

Explanatory Statement

Marine Order 33 (Cargo and cargo handling — grain) 2016 (Order 2016/4)

Authority

1. Subsection 112(4) of the *Navigation Act 2012* (the Navigation Act) provides that the regulations may provide for the carriage of cargo on a vessel.
2. Subsection 112(5) of the Navigation Act provides that the regulations may provide for the loading, stowing or carriage of cargo in vessels, the unloading of cargo from vessels, and the giving of notices for the loading or unloading, stowage or carriage, of cargo in vessels.
3. Paragraph 340(1)(a) of the Navigation Act provides that the regulations may provide for giving effect to the International Convention for the Safety of Life at Sea (SOLAS).
4. Paragraph 341(1) of the Navigation Act provides that the regulations may provide for the imposition of penalties for contravention of provisions of the regulations including the imposition of civil penalties.
5. Paragraph 342(4)(b) of the Navigation Act provides that a Marine Order may provide for a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other document as in force or existing from time to time.
6. Subsection 339(1) of the Navigation Act authorises the Governor-General to make regulations necessary or convenient for carrying out or giving effect to the Navigation Act.
7. Subsection 342(1) of the Navigation Act allows the Australian Maritime Safety Authority (AMSA) to make orders for any matter in the Act for or in relation to which provision may be made by regulations.
8. 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.
9. This Order was made under subsection 342(1) of the Navigation Act and is a legislative instrument for the *Legislation Act 2003*.

Purpose

10. This Order gives effect to the general requirements for the carriage of grain in vessels set out in Part C of Chapter VI of SOLAS and the detailed requirements for its carriage that are set out in the International Code for the Safe Carriage of Grain in Bulk (the International Grain Code). The Order also gives effect to the Code of Practice for the Safe Loading and Unloading of Bulk Carries (the BLU Code) and provides for the loading, unloading, stowage and carriage of grain in vessels.

Overview

11. This Order applies to the loading, unloading, stowage and carriage of grain in bulk on regulated Australian vessels, and on foreign vessels that are in Australian ports and other specified geographical areas. The Order requires the loading, trimming, carriage and unloading of grain in bulk to comply with Part C of Chapter VI of SOLAS, the International Grain Code, the BLU Code and the Order.
12. Under the Order, a cargo ship carrying grain must comply with the International Grain Code. This is a SOLAS requirement (see Regulation 9 of Part C of Chapter VI).

The Order, unlike the previous issue of the Order, also requires vessels carrying grain in bulk to comply with the BLU Code. The International Maritime Organization (IMO) has urged Governments to implement the BLU Code (see IMO Resolution A.862(2)). The BLU Code was amended by IMO Resolution MSC.238 (82) to apply to ships carrying grain.

13. The Order provides that loading of a vessel with grain in bulk may only occur if a plan for loading that complies with the BLU Code has been agreed between the master of the vessel and the representative of the terminal where the loading is to occur. Similarly, it provides that unloading of grain in bulk from a vessel may only occur if there is an agreed plan for unloading. The loading and unloading operations must comply with the relevant agreed plan.

14. The Order also enables a person to apply to AMSA for an exemption, including a sheltered water exemption, of a vessel from a requirement of the Order. A person may also apply to AMSA for approval to use an equivalent to a requirement of the Order.

15. Regulation 4 of Chapter VI of SOLAS requires appropriate precautions to be taken in the use of pesticides in ships, in particular for the purposes of fumigation. The Order requires notices to be given to AMSA of the intention to load, discharge or partially discharge grain. It includes requirements for in transit fumigation including new notice requirements. Finally, the Order provides for the continued use of previously approved equivalents.

16. The Order replaces *Marine Order 33 (Cargo and cargo handling — grain) 2005* following a review of the Order as part of AMSA's ongoing review of instruments. The structure of the Order has been changed and current legislative drafting style applied. The content of the notice of intention to load grain and of the notice of partial discharge of grain is no longer included in the Order as the Order provides for these notices to be given in the approved form. Schedule 1 of the previous Order has not been replicated in this Order as its content may be imposed as conditions on a sheltered water exemption for voyages between the Spencer Gulf ports.

17. When the Order commences, Schedule 18 of *Marine Order 4 (Transitional modifications) 2013* will cease to have effect because that schedule modifies the previous issue of this Order.

Consultation

18. An early draft of this Order was originally placed on AMSA's website on 8 February 2012 for stakeholders to consider and provide feedback by 8 March 2012. In addition, a copy of the draft Order was emailed to industry stakeholders for comment. Only 3 responses were received and they were to the effect that they had no comment on the draft. Work on this Order was then delayed due to other AMSA priorities and recommenced in 2015.

19. A further draft of the Order was placed on AMSA's website on 6 November 2015 for stakeholders to consider and provide feedback by 4 December 2015. It was also emailed to some 33 stakeholders, including freight bodies, grain exporters, marine surveyors and government agencies. Two submissions were received which were considered when the final draft was prepared.

20. The Office of Best Practice Regulation (OBPR) was also consulted and considered that changes made by the Order have regulatory impacts of a minor or machinery nature and no regulation impact statement was required. The OBPR reference number is 13424.

