

Explanatory Statement

Marine Order 54 (Coastal pilotage) 2014 (Order 2014/8)

Authority

1. Part 2 of Chapter 6 of the *Navigation Act 2012* (the *Navigation Act*) deals with pilotage. Sections 163, 164, 165 and 172 are in Part 2 of Chapter 6 of the Navigation Act.
2. Under section 163 of the Navigation Act the regulations may prescribe waters that are compulsory pilotage areas for Part 2 of Chapter 6.
3. Under section 164 of the Navigation Act the regulations may provide for the licensing of pilots and pilotage providers.
4. Under subsection 165(1) of the Navigation Act the regulations may provide for the operations of licensed pilots and pilotage. Under subsection 165(2) of the Navigation Act the regulations may provide for the duties of a licensed pilot and pilotage provider and the manner in which they discharge their duties.
5. Subsection 172(2) of the Navigation Act provides that an application for an exemption from the requirement to navigate with a pilot must contain the prescribed information.
6. Section 314 of the Navigation Act provides that the regulations may provide for matters relating to certificates.
7. Under subsection 339(1) of the Navigation Act the Governor-General may make regulations necessary or convenient for carrying out or giving effect to the Navigation Act.
8. Under subsection 342(1) of the Navigation Act the Australian Maritime Safety Authority (AMSA) may make orders for any matter in the Act for or in relation to which provision may be made by regulations.
9. Subsection 33(3) of the *Acts Interpretation Act 1901* provides that a power in an Act to make a legislative instrument includes the power to repeal or amend the instrument, subject to any conditions that apply to the initial power.
10. This Order was made under subsection 342(1) of the Navigation Act and is a legislative instrument for the *Legislative Instruments Act 2003*.

Purpose

11. This Order:

- (a) prescribes compulsory pilotage areas for the Navigation Act; and
- (b) provides for the licensing of coastal pilots and pilotage providers and their duties; and
- (c) provides for pilotage provider operations; and
- (d) prescribes information to be given with an application for exemption from the requirement to navigate with a pilot; and
- (e) provides for regulatory action that may be taken by the Australian Maritime Safety Authority (*AMSA*) against a pilot or pilotage provider; and
- (f) provides for the oversight by AMSA of pilotage training courses.

Overview

12. This Order improves the arrangements for the protection of vessel safety in coastal pilotage areas by improving the measures available to respond to breaches that have the potential to affect vessel safety and by clarifying requirements for coastal pilots and pilotage providers.

13. This Order gives effect to a review by AMSA undertaken during 2012-13 of the efficacy of the previous issue of Marine Order 54 (*Marine Order 54 (Coastal pilotage) 2011*) in delivering safety outcomes through improved compliance, enforcement and incentive strategies. This review was a recommendation of the expert panel report *The Delivery of Coastal Pilotage Services in the Great Barrier Reef and Torres Strait* released in October 2008 following a review by AMSA and the then Department of Infrastructure, Transport, Regional Development and Local Government of the delivery of coastal pilotage services. The recommended review was to commence 12 months after the current Order commenced on 1 July 2011.

14. Specific changes from the previous issue of the Order include:

- (a) prescribing duties of licensed pilots and licensed pilotage providers for related offences in the Navigation Act; and
- (b) requiring use of the UKCM system (under keel clearance management system) implemented by AMSA in certain compulsory pilotage areas by pilots on vessels with a draught of at least 8 m; and
- (c) clarifying the demerit points scheme for pilotage providers including providing for a 'sliding scale' of demerit points depending upon the severity and frequency of the breach of a licence condition; and
- (d) clarifying and simplifying the incident reporting requirements; and
- (e) removing the requirement for a pilotage provider to apply for annual review of their licence or for an approved pilotage training provider to apply for an annual review of their approval, and the need for related compliance audits by AMSA;
- (f) restructuring the Order for readability, including placing most definitions at the beginning of the Order and placing pilotage provider and pilot licence conditions together in Schedules.

