

Explanatory Statement

Marine Order 504 (Certificates of operation and operation requirements – national law) 2018 (Order 2018/10)

Authority

1. The Marine Safety (Domestic Commercial Vessel) National Law, set out in Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (the national law), provides for this Order to be made.
2. Sections 75 to 79 of the national law provide for various matters to be prescribed in the regulations in relation to certificates for domestic commercial vessels, including matters relating to certificates, application for certificates, the issue, revocation and variation of certificates, and renewal of certificates. Section 80 of the national law provides for regulations to be prescribed for the issue of a certificate of operation to a person in relation to one or more vessels.
3. Subsection 159(1) of the national law provides for regulations to be made prescribing matters required or permitted to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to the national law.
4. Subsection 163(1) of the national law provides that the National Regulator may make a Marine Order for any matter for which provision must or may be made by regulations, other than for matters mentioned in the section.
5. Section 164 of the national law allows a Marine Order to provide for any matter by applying, adopting or incorporating any matter contained in any written instrument in force or existing from time to time including the National Standard for Commercial Vessels (NSCV) and the Uniform Shipping Laws (USL Code).
6. 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.
7. This Order is a legislative instrument for the *Legislation Act 2003*.

Purpose

8. This Order repeals and replaces *Marine Order 504 (Certificates of operation – national law) 2013*.

Overview

9. The national law is a key part of the national system for domestic commercial vessel safety. When applied in all Australian jurisdictions (see section 2 of the national law) it will replace existing State and Territory laws, and parts of Commonwealth law, with a single law for the safety of all domestic commercial vessels and their crew in Australian waters. The national law is supported by Marine Orders made under the national law by the National Regulator.
10. This Marine Order provides requirements for the application, issue, renewal, variation, suspension and revocation of certificates of operation for domestic commercial vessels. A certificate of operation must be held by a person who operates a domestic commercial vessel.

Consultation

11. The changes to the regulatory framework prescribing the operation requirements for domestic commercial vessels have been the subject of extensive consultation with stakeholders, commencing with the 2014 Streamlining Review of National System undertaken on decision of the then Standing Council on Transport and Infrastructure. Consultation was undertaken with state and territory

governments, industry, and the broader community through a number of forums. Face to face consultations were undertaken around Australia, including 24 open consultation sessions attended by approximately 800 stakeholders, one round table discussion with key industry representatives and presentations at industry association meetings. Seventy-nine written submissions were received from stakeholders in response to the 2014 Streamlining Review, with many providing comments on the then current survey arrangements.

12. This was followed by an Operational Safety review in late 2015. In the maritime context, operational safety is concerned with the identification and mitigation of risks through means such as risk assessment, crewing of vessels with people who have appropriate qualifications, training and experience, and having robust procedures and emergency plans in place. It also includes planning and carrying out maintenance, investigating incidents and having a process for continuous improvement of the safety management system. The Operational Safety review included a review of *Marine Order 504 (Certificates of operation –national law) 2013* and Part E of the National Standard for Commercial Vessels – Operations. The review considered the context of regulatory and non-regulatory approaches to operational safety. A discussion paper was released to obtain initial stakeholder feedback to inform and refine the review. Stakeholders were invited to provide input on the specific issues identified in the discussion paper, and on any other issues relating to operational safety. Consultation was predominantly undertaken online, and 10 submissions were received.

13. This Order was developed in order to implement the outcomes of the 2014 Streamlining Review and the Operational Safety review. A copy of the draft of this Order was provided to the Domestic Commercial Vessel Industry Advisory Committee, the Fishing Industry Advisory Committee and the Maritime Agencies Forum from 4 April 2018 to 9 May 2018. The draft order was also available for public comment from 18 April 2018 to 9 May 2018.

14. The Office of Best Practice Regulation (OBPR) was also consulted and considered that changes made by the Order have regulatory impacts of a minor nature and no regulation impact statement was required. The OBPR reference number is 21119.

15. The OBPR considers that consequential 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

16. *Marine Order 501 (Administration – national law) 2013* is incorporated 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*. It is available for free download from the Federal Register of Legislation through links from AMSA's website (<http://www.amsa.gov.au>).

17. SOLAS is of treaty status and is incorporated as amended and in force from time to time for Australia (see definition of SOLAS in *Marine Order 1 (Administration) 2013*, and the definition of Safety Convention in section 14 of the *Navigation Act 2012*. SOLAS is available on the Australian Treaties Database at <http://www.info.dfat.gov.au/treaties>.

