

## **Explanatory Statement**

### **Marine Order 4 (Transitional modifications) 2013 (Order 2013/3)**

#### **Authority**

1. Subsection 342(1) of the *Navigation Act 2012* (the *Act*) allows the Australian Maritime Safety Authority (*AMSA*) to make orders (known as Marine Orders) for any matter in the Act for which regulations may be made.
2. Subsection 343(2) of the Act provides that Marine Orders may provide for specified orders that were in force under the *Navigation Act 1912* (the *1912 Act*) immediately before its repeal to have effect with the modifications mentioned in the Marine Orders.
3. Marine Order 4 is made under subsection 342(1) of the Act and is a legislative instrument for the *Legislative Instruments Act 2003*.

#### **Purpose**

4. This Order modifies existing Marine Orders made under the 1912 Act so that they will be able to operate under the Act.

#### **Overview**

5. On 1 July 2013 the Act comes into force. It aims to ensure shipping and seafarer safety and protection of the marine environment. It provides AMSA with the necessary powers to enforce national and international standards. It is part of a wider maritime reform package introduced at a time when Australia's shipping traffic is predicted to double by 2025.
6. The Act replaces the 1912 Act and is a comprehensive rewrite of it in plain language, and with out-dated provisions removed. The Act reflects contemporary maritime industry practices and provides clarity to domestic and international seafarers, vessel owners and operators on their regulatory responsibilities.
7. The Act continues to give effect to Australia's obligations under international conventions covering such matters as safety at sea, training and certification of seafarers, prevention of collisions at sea and prevention of pollution from ships. A new function for the Act is to implement the International Labour Organization's Maritime Labour Convention 2006 which Australia has ratified and which comes into force internationally on 20 August 2013.
8. The Act envisages the continued operation of Marine Orders made under the 1912 Act, with any necessary modifications. This Order makes the modifications necessary for the existing Marine Orders to operate under the Act. Each schedule to this Order modifies an existing Marine Order.
9. Most Marine Orders made under the 1912 Act will continue in force under the Act. *Marine Orders Part 11 (Substandard ships)* will cease to have effect on 1 July 2013. To implement changes necessary to give effect to the Maritime Labour Convention, a new *Marine Order 11 (Living and working conditions on vessels) 2013* commences on 1 July 2013. This Marine Order combines the material formerly in *Marine Orders Part 10 (Medical first aid on ships)*, *Marine Orders Part 14 (Accommodation)* and *Marine Orders Part 53 (Employment of Crews)*. *Marine Orders Part 63 (AUSREP)* will be replaced on 1 July 2013 with *Marine Order 63 (MASTREP) 2013*.
10. *Marine Orders Part 61 (Safe working on board ships)* also ceases to have effect on 1 July 2013. The subject matter covered in *Marine Orders Part 61* will be regulated under the *Occupational Health and Safety (Maritime Industry) Act 1993*.

11. Some Marine Orders are made under both the 1912 Act and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. These Orders have been modified only to the extent that they are made under the 1912 Act. The affected Orders are *Marine Order 91 (Marine pollution prevention — oil) 2006*, *Marine Order 93 (Marine pollution prevention — noxious liquid substances) 2006*, *Marine Order 94 (Marine pollution prevention — packaged harmful substances) 2009*, *Marine Order 96 (Marine pollution prevention — sewage) 2009* and *Marine Order 97 (Marine pollution prevention — air pollution) 2007*.

12. *Marine Order 95 (Marine pollution prevention — garbage) 2013* and *Marine Orders Part 98 (Marine Pollution – anti-fouling systems)* are not modified as part of this process because they are not made under the 1912 Act. They are made under the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Protection of the Sea (Harmful Anti-fouling Systems) Act 2006*.

13. The aim of the modification process is to enable Marine Orders to continue to operate under the new regulatory framework. The changes made to the Marine Orders in the Schedules are of a minor, machinery nature, with some administrative changes in line with modern drafting practice. There are no policy changes under the modification process. In some cases new material has been introduced into Orders because it was provided in the 1912 Act but not replicated in the Act. The drafting of the Act envisaged in part that general principles would be outlined in the Act and that the Orders would include more detailed implementation provisions.

