

Explanatory Statement

Marine Order 76 (Health — medical fitness) 2017 (Order 2017/8)

Authority

1. Section 65 of the *Navigation Act 2012* (the Navigation Act) provides that regulations may be made about the health of seafarers.
2. Paragraph 164(2)(a) of the Navigation Act provides that the regulations may provide for the medical fitness of licensed pilots.
3. Paragraph 340(1)(h) of the Navigation Act provides that regulations may provide for giving effect to the STCW Convention.
4. Paragraph 340(1)(i) of the Navigation Act provides that regulations may provide for giving effect to the Maritime Labour Convention.
5. 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.
6. Subsection 341(1) of the Navigation Act provides that the regulations may provide for the imposition of penalties for contravening a provision of the regulations, including providing for the imposition of civil penalties.
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 which provision must or 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 is a legislative instrument for the *Legislation Act 2003*.

Purpose

10. This Order:
 - (a) sets out the requirement for seafarers and licensed pilots to hold a certificate of medical fitness; and
 - (b) deals with the duration of certificates of medical fitness; and
 - (c) provides for the appointment of medical inspectors; and
 - (d) gives effect to:
 - (i) regulation I/9 of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention); and
 - (ii) sections A-I/9 and B-I/9 of the Seafarers' Training, Certification and Watchkeeping Code (STCW Code); and
 - (iii) regulation 1.2 of the Maritime Labour Convention.

Overview

11. The Navigation Act implements Australia's obligation under the STCW Convention, the STCW Code and the Maritime Labour Convention for the requirement to hold a certificate of medical fitness. This Order further deals with the appointment of medical inspectors and the assessment of fitness of seafarers and licensed pilots.
12. The Order repeals *Marine Order 9 (Health — medical fitness) 2010*. When this Order commenced, Schedule 4 of *Marine Order 4 (Transitional modifications) 2013* ceased to have effect because that Schedule modifies the repealed Order.

Consultation

13. A draft of this Order was placed on the AMSA website for public comment on 8 August 2017 for a consultation period of 6 weeks. Around 200 stakeholders including seafarer representative organisations, training organisations, ship operators, shipping and cargo industry bodies, recognised organisations and various government bodies were invited to comment on the draft Order. Comments were also invited on the *Standards for the Medical Examination of Seafarers and Coastal Pilots*, published by AMSA and incorporated by reference in this Order. Four comments were received. The comments related to colour vision requirements, diabetes management, and the selection and training of medical inspectors. These comments were taken into account in the preparation of the Order.

14. The Office of Best Practice Regulation (OBPR) considers that the changes made by the Order have regulatory impacts of a minor or machinery nature and no regulation impact statement is required. The OBPR reference number is 16724.

Documents incorporated by reference

15. This Order incorporates by reference parts of the following documents:

- *Marine Order 1 (Administration) 2013*
- STCW Convention
- STCW Code
- *Standards for the Medical Examination of Seafarers and Coastal Pilots*

16. 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*), *Marine Order 1 (Administration) 2013* is adopted as in force from time to time because it is adopted by reference to its title in this Order.

17. The STCW Convention and the STCW Code are incorporated as amended and in force from time to time. The Convention and Code are in the Australian Treaties Library accessible online at the AustLII website at <http://www.austlii.edu.au> or the Australian Treaties Database at <http://www.info.dfat.gov.au/treaties>.

18. The latest edition of the *Standards for the Medical Examination of Seafarers and Coastal pilots* is incorporated in this Order. The Standards are published by AMSA and a free online copy is available on the AMSA website at <http://www.amsa.gov.au>.

19. 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>.

Commencement

20. This Order commenced on 1 January 2018.

Contents of this instrument

21. Division 1 (Preliminary) contains 8 provisions that assist the operation, interpretation and administration of the Order.