Consultation

15. A copy of the draft of this Order was sent to 29 stakeholder organisations including recognised organisations, interested government agencies and all pilotage providers. A list of these stakeholders may be obtained on request from AMSA.

16. A copy of the draft was also placed on AMSA's website on 21 November 2013 for stakeholders to consider and provide written feedback by 31 January 2014. AMSA also met with each pilotage provider separately in December to discuss the draft Order and the review. Comments made at those meetings were taken into account when preparing the Order. Written comments were also received from one pilotage provider and these were also taken into account.

17. The Office of Best Practice Regulation (OBPR) was also consulted and considered that the Order will have machinery impacts and therefore no regulatory impact statement was required (OBPR Reference number 15073).

Documents incorporated by reference

18. This Order incorporates by reference a small number of provisions of the Seafarers' Training, Certification and Watchkeeping Code as adopted by resolution of the 2010 Conference of Parties to the STCW Convention (the **STCW Code**).

19. Copies of documents issued by the International Maritime Organization (**IMO**) such as the STCW Code are available on the IMO website or may also be purchased from:

International Maritime Organization (IMO)
4 Albert Embankment, London SE1 7SR
Phone +44(0)20 7735 7611
Fax +44(0)20 7587 3210
IMO website: <http://www.imo.org>

20. This Order also incorporates by reference:

- the *International Regulations for Preventing Collisions at Sea, 1972* (see Schedule 3, clause 2)
- AS/NZS 4869.1:2006 *Maritime Survivor Locating Systems (MSLC) - Operating on 121.5 MHz* (see Schedule 3, clause 4)
- AS/NZS 4869.2:2010 *Stand alone maritime survivor locating systems (MSLS) – Operating on frequencies other than 121.5 MHz* (see Schedule 3, clause 4)
- the National Standard for Commercial Vessels (see Schedule 5, clause 1)
- paragraph 5.1.6 of *Civil Aviation Order 20.11 (Emergency and life saving equipment and passenger control in emergencies)* (see Schedule 5, clause 4).

Commencement

21. This Order commenced on 1 July 2014.

Contents of this instrument

Division 1 General

22. Section 1 sets out the name of the Order.

23. Section 1A provides for the commencement of the Order.

24. Section 1B repeals the previous issue of this Order.

25. Section 2 sets out the purpose of the Order.

26. Section 3 sets out the powers in the Navigation Act that enable the Order to be made.

27. Section 4 sets out definitions of terms used in the Order.

28. Section 5 provides for interpretation of measurements of latitude and longitude.

29. Section 6 provides for the application of the Order by prescribing pilotage areas for subsection 162(2) of the Navigation Act.

30. Section 7 prescribes the waters that are compulsory pilotage areas for subsection 163(1) of the Navigation Act. As with the previous issue of the Order, one of these areas is the Torres Strait.

31. Section 8 prescribes the duties of a licensed pilot and licensed pilotage provider for subsection 169(1) of the Navigation Act so that related offences in the Navigation Act can operate (see sections 169 and 171 of the Navigation Act). Related offences are in sections 169 and 171 of the Navigation Act.

