 (No. 1)**

## ATTACHMENT

### GENERAL EXPLANATION TO MAIN HARMONISATION AMENDMENTS

#### *Strict liability*

An offence of strict liability is where no fault elements apply to the physical elements of the offence. The Criminal Code provides that in the absence of an express reference to the fact that an offence is a strict liability offence, the prosecution will have to prove fault on the part of the defendant.

The relevant offences are specified as strict liability as follows in order to preserve their current operation:

<b>Schedule</b>	<b>Name of Regulation</b>	<b>Item/s</b>	<b>Subregulation</b>
1	Navigation (Collision) Regulations	2	6(2)
2	Navigation (Construction) Regulations	2-8	19(2), 20(2), 65(3), 93(3), 97(3), 124(3), 248(2)
3	Navigation (Fire Appliances) Regulations	4, 7-10, 14, 17, 21-22	9(2), 10(2), 46(1A), 46(4), 55(3), 57(2), 65(2), 67(2), 68(2)
4	Navigation (Orders) Regulations	2	4(2)
5	Protection of the Sea (Oil Pollution Compensation Fund) Regulations	4	24(3)
6	Protection of the Sea (Prevention of Pollution from Ships) (Orders) Regulations	2	4(2)
7	Shipping Registration Regulations	4-7, 10, 11	13(2A), 14(8), 15(6), 17(10), 19(2A), 35(4C)

#### *Clarifying the defence of reasonable excuse*

In order that the defence of *reasonable excuse* is not mistakenly interpreted to be an element of the offence that must be proved by the prosecution, the defence has been drafted into a new subregulation.

The defence is separated from the relevant offences as follows:

<b>Schedule</b>	<b>Name of regulation/s</b>	<b>Item/s</b>	<b>Subregulation</b>
7	Shipping Registration Regulations	5 to 7, 11	14(9), 15(7), 17(11), 35(4D)

### DETAILS OF REGULATIONS

Item 1 provides the name of the Regulations.

Item 2 provides the Regulations are to commence on gazettal.

Item 3 to 9 inclusive refer to Schedules 1 to 7 respectively of the Regulations which list the various amendments.

#### **Schedule 1: Amendment to the Navigation (Collision) Regulations**

**Authority:** Subsection 425(1) of the *Navigation Act 1912*

Item 1 amends regulations 1 and 2 to provide for the name of the regulations and that they are made under section 258 of the *Navigation Act 1912*.

Item 2 repeals regulations 4, 5, 6, and 7 and substitutes new regulations 4, 5 and 6. New regulations 4 and 5 update the existing drafting style by removing *as in force from time to time*. New regulation 6 is an amalgamation of the existing regulations 6 and 7 creating one criminal offence provision to avoid difficulties in interpretation. Currently regulation 6 requires that a master, mate or other person comply with the measures required by Part 30 of the Marine Orders relating to the prevention of collisions and the provision and use of lights and signals while regulation 7 provides that a person who fails to comply with regulation 6 is guilty of an offence.

Item 2 also inserts new subregulation 6(2) to provide that the offence in subregulation 6(1) is an offence of strict liability. For clarity purposes a note is inserted referring the reader to the relevant penalty provision of the *Navigation Act 1912*.

## **Schedule 2: Amendments of Navigation (Construction) Regulations**

**Authority:** Subsection 425(1) of the *Navigation Act 1912*

Item 1 amends regulation 1 which provides for the name of the regulations.

Item 2 amends regulation 19 which is rephrased in new subregulation 19(1) to eliminate the use of the word *unless* which could unintentionally be interpreted as a defence, and thus clarifies the elements of the offence. The drafting style is updated by replacing *should* with *if* in paragraph 19(1)(c) and the reference to a pecuniary penalty is updated to penalty units.

Item 2 also inserts new subregulation 19(2) to provide that the offence in subregulation 19(1) is an offence of strict liability.

Item 3 amends regulation 20 which is rephrased in new subregulation 20(1) to eliminate the use of the word *unless* which could unintentionally be interpreted as a defence, and thus clarifies the elements of the offence. The reference to a pecuniary penalty is updated to penalty units.

Item 3 also inserts new subregulation 20(2) to provide that the offence in subregulation 20(1) is an offence of strict liability.

Item 4 amends subregulation 65(2) which is rephrased to eliminate the use of the word *unless* which could unintentionally be interpreted as a defence, and thus clarifies the elements of the offence. The reference to a pecuniary penalty is updated to penalty units.

Item 4 also inserts new subregulation 65(3) to provide that the offence in subregulation 65(2) is an offence of strict liability.