### Summary of changes

14. Some terms used in the 1912 Act have been replaced in the Act. This has necessitated some modifications to Marine Orders. For example:

1912 Act	2012 Act
ship	vessel
survey authority	recognised organisation
seaman	seafarer
surveyor	inspector

15. The modification process enables several improvements in drafting style that have been adopted in Orders made recently to be applied to all Orders being modified. This will bring a greater level of uniformity to the Orders as a whole. One improvement is the way Marine Orders are cited. Each Marine Order will state its title which will include the year in which it was made. Each Order will also have a number. The word ‘Part’ will no longer be used for Marine Orders modified by this Order. Other general textual improvements include:

- calling provisions in the modified version sections and subsections
- using the word ‘Schedule’ instead of ‘Appendix’
- replacing footnotes with notes at the foot of the provision itself.

16. Definition sections have been standardised. A number of definitions have been removed from the Orders either because they have been included in *Marine Order 1 (Administration) 2011* to apply to all Orders or because they have been defined in the Act. For some Orders, the definition section has been modified by simply omitting definitions no longer required or adding new ones. For others, it was more convenient to replace the entire definition section rather than making many individual modifications to the original section.

17. All references to sections of the 1912 Act have been updated with the appropriate references to sections in the Act. Some references to other Marine Orders are also changed because of the modification process. Title changes to the AMSA positions responsible for exercising certain powers are also modified to reflect changes in the organisation.

18. Application provisions in some Orders have been changed to reflect the application of appropriate parts of the Act. Some application provisions refer to foreign vessels. Foreign vessels are covered in some situations where the Commonwealth has power to do so. This was also the case under the 1912 Act.

19. Equivalents, exemptions and review provisions have been standardised to refer to the application processes set out in *Marine Order 1 (Administration) 2011*. This is in line with practices adopted in drafting Orders under the 1912 Act since 2011.

20. Some provisions have been omitted from the Orders because the matters dealt with in those provisions are now covered in the Act. Examples include inspection powers, decision making provisions and taking vessels to sea without specified certificates.

21. The Act provides for a number of certificates, for example safety certificates and pollution certificates. For each type of certificate, the Act empowers the prescribing of criteria for issue, variation and revocation. Marine Orders which deal with certificates have been modified to identify which type of certificate under the Act is applicable. In most cases the relevant criteria for issue, variation and revocation have been specified.

22. Under regulations made under the 1912 Act, offences against the regulations were identified as penal provisions in the Orders. Under the Act, offences may be created directly in the Orders. Offences are strict liability, as has been the case under the 1912 Act. They are now identified as such in the offences themselves. This is required because of the repeal of the *Navigation (Orders) Regulations 1980* which takes effect on the repeal of the 1912 Act. The Criminal Code provides that a law must state whether offences are strict liability. The Act introduces a system of civil penalties. Any conduct that is subject to a criminal penalty in a Marine Order now also gives rise to a civil penalty.

### **Incorporation by reference**

23. Marine Orders under the 1912 Act incorporated a number of requirements set out in international conventions, including the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Standards of Training, Certification and Watchkeeping (STCW) and the International Convention for the Prevention of Pollution from Ships (MARPOL). As the modification process involves no policy changes, convention requirements in Orders remain unchanged and no new convention requirements have been included. The only exceptions occur if the 1912 Act contained convention requirements that have not been included in the Act.

24. Also, as provided for by subsection 342(4) of the Act, some of the international Codes adopted by the IMO that are incorporated partially or wholly by Marine Orders are now defined as being 'in force from time to time'. This avoids the administrative cost and possible delay involved in amending a Marine Order to align a Code adopted by the Order with the latest IMO version of the Code each time the Code is amended. Although AMSA has the power under the Act to adopt by reference any document as in force from time to time, this Marine Order only adopts in this way international standards developed through the consultative IMO process. To ensure users have access to the latest version of these Codes, each IMO Resolution adopting or amending a Code referenced in a Marine Order will be made available on AMSA's website through a link located close to the link to the Order.

## **Consultation**

25. A copy of the draft of this instrument was circulated to over 350 stakeholders including industry organisations and interested government agencies. A list of these stakeholders may be obtained on request from AMSA. A copy of the draft was also placed on the AMSA website for public comment. Responses were received from 8 stakeholders. These responses were taken into account in finalising the Order.

26. The Office of Best Practice Regulation (OBPR) was consulted on the proposed Order. The OBPR considered that, because the Marine Order deals with matters of a minor or machinery nature, no further analysis (in the form of a Regulatory Impact Statement) was required. The OBPR reference number is 2012/14274.

## **Commencement**

27. The Order commences on 1 July 2013.

## **Contents of this instrument**

28. Section 1 states the name of the Order.

29. Section 2 states that the Order commences on 1 July 2013.

30. Section 3 continues in effect the Orders mentioned in the Schedules to the Order and modifies them.

31. Each Schedule modifies the Marine Order named in the Schedule heading.

32. Generally, the modifications make the changes described in paragraphs 14 to 24. Where the changes from the 1912 Act to the Act have required more substantive changes, these are described as follows.