Division 2 Pilotage providers

32. Section 9 sets out the process for a person to apply to AMSA for a pilotage provider licence. AMSA may ask for additional information, and must undertake a compliance audit of the applicant.
33. Section 10 provides for AMSA to decide the application. Issue of a pilotage provider is taken to include approval of the applicant's safety management system. A decision under this section is a reviewable decision.
34. Section 11 provides for the form of a pilotage provider licence and the matters to be stated by a licence. If AMSA imposes any conditions on the licence, these must be stated.
35. Section 12 sets out the conditions to which a pilotage provider licence is subject. Some of these conditions are set out in Schedule 1.
36. Section 13 provides for the term of a pilotage provider licence. A licence has a maximum term of 5 years but a holder can apply for it to be renewed.
37. Section 14 deals with variation of a pilotage provider licence on AMSA's own initiative. If AMSA proposes to do this, it must give the pilotage provider notice and consider any written comments made by the pilotage provider.
38. Section 15 deals with variation of a pilotage provider licence on the application of the person holding it. AMSA may ask for additional information before deciding the application for variation.
39. Section 16 provides for the holder of a pilotage provider licence to apply to AMSA for renewal of the licence.
40. Section 17 provides for AMSA to decide an application for renewal of a pilotage provider licence. Criteria for renewal are set out in the section, and include that a satisfactory compliance audit has been conducted.
41. Section 18 provides for the surrender of a pilotage provider licence to AMSA.
42. Section 19 provides for a pilotage provider licence to be returned no later than 14 days after the person ceases to be a licensed pilotage provider.
43. Section 20 sets out when AMSA or an approved auditor on behalf of AMSA, may conduct a compliance audit of a person.
44. Section 21 provides for approval by AMSA of persons to conduct audits on behalf of AMSA.
45. Section 22 sets out the purposes for which a compliance audit may be conducted. An audit may be conducted to substantiate information given to AMSA or to help AMSA decide whether the person has complied with the Act or the conditions of a persons' licence or proposed licence, or to review all aspects of a persons' systems that are relevant to the Order.
46. Section 23 provides that a person who is subject to a compliance audit must comply with the reasonable requirements of the auditor.
47. Section 24 provides that the compliance audit arrangements do not prevent AMSA from inquiring into the activities of a pilotage provider and that a pilotage provider must respond to any request made by AMSA for that purpose.
48. Section 25 sets out the grounds for regulatory action that may be taken by AMSA against a person who holds a pilotage provider licence. Regulatory action may be taken if, for example, the person gives false or misleading information in a licence application, or contravenes the Act or the Order.

49. Section 26 sets out the kinds of regulatory action that may be taken. This ranges from reprimanding a person to cancelling their licence and disqualifying them from applying for another one.

50. Section 27 provides for AMSA to take regulatory action. AMSA must first give a person written notice of proposed regulatory action and consider any response received from the person. AMSA must be satisfied that the action is in the public interest when considering any contravention of any other law of the Commonwealth or a State or Territory. AMSA must give written notice to the person of its decision. A decision to take regulatory action is a reviewable decision.

51. Section 28 provides for AMSA to be able to immediately suspend a pilotage provider licence if AMSA reasonably considers there is a ground for regulatory action and it is in the public interest to do so before a decision is made to take regulatory action on the regulatory ground. However, if AMSA does give an immediate suspension notice it must as soon as practicable afterwards, give the person a regulatory action notice or tell the person that a regulatory action notice will not be given.

52. Section 29 provides that a pilotage provider cannot undertake any activity authorised by the pilotage provider licence the provider holds during its suspension.

53. Section 30 provides that AMSA may take regulatory action against a pilotage provider for a regulatory incident if the pilotage provider has incurred at least 40 demerit points in a compliance period. However, AMSA may take regulatory action beforehand if it is satisfied there is a ground for regulatory action. There is now no automatic suspension if a pilotage provider incurs 40 demerit points in that period. AMSA may now choose what regulatory action is appropriate to take against the person.

Division 3 Demerit points and register

54. Section 31 provides for a demerit points system for pilotage providers, allocating demerit points for certain infringements of licence conditions in Schedule 1 that are mentioned in the table to the section. Demerit points count for similar infringements for 1 year after they are incurred.

55. The demerit points system and related register was in the previous issue of the Order and is not new to pilotage providers. However, the demerit table has been revised so that there is a sliding scale of demerit points based on the severity and frequency of infringements.

56. Section 32 provides for the recording of demerit points by AMSA in the demerit points register and for AMSA to notify the pilotage provider.

57. Section 33 provides that demerit points are taken to have been incurred on the day AMSA records them in the register.

58. Section 34 provides for the clearing of demerit points incurred by a pilotage provider. Demerit points are now to be cleared 12 months after they are deemed to be incurred rather than at the end of a compliance period. Demerit points taken into account for a licence suspension are to be cleared on suspension.