Item 5 amends subregulation 93(2) which is rephrased to eliminate the use of the word *unless* which could unintentionally be interpreted as a defence, and thus clarifies the elements of the offence. The reference to a pecuniary penalty is updated to penalty units.

Item 5 also inserts new subregulation 93(3) to provide that the offence in subregulation 93(2) is an offence of strict liability.

Item 6 amends subregulation 97(2) which is rephrased to eliminate the use of the word *unless* which could unintentionally be interpreted as a defence, and thus clarifies the elements of the offence. The reference to a pecuniary penalty is updated to penalty units.

Item 6 also inserts new subregulation 97(3) to provide that the offence in subregulation 97(2) is an offence of strict liability.

Item 7 amends regulation 124 which is rephrased in new subregulation 124(1) to eliminate the use of the word *unless* which could unintentionally be interpreted as a defence, and thus clarifies the elements of the offence. The reference to a pecuniary penalty is updated to penalty units.

Item 7 also inserts new subregulation 124(2) to provide that the offence in subregulation 124(1) is an offence of strict liability.

Item 8 amends regulation 248 which is rephrased in new subregulation 248(1) to eliminate the use of the word *unless* which could unintentionally be interpreted as a defence, and thus clarifies the elements of the offence. The reference to a pecuniary penalty is updated to penalty units.

Item 8 also inserts new subregulation 248(2) to provide that the offence in subregulation 248(1) is an offence of strict liability.

### **Schedule 3: Amendments of Navigation (Fire Appliances) Regulations**

**Authority:** Subsection 425(1) of the *Navigation Act 1912*

Item 1 amends regulation 1 which provides for the name of the regulations.

Items 2 to 3 updates the drafting style of subregulation 9(1) by replacing shall with must and replaces the pecuniary penalty with a penalty unit.

Item 4 inserts new subregulation 9(2) to provide that the offence in subregulation 9(1) is an offence of strict liability.

Items 5 to 6 updates the drafting style of subregulation 10(1) by replacing *shall* with must and replaces the pecuniary penalty with a penalty unit.

Item 7 inserts new subregulation 10(2) to provide that the offence in subregulation 10(1) is an offence of strict liability.

Item 8 updates the drafting style in subregulation 46(1) by replacing *shall* with must and replaces the pecuniary penalty with a penalty unit.

Item 8 also inserts new subregulation 46(1 A) to provide that the offence in subregulation 46(1) is an offence of strict liability.

Item 9 updates the drafting style in subregulation 46(3) by replacing *shall* with must and replaces the pecuniary penalty with a penalty unit.

Item 9 also inserts new subregulation 46(4) to provide that the offence in subregulation 46(3) is an offence of strict liability.

Item 10 updates the drafting style in subregulation 55(2) by replacing *shall* with must and replaces the pecuniary penalty with penalty unit.

Item 10 also inserts new subregulation 55 (3) to provide that the offence in subregulation 55(2) is an offence of strict liability.

Items 11 to 13 updates the drafting style of subregulation 57(1) by replacing *shall* with must and updates the pecuniary penalty to a penalty unit.

Item 14 inserts new subregulation 57(2) to provide that the offence in subregulation 57(1) is an offence of strict liability.

Items 15 to 16 updates the drafting style of subregulation 65(1) by replacing *shall* with must and replaces the pecuniary penalty with a penalty unit.

Item 17 inserts new subregulation 65(2) to provide that the offence in subregulation 65(1) is an offence of strict liability.

Items 18 to 20 updates the drafting style of subregulation 67(1) by replacing *where* with if and *shall* with must and replaces the pecuniary penalty with a penalty unit.

Item 21 inserts new subregulation 67(2) to provide that the offence in subregulation 67(1) is an offence of strict liability.

Item 22 updates the drafting style of subregulation 68(1) by replacing *shall* with must; replaces the pecuniary penalty with a penalty unit and inserts new subregulation 68(2) to provide that the offence in subregulation 68(1) is an offence of strict liability.

#### **Schedule 4: Amendments of Navigation (Orders) Regulations**

**Authority:** Subsection 425(1) of the *Navigation Act 1912*

Item 1 amends regulation 1 which provides for the name of the regulations.

Item 2 amends subregulation 4(1) by replacing *contravenes* with *fails to comply so* any unintended implication that the prosecution is required to prove fault on the part of the defendant is removed. The reference to a pecuniary penalty is updated to penalty units.

Item 2 also inserts new subregulation 4(2) to provide that the offence in subregulation 4(1) is an offence of strict liability.