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

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

24. Section 1B provides that *Marine Order 9 (Health — medical fitness) 2010* is repealed.

25. Section 2 states 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 states the application of the Order.
29. Section 6 specifies the decision under the Order that is a reviewable decision.
30. Division 2 (Requirements) contains 5 provisions.
31. Section 7 provides that a person may perform duties as a seafarer on a regulated Australian vessel only if the person holds a certificate of medical fitness evidencing that the person is medically fit. Section 7 also provides that the owner of a regulated Australian vessel must not take the vessel to sea if a seafarer on board does not hold a certificate of medical fitness. The requirements are strict liability offences with civil penalties also specified. The penalty for a strict liability offence cannot be more than 50 penalty units for an individual or 250 penalty units for a body corporate. The maximum civil penalty amounts are the same as the amounts for an offence. At the time of making of this Order, the *Crimes Act 1914* provided that the monetary amount of a penalty unit was \$210.
32. Section 8 provides that a person may perform duties as a licensed pilot only if the person holds a certificate of medical fitness evidencing that the person is fit. The requirement is a strict liability offence with a civil penalty also specified. The penalty for a strict liability offence cannot be more than 50 penalty units for an individual or 250 penalty units for a body corporate. The maximum civil penalty amounts are the same as the amounts for an offence. At the time of making of this Order, the *Crimes Act 1914* provided that the monetary amount of a penalty unit was \$210.
33. Section 9 requires a seafarer or licensed pilot to use an aid when performing duties if an aid was used for the purpose of the person being found medically fit. Depending on whether the aid is for vision or hearing, a spare aid or batteries must be carried by the person. The requirement is a strict liability offence with a civil penalty also specified. The penalty for a strict liability offence cannot be more than 50 penalty units for an individual or 250 penalty units for a body corporate. The maximum civil penalty amounts are the same as the amounts for an offence. At the time of making of this Order, the *Crimes Act 1914* provided that the monetary amount of a penalty unit was \$210.
34. Section 10 provides that a seafarer must not perform duties on a regulated Australian vessel if the seafarer has had a change in medical condition making the seafarer unfit. Section 10 also provides that a licensed pilot must not perform duties as a licensed pilot if the pilot has had a change in medical condition making the pilot unfit. The requirements are strict liability offences with civil penalties also specified. The penalty for a strict liability offence cannot be more than 50 penalty units for an individual or 250 penalty units for a body corporate. The maximum civil penalty amounts are the same as the amounts for an offence. At the time of making of this Order, the *Crimes Act 1914* provided that the monetary amount of a penalty unit was \$210. Section 10 further sets out the circumstances when a seafarer or licensed pilot may be required to be assessed for a replacement certificate of medical fitness. Section 10 further sets out the circumstances when a seafarer or licensed pilot may be directed to be assessed for a replacement certificate of medical fitness.
35. Section 11 sets out the circumstances when a seafarer or licensed pilot must make available his or her certificate of medical fitness.
36. Division 3 (Medical inspectors and assessments) contains 4 provisions.

37. Section 12 enables AMSA to appoint the person specified in the provision as a medical inspector.
38. Section 13 empowers a medical inspector to issue a certificate of medical fitness. It further provides that for the issue of a certificate of medical fitness, a medical inspector must assess a person in accordance with the latest edition of the *Standards for the Medical Examination of Seafarers and Coastal Pilots*, and complete a medical examination in the approved form. Both the standards and approved form are available on the AMSA website at <http://www.amsa.gov.au>.
39. Section 14 provides a review mechanism to a person if that person has been assessed as medically unfit, or medically unfit for particular duties, in consecutive assessments by a medical inspector. The review mechanism is intended to provide fairness by giving a person affected the opportunity to be assessed by an expert panel consisting of an occupational physician, a specialist physician or surgeon and a medical inspector. Using their medical knowledge and specialised expertise, the panel will assess the person and provide their opinion on whether he or she is medically fit to perform duties as a seafarer or pilot. The person affected must arrange the members of the expert panel. The panel must be approved by AMSA to ensure that the members are appropriately qualified. The expert panel may issue a certificate of medical fitness following assessment.
40. Section 15 sets out the arrangements that apply if a person needs to be assessed for medical fitness while in an overseas country.
41. Division 5 (Duration of certificate of medical fitness) contains 2 provisions.
42. Section 16 sets out the duration of a certificate of medical fitness.
43. Section 17 sets out the circumstances when a certificate of medical fitness may be revoked by AMSA.