59. Section 35 provides that AMSA may take regulatory action against a pilotage provider if the provider has incurred at least 40 demerit points within 12 months. When considering what regulatory action to take, AMSA must take specified matters into account, such as the need to protect public safety and the regularity and seriousness of the relevant regulatory incidents.

60. Section 36 sets out the matters that must be stated in a suspension notice or in an immediate suspension notice that is given to a pilotage provider because the pilotage provider has incurred the maximum demerit points permitted.

61. Section 37 provides for AMSA to keep a demerit points register. This register is not a public register and will not be made available for public inspection. AMSA may disclose information kept on the register about demerit points incurred by a pilotage provider to the pilotage provider on request by the pilotage provider.

62. Section 38 provides for AMSA to correct the register if required.

Division 4 Fatigue risk management plan

63. It is a condition of a pilotage provider licence that the pilotage provider ensure that each pilot contracted or employed by the pilotage provider complies with either a fatigue management plan approved by AMSA or the default fatigue management plan published by AMSA (see licence condition 2 in Schedule 1 of the Order).

64. Section 39 provides for a pilotage provider to apply to AMSA for approval of a fatigue risk management plan.

65. Section 40 provides for a pilotage provider to apply to AMSA for approval to vary the pilotage provider's approved fatigue risk management plan.

Division 5 Safety management system

66. It is a condition of a pilotage provider licence that the provider has a safety management system (see licence condition 3 of Schedule 1 of the Order). The proposed safety management system of a pilotage provider must be included in an application for a pilotage provider's licence. A system is approved by AMSA when AMSA issues the licence.

67. Section 41 provides for a pilotage provider to apply to AMSA to vary the licence of the pilotage provider in order to vary the pilotage provider's safety management system.

68. Section 42 sets out the duties of the designated person for a pilotage provider's safety management system (licence condition 4 in Schedule 1 of the Order requires a pilotage provider to designate such a person).

69. Section 43 sets out mandatory requirements for a safety management system in relation to the matters that it must describe and the information that it must include.

70. Section 44 requires a safety management system to include requirements that ensure pilots contracted or employed by the pilotage provider understand the system and can undertake pilotages in accordance with the Order.

71. Section 45 requires a pilotage provider, when implementing a safety management system, to ensure that its pilots are trained to identify and minimise risks associated with their duties and comply with applicable legislation.

Division 6 Licensed pilots

72. Section 46 defines *pilot licence* as a licence of a class mentioned in the section.

73. Section 47 sets out the process for a person to apply to AMSA for a pilot licence. AMSA may ask for additional information.

74. Section 48 provides for AMSA to decide the application. If AMSA does not issue a pilot licence to the applicant within 30 days after receipt of the application, it is taken to have refused to issue the licence. Criteria for issue are set out in Subdivision 6.4. A decision under section 48 is a reviewable decision.