18. The ISM Code is incorporated as amended and as in force from time to time. The ISM Code is available for free download from the IMO website and information on how to access it is available on AMSA's website at <http://www.amsa.gov.au>.

19. The ISM Code and SOLAS may also be purchased from the IMO — see the IMO website at <http://www.imo.org/publications>.
20. The manner of incorporation for Marine Order 501 is 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*).
21. 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 ‘Conventions underpinning marine orders’ page on AMSA’s website at <https://www.amsa.gov.au/vessels-operators/regulations-and-standards-vessels/conventions-underpinning-marine-orders>
22. 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

23. This Order commenced on 1 July 2018.

Contents of this instrument

24. Division 1 (Preliminary) has 5 provisions.
25. Section 1 sets out the name of the Order.
26. Section 1A provides for the commencement of the Order on 1 July 2018.
27. Section 1B provides for the repeal of *Marine Order 504 (Certificates of operation – national law) 2013* (the repealed Marine Order 504).
28. Section 2 provides that the Order applies to persons who apply to the National Regulator for certificates of operation, or for the renewal, suspension, variation or revocation of those certificates; and to owners and masters of domestic commercial vessels.
29. Section 3 provides for applications under this Order to be made in accordance with *Marine Order 501 (Administration – national law) 2013*.
30. Division 2 (Requirements for certificate of operation) has 6 provisions.
31. Section 4 sets out the requirements for a safety management system under this Order, and provides that an application for a certificate of operation must be made in the approved form, and must include a declaration that: there is a safety management system in place for each vessel to which the application relates; and the safety management system complies with the requirements of this Order.
32. Section 5 sets out the criteria that the National Regulator must be satisfied of for the issue of a certificate of operation. Criteria include that the operation of the vessel complies with the operation requirements in Schedule 1 or Schedule 2 of this Order, or the ISM Code, depending on the kind of vessel that is the subject of the certificate application. The vessel must also have a unique identifier. The national law requires that all domestic commercial vessels must have a unique identifier. These requirements for applying for a unique identifier are set out in *Marine Order 502 (Unique identifiers – national law) 2017*.
33. Section 6 relates to renewal of a certificate of operation so that the National Regulator can now renew a certificate of operation in the circumstances specified.

The circumstances specified include where the vessel has had a certificate of operation in force in the 2 year period before application for a certificate, but the certificate has expired. However, the National Regulator may not renew a certificate of operation if a change is sought to the vessels set out in the certificate; or the service category of the vessels; or the kind of operation the vessel is used for. In those circumstances, an application for the issue of a further certificate of operation will need to meet the criteria for first time issue of a certificate of operation specified in section 5. A decision by the National Regulator to refuse to renew a certificate is a reviewable decision for section 16 (internal review) and section 17 (review by the Administrative Appeals Tribunal) of Marine Order 501.

34. Section 7 sets out the conditions that apply to the issue of a certificate of operation. The conditions include that a safety management system that complies with the requirements of this Order continues to be in place for each vessel to which the certificate applies; and that the operation of each vessel to which the certificate applies continues to comply with the operation requirements in Schedule 1 or Schedule 2 of this Order, or the ISM Code. Subsection 7(2) clarifies that a certificate of operation issued prior to 1 July 2018 is subject to the conditions mentioned in section 7(1).

35. Section 8 sets out requirements for the form of the certificate of operation to be issued by the National Regulator.

36. Section 9 provides that a certificate of operation will cease to be in force 5 years after it comes into force, if the certificate itself does not specify its date of expiry.

37. Division 3 (Variation, suspension and revocation of certificates of operation) contains 5 provisions.

38. Section 10 provides that an application for variation, suspension or revocation of a certificate of operation must be in the approved form and include certain information, including a copy of the certificate of operation and, for an application for a suspension, the period of suspension sought.

39. Section 11 prescribes criteria for the variation of a certificate of operation on application to the National Regulator for paragraph 50(1)(b) of the national law, and on the National Regulator's own initiative for paragraph 50(2)(a) of the national law. There is a new criterion that provides for variation in circumstances of removal of a service category. This provision is similar to the comparable provision relating to the criteria for variation of a certificate (section 14) of the repealed Marine Order 504.

40. Section 12 provides criteria for suspension of a certificate of operation on application to the National Regulator for paragraph 51(1)(b) of the national law, and also for suspension on the National Regulator's own initiative for paragraph 51(2A) of the national law. It also prescribes the period of suspension for paragraph 51(3)(b) of the national law. This provision is similar to the comparable provisions setting out the criteria for suspension of a certificate of operation (section 15) and the prescribed period for suspension (section 16).