### ***Marine Order 1 (Administration)***

33. Item 2 specifies the provisions in the Act that provide the powers to make the Order. Item 5 inserts some new definitions of terms that are used in other Marine Orders. It also prescribes recognised organisations for the Act. Recognised organisations are listed in Schedule 1 of *Marine Order 1 (Administration) 2011*. These recognised bodies were known as survey authorities under the 1912 Act. They are classification societies that provide survey and certification services for vessels.

34. Item 7 inserts three new Divisions into the Order. New Division 5 sets out the detail of the arrangements in the Act for vessels to opt-in to coverage under the Act. It also prescribes the matters about which AMSA must be satisfied to revoke an opt-in declaration. New Division 6 sets out an infringement notice scheme to be administered by AMSA. New Division 7 sets out transitional arrangements providing for the continuation of certificates issued under the *Navigation Act 1912* and other matters.

### ***Marine Orders Part 12, issue 3 (Construction — Subdivision and stability, machinery and electrical installations)***

35. Item 5 changes the definition of ‘Guidelines’ to a definition of ‘OSV Design and Construction Guidelines’ defined as in force from time to time. These are IMO Guidelines and this approach is consistent with the approach taken for the adoption of IMO developed Codes (see paragraph 24).

### ***Marine Orders Part 16, Issue 3 (Load lines)***

36. This Marine Order is changed to regulate matters relating to the implementation of the Load Lines Convention in Australia. This change is necessary because these matters were dealt with in the 1912 Act but are not included in the Act.

37. Item 8 sets out the criteria for the issue, variation and revocation of an Australian load line certificate for vessels to which the Load Lines Convention does not apply. For vessels to which the Load Lines Convention applies, item 12 sets out the criteria for the issue, variation and revocation of an international load line certificate and an international load line exemption certificate. Item 15 adds a new section to describe when a vessel is overloaded. A similar provision from the 1912 Act was not included in the Act.

***Marine Orders Part 18, Issue 4 (Measures to enhance maritime safety)***

38. Item 13 updates an offence provision to reflect the establishment of the Australian International Shipping Register by recent amendments of the *Australian Shipping Registration Act 1981*.

***Marine Orders Part 31, Issue 6 (Ship surveys and certification)***

39. The first subsection of the former application provision (section 4) is replaced by a provision consistent with that used in other modified orders. Division headings are added so that the basic structure of the Order is clearer to the reader.

40. A new section 4A prescribes certificates for subparagraph 15(1)(c)(i) of the Act (which characterises a vessel as a regulated Australian vessel by reference to the certificates in force for the vessel). A new section 13A is the standard provision being inserted into modified orders prescribing matters relating to the reporting of marine incidents under the Act.

41. As noted in the summary of changes in paragraph 14 of this Statement, references to ‘ship’ have in most cases been changed to ‘vessel’ following the change in terminology from the 1912 Act to the Act. An exception occurs in some of the forms in Schedule 1. This is because the forms relate to international Conventions which generally use the word ‘ship’ rather than ‘vessel’.

***Marine Order 32, Issue 3 (Cargo handling equipment)***

42. A new section 17A is inserted into this Marine Order. Section 94 of the Act makes it an offence to employ a seafarer to load or unload cargo where sufficient shore labour is available, or, where insufficient shore labour is available, seafarers may only be used in accordance with requirements prescribed by the regulations. New section 17A prescribes the requirements for using seafarers to unload vessels where there is insufficient shore labour available.

***Marine Orders Part 62, Issue 1 (Commonwealth ships)***

43. This Marine Order is modified to refer to Government vessels instead of to Commonwealth ships. This is in line with the new terminology of the Act. The modifications also omit the exemption in Appendix 1 to this Marine Order. This is because it is an administrative instrument and needs to be updated because of the new Act. The new exemption is made by AMSA under subsection 334(1) of the Act and exempts certain Government vessels from equivalent provisions of the Act and other Marine Orders. This exemption will be available on the AMSA website together with the Marine Order. Subsection 334(4) of the Act specifies that this exemption is not a legislative instrument.

***Marine Orders Part 91, Issue 5 (Marine pollution prevention — oil)***

44. Section 10 is redrafted to deal with prescription of matters for the Act relating to the reporting of alterations of vessels and marine incidents.