75. Section 49 provides for the form of a pilot licence and the matters to be stated by a licence. If AMSA imposes any conditions on the licence, these must be stated.
76. Section 50 sets out the conditions to which a pilot licence is subject. Most of these conditions are set out in Schedule 3 and some may be in Schedule 4 (for check pilot licences).
77. Section 51 provides for the term of a pilot licence. A licence has a maximum term of 2 years but a holder can apply for it to be renewed.
78. Section 52 deals with variation of a pilot licence. A pilot licence may only be varied on AMSA's own initiative. If AMSA proposes to do this, then unless the licensee agrees in writing to the variation AMSA must give the licensee notice of the proposed variation, give the licensee 30 days to comment and consider any comments provided.
79. Section 53 provides for the holder of a pilot licence to apply to AMSA for renewal of the licence.
80. Section 54 provides for AMSA to decide an application for renewal of a pilot licence. Criteria for renewal are set out in section 61.
81. Section 56 sets out the criteria for the issue of a training pilot licence. The requirement include medical suitability and adequate qualifying sea service.
82. Section 57 sets out the criteria for the issue of a restricted pilot licence. These requirements include that the person holds a trainee pilot licence, completes a competency assessment, medical suitability and fatigue management training.
83. Section 58 sets out the draught limits, and the required number of transits to proceed through the draught limit increments, for a restricted pilot licence.
84. Section 59 sets out the criteria for issue of an unrestricted pilot licence. These include a specified number of transits through particular pilotage areas.
85. Section 60 sets out the criteria for issue of a check pilot licence, including completion of a specified number of specified transits.
86. Section 61 sets out the criteria for renewal of a pilot licence, including the completion of a specified number of specified transits.
87. Section 62 sets out the grounds for regulatory action that may be taken by AMSA against a licensed pilot if the pilot gives false or misleading information in an application for a licence or licence renewal, contravenes the Act or the Order or contravenes other laws.
88. Section 63 sets out the kinds of regulatory action that may be taken. This ranges from reprimanding a person to cancelling their licence and disqualifying them from applying for another one.
89. Section 64 provides for AMSA to give a person written notice of proposed regulatory action and consider any response received from the person. AMSA must be satisfied that a ground for regulatory action has been established before taking the regulatory action.
90. Section 65 provides for emergency regulatory action to be taken by AMSA against a pilot if a pilot collides with another vessel, or runs aground. AMSA must suspend the pilot licence for 7 days while the pilot's conduct in relation to the incident is further investigated.
91. Section 66 provides that if a licence is suspended the pilot cannot carry on any activity it authorises.

92. Section 67 provides for licence conditions on check pilot licenses (check pilot licence conditions are set out in Schedule 4).
93. Section 68 makes clear that a check pilot voyage counts as a transit of the pilotage area for both the pilot and the check pilot.
94. Section 69 makes clear that during a check pilot voyage the pilot (and not the check pilot) is responsible for the conduct of the voyage.
95. Section 70 provides for assessment reviews by AMSA following an unsatisfactory finding for a pilot on a check pilot voyage.

Section 71 provides for AMSA to be able to ensure consistency in assessments by being able to be present during the conduct of assessments by check pilots, to review conducted assessments or undertake competency assessments.

Division 8 Approved pilotage training courses

96. Section 72 sets out the process for a person to apply to AMSA for approval to provide a pilotage training course for a stated pilotage areas. AMSA may ask for additional information.
97. Section 73 provides for AMSA to decide the application. If AMSA does not approve the application within 90 days after receiving it, AMSA it is taken to have refused to approve the provision of the training course.
98. Section 74 provides for the form of the approval and the matters to be stated in the approval. If AMSA imposes any conditions on the approval, these must be stated.
99. Section 75 provides for the term of a pilotage training course approval. The maximum approval term is 4 years but the holder can apply for it to be renewed.
100. Section 76 sets out the process for a person to apply to AMSA for renewal of an approval to provide a pilotage training course. AMSA must conduct a training course audit of the applicant before deciding the application.
101. Section 77 provides for AMSA to decide the application, including criteria for renewal. These criteria include a satisfactory training course audit. If AMSA does not renew the approval within 90 days of receiving the application, it is taken to have refused to renew the approval.
102. Section 78 provides for audits of persons who apply for approval, or for renewal of an approval, to provide a pilotage training course. A training course audit may also be conducted if AMSA determines that an audit is necessary. AMSA, or an approved auditor on behalf of AMSA, may conduct the audit.
103. Section 79 sets out the reasons for an audit to be conducted. An audit may review all aspects of a training course that are relevant to the Order.
104. Section 80 ensures that persons who are audited have to comply with the reasonable requirements of the auditor.
105. Section 81 provides that the training course audit arrangements do not prevent AMSA from inquiring into the activities of a pilotage training provider and that the provider must respond to any request made by AMSA for that purpose.

Division 9 Administration of Order

106. Section 82 prescribes the information to be provided with an application for exemption from the requirement to navigate with a pilot.
107. Section 83 provides for the review of decisions made under the Order. Reviewable decisions are set out in Schedule 6. These decisions are reviewable under

Marine Order 1 (Administration) 2013 which provides for internal review of decisions by AMSA and external review by the Administrative Appeals Tribunal.