Documents incorporated by reference

21. This Order incorporates the following documents by reference:

- the *International Code for the Safe Carriage of Grain in Bulk* set out in the Annex to IMO Resolution MSC.23(59), as in force from time to time (the International Grain Code)
- Part C of Chapter VI of SOLAS
- the *Code of Practice for the Safe Loading and Unloading of Bulk Carriers* set out in the Annex to IMO Resolution A.862(20), as in force from time to time (the BLU Code)
- the IMO's *Recommendations on the safe use of pesticides in ships applicable to the fumigation of cargo holds* set out in the Annex to IMO MSC.1/Circ.1264, as amended from time to time

22. A copy of each IMO resolution that adopts or amends the International Grain Code is available on AMSA's website at <http://www.amsa.gov.au>. The supplement to the IMO publication *IMSBC Code (International Maritime Solid Bulk Cargoes Code)*, 2013 edition includes the BLU Code. See also the publication *BLU Code (Code of Practice of the Safe Loading and Unloading of Bulk Carriers) including BLU Manual*, 2011 edition.

23. A copy of documents issued by the IMO and mentioned in the Order are available for free download from the IMO website at <http://www.imo.org> or may be purchased as a consolidated publication from:

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

24. Information on purchasing or obtaining access to IMO documents mentioned in this Order is also available on the Marine Orders link on the AMSA website at <http://www.amsa.gov.au>, where AMSA also provides information on how to navigate the IMO website to download the documents.

25. SOLAS is of treaty status and is incorporated as amended and in force from time to time for Australia (see definition in *Marine Order 1 (Administration) 2013* that is noted in the Order). The original convention and any amendments in force can also be found in the Australian Treaties Series accessible from the Australian Treaties Library on the AustLII website at <http://www.austlii.edu.au>.

Commencement

26. This Order commenced on 1 May 2016.

Contents of this instrument

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

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

29. Section 1B repeals the previous issue of the Order.

30. Section 2 states the purpose of the Order, which is to give effect to Part C of Chapter VI of SOLAS that deals with the carriage of grain in vessels, the International Grain Code and the BLU Code, and to provide for the loading, unloading, stowage and carriage of grain in vessels.

31. Section 3 sets out the powers in the Navigation Act that enable the Order to be made.
32. Section 4 sets out definitions of terms used in the Order.
33. Section 5 sets out some rules of interpretation for the Order.
34. Section 5 describes the application of the Order to regulated Australian vessels and foreign vessels. The Order does not apply to a vessel taking on board or carrying grain wholly in bags, or in bulk wholly in freight containers.
35. Division 2 is about exemptions and equivalents.
36. Section 7 provides a process for applications for an exemption, including a sheltered water exemption, of a vessel from a requirement of the Order. ***Sheltered water exemption*** is defined in section 4 of the Order. An exemption may only be given if AMSA is satisfied that compliance with the requirement would be unnecessary or unreasonable, giving the exemption would not contravene SOLAS or the International Grain Code and, for an exemption permitted by the International Grain Code, the vessel is a regulated Australian vessel.
37. Section 8 provides for applications for approval to use an equivalent to a requirement of the Order. Approval may only be given if AMSA is satisfied that use of the equivalent would be at least as effective as compliance with the requirement to which the equivalent is an alternative and approving use of the equivalent would not contravene SOLAS or the International Grain Code.
38. Division 3 is about the loading and unloading etc of grain in bulk.
39. Section 9 requires grain in bulk to be loaded, trimmed and carried on a vessel and unloaded from a vessel in accordance with Part C of Chapter VI of SOLAS, the International Grain Code, the BLU Code and the Order. Related requirements apply to the master, terminal operators and terminal representatives. Documents necessary to demonstrate compliance with this requirement must be carried on the vessel and made available to inspectors on request.
40. Section 10 requires the master of a vessel to demonstrate its compliance with the stability requirements of the International Grain Code if required by AMSA. However, if a sheltered water exemption applies to the vessel the master can demonstrate that it complies with the stability requirements of the exemption.
41. Section 11 provides that grain in bulk may be loaded onto a vessel only if the master of the vessel and the terminal representative have agreed on a plan for loading that complies with the BLU Code. The section requires the plan to be lodged with the terminal representative and a copy kept on the vessel. The plan must be made available for inspection by an AMSA inspector on request. The section also provides similar requirements for the unloading of grain in bulk.
42. Section 12 provides for the master and the terminal representative to ensure the loading and unloading of grain in bulk is in accordance with the agreed plan. Provision is made for the suspension of loading or unloading if a limit mentioned in the plan is or is likely to be exceeded.
43. Division 4 is about notices of intention to load or discharge grain.
44. Section 13 provides that the master of a vessel must ensure that notice of intention to load grain is given to AMSA in the approved form at least 72 hours before any intended loading of grain in bulk on a vessel. It also requires the master to provide revised information if the information provided changes, or further information about the stability calculation for the intended loading of grain in bulk if requested by an AMSA inspector.