41. Section 13 provides criteria for revocation of a certificate of operation on application to the National Regulator for paragraph 52(1)(b) of the national law, and on the National Regulator's own initiative for paragraph 52(2)(a) of the national law. This provision is similar to the comparable provision setting out the criteria for revocation of a certificate of operation (section 17) in the repealed Marine Order 504.

42. Section 14 provides that the holder of a certificate of operation must notify the National Regulator within 14 days of the vessel being sold, modified or sunk. This section is similar to section 18 in the repealed Marine Order 504.

43. Division 4 (Interpretation and transitional) has 3 provisions.

44. Section 15 sets out definitions for the purpose of the Order. The definitions section includes new definitions for the following terms and expressions: briefer; certificate of recognition; Class 1 vessel; Class 2 vessel; Class 3 vessel; Class 4 vessel; fast craft; guide; hazardous occurrence; hirer; ISM Code; Marine Order 501; non-conformance; NSCV Part B; NSCV Part D; operational area; participant; pen; personal watercraft; seafarer certificate; service category; takeaway vessel; tour leader; and vessel use category. Definitions from the repealed Marine Order 504 for dangerous goods and landing barge have not been incorporated, as they are not used in the Order. In addition, several terms used in the Order are noted as being defined in Marine Order 501 or the National Law.

45. Section 16 sets out the meaning of ‘existing vessel’ for the purpose of the Order. Existing vessels are excluded from the application of certain requirements related to crewing of a domestic commercial vessel. Changes have been made to the meaning of ‘existing vessel’ to clarify that a vessel that was previously a foreign commercial vessel would not be entitled to ‘existing vessel’ status for the purpose of Marine Order 504. It is further provided that a break in the vessel’s use in connection with a commercial, governmental or research activity for more than two years after the commencement of the national law would make the vessel ineligible for ‘existing vessel’ status.

46. Section 17 provides that an application made but not decided before the commencement of the Marine Order is to be taken as an application made under the new Marine Order 504; however, the National Regulator has the discretion to consider the order under the repealed Marine Order 504 as if it had not been repealed.

47. Schedule 1 sets out the operation requirements that must be complied with, and that a safety management system must address. Schedule 1 applies to all vessels unless expressly provided.

48. Schedule 2 sets out additional operation requirements that apply to Class 4 vessels.

Statement of compatibility with human rights

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

Overview of the legislative instrument

50. This Order is made under the *Marine Safety (Domestic Commercial Vessel) National Law* and prescribes matters concerning certificates of operation for domestic commercial vessels. More specifically, it provides matters for the application, issue, variation, suspension and revocation of certificates of operation for such vessels, and prescribes operation requirements for the purposes of the national law that apply to domestic commercial vessels.

51. This Order repeals and replaces Marine Order 504 (Certificates of operation — national law) 2013.

Human rights implications

52. This instrument engages the human rights recognised by the International Covenant on Economic, Social and Cultural Rights (*the Covenant*). Article 6 of the Covenant recognises the right to work, defined as the opportunity of everyone to gain their living by freely chosen or accepted work. This instrument engages Article 6 by imposing standards for the training and crewing of domestic commercial vessels, in accordance with the operational requirements set out in Schedule 1 of the instrument.

53. Overall, this instrument advances the right to work by promoting access to safe working conditions, which is recognised by Article 7 as being essential to the right to just and favourable working conditions. Specifically, this instrument is consistent with the right to work by promoting occupational safety for seafarers who work with complex equipment, often in an isolated marine environment, on vessels that may carry potentially hazardous materials as cargo or supplies.

54. The owner of the vessel is required to ensure that the vessel is operated at all times with appropriate crew, which they must determine by an evaluation that covers a number of factors related to the work that will be performed, the conditions under which it will be performed and the risks involved. For a particular sized vessel, a minimum crewing level is also set out in Schedule 1, Clause 6(4) and (5) composed of the number of certificated and uncertificated crew. It is only permitted to operate with minimum crewing if the appropriate crewing evaluation demonstrates that those numbers are sufficient.

55. Schedule 1 Clause 6 also imposes requirements for onboard training, requires that there is at all times a person on board the vessel who is qualified in first aid, and requires that the master or deck watchkeeper is qualified to operate the radio or other communication equipment.

Conclusion

56. AMSA considers that this instrument is compatible with the human rights and freedoms to which the *Human Rights (Parliamentary Scrutiny) Act 2011* applies.

Making the instrument

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