108. Section 84 provides a power for AMSA to extend any time limit for doing something under this Order if a person applies to AMSA for an extension of time, whether or not the time limit has passed.

Division 10 Transitional provisions

109. Section 85 provides for pilotage provider licences that were issued under the previous issue of this Order and that were in force just before this Order commences to be taken to have been issued under this Order. This enables AMSA to take regulatory action if required or to renew the licence etc.

110. Section 86 provides for pilot licences issued under the previous issue of the Order that were in force before commencement of this Order to be taken to have been issued under this Order. This enables AMSA to take regulatory action if required or to renew the licence etc.

111. Section 87 provides that a person approved to provide training under the previous issue of this Order is taken to be approved under this issue. This allows AMSA to conduct any necessary training course audits or renew the training course approval.

112. Section 88 provides for pilotage providers' fatigue risk management plans that have been approved under the previous issue of this Order to be taken to have been approved under this Order. This is so AMSA can deal with them in the same way that it can deal with a plan approved under this Order.

Schedules

113. Schedule 1 lists the conditions to which all pilotage provider licences are subject.

114. Schedule 2 lists the demerit infringements for which a pilotage provider may incur demerit points.

115. Schedule 3 lists conditions to which all pilot licenses are subject.

116. Schedule 4 lists some further conditions on all check pilot licences.

117. Schedule 5 sets out pilot transfer requirements including requirements for pilot launches and their equipment, for pilots and crew members working on pilot launches, and for transfers by helicopter.

118. Schedule 6 sets out the decisions made under the Order that are reviewable decisions.

Compatibility with human rights

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

Overview of the legislative instrument

120. This Order is the result of a review undertaken by AMSA during 2012-13 of the efficacy of *Marine Order 54 (Coastal pilotage) 2011* in delivering safety outcomes through improved compliance, enforcement and incentive strategies. This review was a recommendation of the expert panel report *The Delivery of Coastal Pilotage Services in the Great Barrier Reef and Torres Strait* released in October 2008.

121. The Order:

- prescribes compulsory pilotage areas for the Navigation Act

- provides for the licensing of coastal pilots and pilotage providers and their duties
- provides for pilotage provider operations
- prescribes information to be given with an application for exemption from the requirement to navigate with a pilot
- requires the use of the UKCM system implemented by AMSA in certain compulsory pilotage areas by vessels with a certain draught
- provides for regulatory action that may be taken against a pilot or pilotage provider
- provides for the oversight by AMSA of the provision of pilotage training courses.

Human rights implications

122. This Order engages the right to work of coastal pilots and pilotage providers by providing for their licencing by AMSA. However, this is considered necessary to ensure that only competent and qualified pilots may assist a vessel's master to navigate vessels within compulsory pilotage areas. This ensures the safety of vessels and their passengers within waters that are potentially hazardous to navigation.

123. Similarly, this Order engages the right to work of providers of pilotage training courses because AMSA must approve the provision of pilotage training courses by them. Again, this is considered necessary to ensure that only competent and qualified pilots can work with vessel masters to ensure the safe passage of vessels.

124. Also, this Order provides that AMSA may take regulatory action such as suspension or cancellation of a pilot or pilotage provider's licence. However, these powers may only be used if there is a specified ground for regulatory action and AMSA has provided proper notice of any action and allowed a written response. Any regulatory action taken is also reviewable.

125. This Order also engages the right to privacy. AMSA may notify certain information that it holds about a pilot to a pilotage provider that employs the pilot, eg details of any regulatory action taken by AMSA against the pilot such as licence suspension. This is a condition of every pilot licence. It is needed to ensure the safety of piloted vessels and persons on board those vessels by ensuring vessels are piloted by competent pilots within compulsory pilotage areas.

126. AMSA may also keep a register of demerit points allocated to a pilotage provider which may also include other licence information given to AMSA. However, this register will not be made available for public inspection.

Conclusion

127. This legislative 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

128. 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 Authority Act 1990*.