45. Section 14 provides that the master of a vessel cannot permit grain to be loaded on a vessel if the required notice or requested stability calculation information has not been given, if a required inspection has not occurred or, if an inspection has occurred, the inspector has not given approval after the inspection for the grain to be loaded.

46. Section 15 provides that the master of a vessel must ensure that notice of the intention to partially discharge grain is given to AMSA in the approved form at least 24 hours before the anticipated time of arrival at port. The section also provides the master must provide to AMSA revised information if there is significant change to the information provided in the notice, and further stability calculation information if requested by an inspector.

47. Section 16 provides that the master of a vessel cannot take the vessel to sea following partial discharge of grain if the required notice or requested stability calculation information has not been given, if a required inspection has not occurred or if the inspector has not given approval after an inspection for the vessel to go to sea.

48. Division 5 sets out fumigation requirements.

49. Section 17 provides for notice to be given to AMSA of the intended fumigation of cargo holds in port. It sets out the information that is to be given to AMSA in writing.

50. Section 18 sets out requirements for fumigation before grain loading. Any required fumigation must be conducted in accordance with the IMO's *Recommendations on the safe use of pesticides in ships applicable to the fumigation of cargo holds*.

51. Section 19 requires the agent of a vessel that carries, or is to carry, grain in bulk to notify AMSA of the intention to conduct in transit fumigation at least 72 hours before the intended fumigation. Notice is to be given in the approved form. AMSA may also request the master of a vessel without an agent to give the notice.

52. Section 20 provides for notice of in transit fumigation that is being conducted on a voyage to be given to AMSA at least 72 hours before the vessel arrives at an Australian port. This notice is also to be given in the approved form.

53. Section 21 sets out requirements for in transit fumigation. Only approved fumigants may be used. An approved fumigant is a fumigant approved in writing by the Australian Pesticides and Veterinary Medicines Authority. If transit fumigation is carried out, it must be conducted in accordance with the IMO's *Recommendations on the safe use of pesticides in ships applicable to the fumigation of cargo holds*.

54. Section 22 is the only provision in Division 6 (Transitional). It ensures the continuance of approvals given under the previous issue of the Order for use of an equivalent that is in use on a vessel on 30 April 2016.

Statement of compatibility with human rights

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

Overview of the legislative instrument

56. This Order gives effect to Part C of Chapter VI of the International Convention for the Safety of Life at Sea (SOLAS) dealing with the carriage of grain in ships and generally provides for the loading, stowing and carriage of grain in vessels. This Order, unlike the previous Order, requires vessels carrying grain in bulk to comply with the *Code of practice of the safe loading and unloading of bulk carriers* (the BLU Code). This is consistent with urging by the International Maritime Organisation (IMO) for governments to implement this Code (see IMO Resolution A.862(2)). The

BLU Code was amended under IMO Resolution MSC.238 (82) to apply to vessels carrying grain.

57. The Order requires that there be agreed plans for the loading and unloading of grain in bulk and that loading and unloading be conducted in accordance with these plans. These are new requirements that implement the BLU Code.

58. The Order also enables a person to apply to AMSA for an exemption, including a sheltered water exemption, of a vessel from a requirement of the Order. A person may also apply to AMSA for approval to use an equivalent to a requirement of the Order. The Order includes requirements for notices to be given to AMSA of the intention to load, discharge or partially discharge grain. It also includes requirements for in transit fumigation including new notice requirements. Finally, the Order provides for the continued use of previously approved equivalents.

Human rights implications

59. Sections 9, 10, 11, 12, 14, 16, 18 and 21 of the Order create offences to which strict liability applies. They also create civil penalties. Strict liability offences may engage and limit the presumption of innocence mentioned in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Civil penalty provisions may engage the criminal process provisions under Articles 14 and 15 of the ICCPR.

60. Strict liability is imposed to protect life at sea and, for those relating to in transit fumigation, to protect the safety of those on land who are involved in the discharge of grain that has been fumigated. The offences that ensure compliance with the BLU Code, including compliance with agreed plans for the loading and unloading of grain in bulk, are necessary for maritime safety. As the IMO noted in IMO Resolution A.862 (20) in which it adopted the BLU Code, a number of accidents have occurred as a result of improper loading and unloading of bulk carriers and following safe loading and unloading practices can prevent such accidents occurring.

61. The penalties for these offences are relatively low (50 penalty units) and are within the limitation imposed by paragraph 341(1)(a) of the Navigation Act. The civil penalty provisions are directed at seafarers and terminal representatives and operators rather than the community at large and are regulatory in nature. The civil penalty provisions are authorised by paragraph 341(1)(b) of the Navigation Act. Having regard to the objectives of the civil penalty provisions (which are protective, preventative, disciplinary or regulatory in nature), and the relatively low level of penalty, the civil penalties should not be considered to be criminal matters for human rights law.

62. It is considered any limitation on human rights as a result of the imposition of strict liability and the creation of civil penalties is reasonable, necessary and proportionate for achieving the objectives of saving lives at sea and on shore.

Conclusion

63. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Making the instrument

64. 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*.