#### **Schedule 5: Amendment of Protection of the Sea (Oil Pollution Compensation Fund) Regulations**

**Authority:** Section 47 of the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993*

Item 1 amends regulation 1 which provides for the name of the regulations.

Item 2 inserts the penalty at the foot of subregulation 23(1) for clarity purposes.

Item 3 inserts new subregulation 23(4) that provides strict liability applies to specific elements of the offence. This amendment ensures that the offence is not interpreted as requiring the prosecution to prove the defendant had knowledge that they were a person to whom regulation 22 applied and that they knew of the requirements of the form in the relevant schedule. Section 9.4(1) of the Criminal Code provides that mistake or ignorance of subordinate legislation is no excuse. Subsection 9.4(2) however provides that 9.4(1) does not apply if the particular

subordinate legislation is expressly or impliedly to the contrary effect. The possibility that section 9.4 of the Criminal Code could be interpreted as not applying is therefore avoided by this amendment.

Item 4 inserts new subregulation 24(3) to provide that an offence in subregulation 24(2) is an offence of strict liability.

### **Schedule 6: Amendment of Protection of the Sea (Prevention of Pollution from Ships) (Orders) Regulations**

**Authority:** Subsection 33(1) of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*

Item 1 amends regulation 1 which provides for the name of the regulations.

Item 2 amends subregulation 4(1) by replacing *contravenes* with *fails to comply so* any unintended implication that the prosecution is required to prove fault on the part of the defendant is removed.

Item 2 also inserts new subregulation 4(2) to provide that the offence in subregulation 4(1) is an offence of strict liability.

### **Schedule 7: Amendment of Shipping Registration Regulations**

**Authority:** Subsection 83(1) of the *Shipping Registration Act 1981*

Item 1 amends regulation 1 which provides for the name of the regulations.

Items 2 to 3 amends subregulation 13(1) by replacing *shall not* with *may* and *unless* with only *if*. Both amendments enable the use of the word *unless* to be eliminated which could unintentionally be interpreted as a defence, and thus clarifies the elements of the offence.

Item 4 amends subregulation 13(2) which is rephrased for clarity purposes. The reference to the pecuniary penalty is updated to a penalty unit.

Item 4 also inserts new subregulation 13(2A) to provide that the offence in subregulation 13(2) is an offence of strict liability. This amendment does not create a new offence of strict liability. The existing offence under subregulation 13(2) makes the master *and owner of* the ship vicariously liable for failing to comply with the requirements of subregulation 13(1). Vicarious liability is interpreted as giving rise to strict liability and therefore not requiring proof of fault. The amendment is necessary to maintain the current operation of subregulation 13(2).

Item 5 amends subregulation 14(7) which omits the words *without reasonable excuse, refuses* or *fails* and substitutes the word *fails*. The reference to the pecuniary penalty is updated to a penalty unit.

Item 5 also inserts new subregulation 14(8) to provide that the offence in subregulation 14(7) is an offence of strict liability. New subregulation 14(9) is inserted to contain the defence of reasonable excuse removed from subregulation 14(7).

Item 6 amends subregulation 15(5) which omits the words *without reasonable excuse, refuses* or *fails* and substitutes the word *fails*. The reference to the pecuniary penalty is updated to a penalty unit.

Item 6 also inserts new subregulation 15(6) to provide that the offence in subregulation 15(5) is an offence of strict liability. New subregulation 15(7) is inserted to contain the defence of reasonable excuse removed from subregulation 15(5).

Item 7 amends subregulation 17(9) which omits the words without *reasonable excuse*, *refuses* or fails and substitutes the word fails. The reference to the pecuniary penalty is updated to a penalty unit.

Item 7 also inserts new subregulation 17(10) to provide that the offence in subregulation 17(9) is an offence of strict liability. New subregulation 17(11) is inserted to contain the defence of reasonable excuse removed from subregulation 17(9).

Items 8 to 9 update the pecuniary penalties in subregulations 19(1) & (2) with penalty units.

Item 10 inserts new subregulation 19(2A) to provide that the offences in subregulations 19(1)&(2) are offences of strict liability.

Item 11 amends subregulation 35 (4B) which omits the words without *reasonable excuse* *refuses* or fails and substitutes the word fails. The reference to the pecuniary penalty is updated to a penalty unit.

Item 11 inserts new subregulation 35(4C) to provide that the offence in subregulation 35(4B) is an offence of strict liability. New subregulation 35(4D) is inserted to contain the defence of reasonable excuse removed from subregulation 35(4B).