**Marine Orders Part 93, Issue 5 (Marine pollution prevention — noxious liquid substances)**

45. Section 10 is redrafted to deal with prescription of matters for the Act relating to the reporting of alterations of vessels and marine incidents.

**Marine Orders Part 96, Issue 2 (Marine pollution prevention — sewage)**

46. Section 10 is redrafted to deal with prescription of matters for the Act relating to the reporting of alterations of vessels and marine incidents.

**Marine Orders Part 97, Issue 1 (Marine pollution prevention — air pollution)**

47. Section 11 is redrafted to deal with prescription of matters for the Act relating to the reporting of alterations of vessels and marine incidents.

**Statement of compatibility with human rights**

48. This statement is made for subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the legislative instrument**

49. This instrument makes the necessary modifications so that Marine Orders originally made under the *Navigation Act 1912* (the **1912 Act**) can operate under the *Navigation Act 2012* (the **Act**) which comes into effect on 1 July 2013. The Act envisages the continued operation of Marine Orders made under the 1912 Act, with any necessary modifications. Each schedule to this Order modifies an existing Marine Order.

50. Most Marine Orders made under the 1912 Act will continue in force under the Act. Changes are generally of a minor or machinery nature. There are no changes to policy as part of the modification process.

**Summary of changes**

51. Some terms used in the 1912 Act have been replaced in the Act. This has required some modifications of Marine Orders. Also, several improvements in drafting style that have been adopted in Orders made recently have been applied to all Orders being modified. Definition sections have been standardised. Some definitions have been removed either because they have been included in *Marine Order 1 (Administration) 2011* to apply to all Orders or because they have been defined in the Act. All references to sections of the 1912 Act have been updated with the appropriate references to sections in the Act. Some references to other Marine Orders are also changed because of the modification process. Titles of AMSA positions responsible for exercising certain powers have been updated.

52. Application provisions in some Orders have been changed to reflect the application of appropriate parts of the Act. Some application provisions refer to foreign vessels. Foreign vessels are covered in some situations where the Commonwealth has power to do so. This was also the case under the 1912 Act.

53. Equivalents, exemptions and review provisions have been standardised to refer to the application processes set out in *Marine Order 1 (Administration) 2011*. This is in line with practices adopted in drafting Orders under the 1912 Act since 2011.

54. Some provisions have been omitted from the Orders because the matters dealt with in those provisions are now covered in the Act. Examples include inspection powers, decision making provisions and taking vessels to sea without specified certificates.

55. The Act provides for a number of certificates, for example safety certificates and pollution certificates. For each type of certificate, the Act provides for criteria for issue, variation and revocation to be prescribed. Modifications are made to Marine Orders which deal with certificates to identify which type of certificate under the Act is applicable. In most cases criteria for issue, variation and revocation have been specified.

56. Also, as provided for by subsection 342(4) of the Act, some of the international IMO Codes incorporated by Marine Orders are now defined as being ‘in force from time to time’. This avoids the administrative cost and possible delay involved in amending a Marine Order to align a Code adopted by the Order with the latest IMO version of the Code each time the Code is amended. To ensure users have access to the latest version of these Codes, each IMO Resolution adopting or amending a Code referenced in an Order will be made available on AMSA’s website through a link located close to the link to the Order.

### **Human rights implications**

57. Offences that were penal provision (strict liability) offences under the Marine Orders remain strict liability offences under the Orders as modified. Under the *Navigation (Orders) Regulations 1980* that will be repealed due to the repeal of the 1912 Act, offences against the regulations were identified as penal provisions in the Orders. Under the Act, offences may be created directly in the Orders and are now identified as such in the offences themselves. The Criminal Code provides that a law must state whether offences are strict liability. The Act introduces a system of civil penalties and provides for the imposition of civil penalties in the Orders. Conduct that is subject to a criminal penalty in a Marine Order now also gives rise to a civil penalty.

58. As strict liability offences allow for the imposition of criminal liability without the need to prove fault, strict liability offences limit the presumption of innocence in article 14(2) of the ICCPR. However, as a regulatory agency with responsibility for maritime safety, AMSA needs to be able to impose sanctions on behaviour that creates a risk to safety and the environment (and therefore the human rights of others), regardless of the intention of the offender. Recognising the lower level of proof required for a strict liability offence, the penalties are set relatively low in accordance with Commonwealth criminal law policy (and limited by s 341(1)(a) of the Act).

### **Assessment**

59. This instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

### **Making the instrument**

60. This instrument has been made by the Chief Executive Officer of the Australian Maritime Safety Authority, in accordance with subsection 49(4) of the *Australian Maritime Safety Authority Act 1990*.