

Explanatory Statement

Marine Order 53 (Vessels in polar waters) 2016 (Order 2016/21)

Authority

1. Section 98 of the *Navigation Act 2012* (the Navigation Act) provides that the regulations may provide for safety certificates including giving effect to the *International Convention for the Safety of Life at Sea 1974* (SOLAS).
2. Subsection 314 of the Navigation Act provides that regulations may provide for particular matters relating to certificates.
3. 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.
4. Paragraph 339(2) of the Navigation Act provides that the regulations may provide for matters including the design and construction of vessels, the machinery and equipment to be carried on board vessels and the maintenance, testing, survey and certification of vessels.
5. Paragraph 340(1)(a) of the Navigation Act provides that the regulations may give effect to SOLAS.
6. Subsection 341(1) of the Navigation Act provides for the imposition of penalties in regulations.
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 342(4) provides that a Marine Order may provide for a matter by applying, adopting or incorporating, with or without modification, any matter contained in a document as in force or existing at a particular time or from time to time.
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 is a legislative instrument for the *Legislation Act 2003*.

Purpose

11. This Order sets out certification requirements for vessels that undertake voyages in polar waters. It also sets out arrangements for the safe operation of vessels in polar waters.

Overview

12. The Navigation Act implements Australia's obligations under SOLAS. The Polar Code is a mandatory code under Chapter XIV of SOLAS and sets out requirements for the design, construction, equipment, operation, training, search and rescue and environmental protection matters for vessels operating in polar waters. This Order gives effect to the Polar Code excluding environment protection related requirements.

Consultation

13. A copy of the draft of this Order was placed on the AMSA website for public comment for 4 weeks. Over 80 stakeholders, including recognised organisations, shipping industry peak bodies, training organisations, unions, and interested

government departments and agencies, were invited to participate in the consultation process.

14. The Office of Best Practice Regulation (OBPR) was also consulted and considered that the requirements of this new Order have regulatory impacts of a minor or machinery nature and no regulation impact statement was required. The OBPR reference number is 19685.

Documents incorporated by reference

15. This Order incorporates by reference parts of the following documents as in force from time to time:

- *Marine Order 1 (Administration) 2013*;
- the Polar Code;
- SOLAS.

16. *Marine Order 1 (Administration) 2013* is adopted as in force from time to time due to the operation of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) and is available for free from the Federal Register of Legislation.

17. The Polar Code and SOLAS are available for free from the Australian Treaties Database at <http://www.info.dfat.gov.au/treaties>.

18. Information on obtaining copies of any International Maritime Organization (IMO) Resolution, IMO document or other document that is mentioned in this Order is available from the Marine Order link at <http://www.amsa.gov.au>.

19. IMO published material may also be purchased 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>

Commencement

20. The Order commenced on 1 January 2017.

Contents of this instrument

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

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

23. Section 2 states the purpose of the Order, which is to give effect to the Polar Code other than Chapter 12 of Part I-A and Part II-A.

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

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

26. Section 5 sets out matters that assist with the interpretation of the Order.

27. Section 6 states the application of the Order for a regulated Australian vessel, foreign vessel and vessel owned or operated by the Commonwealth.

28. Section 7 provides for the approval by AMSA of a design or arrangement as an alternative to complying with a requirement of Chapters 3, 6, 7 or 8 of the Polar Code.

29. Section 8 enables an issuing body (AMSA or a recognised organisation) to issue an approval for a material, equipment, appendage or arrangement that is required by the Polar Code.
30. Section 9 sets out the requirement for a regulated Australian vessel that operates in polar waters to have a Polar Ship Certificate.
31. Section 10 specifies a Polar Ship Certificate as a safety certificate so that a person may apply for the issue of a Polar Ship Certificate under subsection 99(1) of the Navigation Act. A person must apply in accordance with Division 3 of *Marine Order 1 (Administration) 2013*.
32. Section 11 sets out the criteria that must be satisfied for an issuing body to issue a Polar Ship Certificate.
33. Section 12 sets out the conditions that apply to the issue of a Polar Ship Certificate.
34. Section 13 states the duration of a Polar Ship Certificate.
35. Section 14 enables an issuing body to make an endorsement on a Polar Ship Certificate for paragraph 12(a).
36. Section 15 sets out the criteria for variation of a Polar Ship Certificate.
37. Section 16 sets out the criteria for revocation of a Polar Ship Certificate.
38. Section 17 provides that a foreign vessel must have a certificate that is issued in accordance with the Polar Code.
39. Section 18 requires a foreign vessel to comply with the requirements of Chapter XIV of SOLAS and the Polar Code that its flag state apply to it.
40. Section 19 provides that it is an offence if a master or owner takes a regulated Australia vessel to sea without a polar water operational manual on board. Strict liability applies to the offence and a person is also liable to civil penalty.
41. Section 20 provides that it is an offence if a master of a regulated Australian vessel does not have in place a voyage plan for any voyage in polar waters. Strict liability applies to the offence and a person is also liable to civil penalty.

Statement of compatibility with human rights

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

Overview of the legislative instrument

43. The Navigation Act implements Australia's obligations under the *International Convention for the Safety of Life at Sea (SOLAS)*. SOLAS deals with internationally accepted standards for certification of vessels and arrangements for the safe operation of vessels. This Order gives effect to the Polar Code that is a mandatory code for vessels operating in polar waters that are subject to Chapter XIV of SOLAS.

Human rights implications

44. Sections 19 and 20 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.

45. In section 19, a criminal offence has been created to ensure that no regulated Australian vessel operates in polar waters without a polar water operational manual on board. Without this manual, the owner, operator, master or crew might not have sufficient information about a vessel's operational capabilities and limitations that are necessary to support their decision making. Any failure on board the vessel may jeopardise safety with accidents exacerbated by the extreme conditions and isolation of polar waters. Given the higher than normal operational risks of operating in polar waters, strict liability is imposed to ensure proper precautions are followed for the safety of vessels operating in those waters and persons on board those vessels. The offence carries a low penalty of 50 penalty units. A civil penalty of 50 penalty units is also imposed.

46. In section 20, a criminal offence has been created to ensure that a master does not operate a regulated Australian vessel in polar waters without a voyage plan in place. The voyage plan sets out the route through polar waters and must take into account the potential hazards mentioned in Chapter 11 of the Polar Code. A voyage plan provides the master, operator and crew with the information needed for a vessel to navigate safely through polar waters. Strict liability is imposed to ensure masters give proper consideration to avoiding hazards in deciding a route for the safety of the vessel and persons on board. The offence carries a low penalty of 50 penalty units. A civil penalty of 50 penalty units is also imposed.

47. The criminal penalty provisions in this Order are authorised by paragraph 341(1)(a) of the Navigation Act. The civil penalty provisions in this Order are authorised by paragraph 341(1)(b) of the Navigation Act.

48. 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. However, having regard to the objectives of the civil penalty provisions in this Order and the low level of penalty, the civil penalties should not be considered to be criminal matters for human rights law.

Conclusion

49. AMSA considers that this instrument is compatible with the rights or freedoms to which the *Human Rights (Parliamentary Scrutiny) Act 2011* applies because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Making the instrument

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