Statement of compatibility with human rights

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

Overview of the legislative instrument

45. The purpose of this Order is to put in place measures to ensure that seafarers and licensed pilots performing duties on vessels are medically fit to perform those duties. The Order gives effect to Australia's obligation under the STCW Convention, the STCW Code and the Maritime Labour Convention. The Order further provides for the appointment of medical inspectors to conduct medical assessments and issue certificates to seafarers and licensed pilots evidencing medical fitness.

46. This Order repealed and replaced *Marine Order 9 (Health — medical fitness) 2010*.

Human rights implications

47. Sections 7 to 10 of this Order impose offences to which strict liability applies. The offences are imposed on seafarers, licensed pilots and owners of Australian regulated vessels. The objective of the offences is to ensure that seafarers and licensed pilots performing duties on vessels have evidence that they are medically fit to perform their duties. The safety of life, property and the environment are dependent on seafarers being physically able to perform their duties. Certain medical conditions, such as colour blindness, need to be properly identified so to preclude a person from holding a particular position on board a vessel. Other medical conditions are potentially life-threatening, particularly in the isolated working

environment of a vessel at sea, and require proper control and management by medication. Medical fitness assessments need to be conducted by suitably qualified and experienced medical practitioners in accordance with medical standards that are appropriate for persons working at sea. The requirements in this Order are intended to ensure that a person:

- has physical capability to fulfil all requirements of their duties;
- can demonstrate adequate hearing and speech to communicate effectively including detecting audible alarms;
- has no medical condition, disorder or impairment that will prevent the effective and safe conduct of routine and emergency duties on board a vessel;
- is not suffering from any medical condition likely to be aggravated by service at sea or to render the seafarer unfit for service endangering life of others on board, the vessel and the environment;
- is not taking any medication that has side effects that will impair judgment, balance or any other requirements for effective and safe performance of routine and emergency duties on board.

48. Strict liability is imposed for breaches in this Order to ensure compliance with internationally recognised measures that are intended to create world-wide uniformity in standards for medical fitness for individuals working at sea. The penalty for an offence is relatively low (maximum of 50 penalty units for an individual) and within the limitation imposed by paragraph 341(1)(a) of the Navigation Act. It is long standing practice to impose strict liability for breaches in marine orders in circumstances requiring deterrence and where breaches pose serious threats to life, safety of navigation or the marine environment.

49. This Order also creates civil penalties for failure to comply with offences. 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 and the relatively low level of penalty (the same maximum amounts as for an offence), the civil penalties should not be considered to be criminal matters for human rights law.

50. Offences that are strict liability 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.

51. The requirements in the Order may also engage Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in relation to the right to work (a seafarer or pilot may not perform duties without a certificate evidencing medical fitness) and the right for workers to have safe conditions in the workplace (persons on board a vessel may be endangered if co-workers are not medically fit).

52. It is considered any limitation on human rights as a result of the imposition of offences that are strict liability, the creation of civil penalties, the imposition of medical fitness requirements for performance of work duties, is reasonable, necessary and proportionate to ensure that seafarers and licensed pilots are physically able to perform their duties and do not endanger themselves, others on board, and the safety of the vessel or marine environment.

Conclusion

53. AMSA considers that this Order is compatible with human rights. To the extent that it limits rights or freedoms to which the *Human Rights (Parliamentary Scrutiny) Act 2011* applies, the limitation is reasonable, necessary and proportionate.

Making the instrument

54. 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*.