

Explanatory Statement

Marine Order 97 (Marine pollution prevention — air pollution) Amendment Order (No 2) 2019 (Order 2019/11)

Authority

1. This Order was made under both subsection 342(1) of the *Navigation Act 2012* (the Navigation Act) and subsection 34(1) of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (the Pollution Prevention Act). The Order amends *Marine Order 97 (Marine pollution prevention — air pollution) 2013* (Marine Order 97) that was also made under those provisions.
2. 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.
3. 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.
4. Subsection 33(1) of the Pollution Prevention Act authorises the Governor-General to make regulations necessary or convenient for carrying out or giving effect to the Pollution Prevention Act, particularly for giving effect to the International Convention for the Prevention of Pollution from Ships (MARPOL).
5. Subsection 34(1) of the Pollution Prevention Act allows AMSA to make orders for any matter in the Act for which provision must or may be made by the regulations.
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 was made under subsection 342(1) and is a legislative instrument for the *Legislation Act 2003*.

Purpose

8. This Order repeals *Marine Order 97 (Marine pollution prevention — air pollution) Amendment Order 2019*, because of an administrative error in the commencement provision of that Order. The present Order corrects that administrative error. The Schedules are identical to the Schedules of the repealed Order. The Schedules amend Marine Order 97 in accordance with changes made to the Pollution Prevention Act for enforcing the use and carriage on board a vessel of fuel with a sulphur content lower than previous limits.
9. Marine Order 97 is amended by removing outdated sulphur fuel oil limits and prescribing matters in relation to the use of exhaust gas cleaning systems or other technological methods which can be used under the Pollution Prevention Act. This Order also prescribes emission levels for sulphur oxides and prescribes matters for the Pollution Prevention Act about compulsory reporting of the non-availability of low sulphur fuel oil.
10. The Order also clarifies that all vessels must comply with Annex VI of MARPOL and makes provision for the Register of Local Suppliers of Fuel Oil.

Overview

11. The Navigation Act and the Pollution Prevention Act implement Australia's obligations under MARPOL. Marine Order 97 is made under both Acts. It gives effect to Annex VI of MARPOL which deals with the prevention of air pollution from vessels. Marine Order 97 provides matters for Chapter 4 of the Navigation Act

and Part IIID of the Pollution Prevention Act. It provides for such matters as the certification requirements of MARPOL, emission limits for nitrogen oxides and sulphur oxides, shipboard incineration, fuel oil sampling, energy efficiency and record keeping.

12. This Marine Order amends Marine Order 97 to give effect to MARPOL Annex VI amendments. These MARPOL amendments come into force on 1 January 2020 and 1 March 2020 and relate to the sulphur content of fuel oil used and carried by a vessel.

13. The Pollution Prevention Act was amended by the *Protection of the Sea (Prevention of Pollution from Ships) Amendment (Air Pollution) Act 2019* (the Pollution Prevention Amendment Act) to enable the implementation in Australia of the changes to MARPOL Annex VI concerning sulphur limits in fuel oil. This Marine Order amends Marine Order 97 on account of the changes made to the Pollution Prevention Act.

Consultation

14. A draft of this Order has not been subject to consultation. The changes correct an administrative error in the commencement provision of the repealed Order. The Schedules, which contain the amendments to Marine Order 97, are identical to the Schedules in the repealed Order.

15. A draft of the repealed Order was placed on AMSA's website on 2 October 2019 for public consultation with comments to be provided by 30 October 2019. Around 235 stakeholders including vessel operators, recognised organisations, shipping and cargo industry bodies, training organisations, seafarer representative organisations and relevant government agencies were contacted by email and invited to comment. Three responses were received and these were taken into account in finalising the Order.

16. The Office of Best Practice Regulation (OBPR) considered that the changes to Marine Order 97 made by the repealed Order had regulatory impacts of a minor or machinery nature and no regulation impact statement was required. The OBPR reference numbers are 16724 and 24833.

Documents incorporated by reference

17. The following documents or parts of them are incorporated by reference in the Order:

- 2015 Guidelines for exhaust gas cleaning systems adopted by IMO Resolution MEPC.259(68) and as amended from time to time
- Annex VI of MARPOL
- *Marine Order 1 (Administration) 2013* (Marine Order 1)

18. The *2015 Guidelines for exhaust gas cleaning systems* are available in IMO resolution MEPC.259(68). They are adopted as amended from time to time. Information on obtaining access to IMO resolutions and circulars is available at the Marine Orders link on the AMSA website at <http://www.amsa.gov.au>, where AMSA provides information on how to navigate the IMO website to download documents. These resolutions are available to download from the IMO website for free. IMO documents may also be purchased from the IMO — see the IMO website at <http://www.imo.org/publications>.

19. MARPOL is of treaty status and is incorporated as amended and in force for Australia from time to time (see definition of *MARPOL* in Marine Order 1 and definition of *the Convention* in subsection 3(1) of the Pollution Prevention Act).

MARPOL, including any amendments, can be found in the Australian Treaties Series accessible from the Australian Treaties Library on the AustLII website at <http://www.austlii.edu.au>. Information about obtaining hard copies of MARPOL is available at the Marine Orders link on the AMSA website at <http://www.amsa.gov.au>.

20. 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 is adopted as in force from time to time because it is adopted by reference to its title in this Order. This Marine Order can be accessed through the Marine Orders link on the AMSA website at <http://www.amsa.gov.au> and is available for free download from the Federal Register of Legislation through links from AMSA's website.

Commencement

21. Different parts of this Order commenced on different dates. The dates are tied to the commencement dates for amendments to the Pollution Prevention Act that implement the requirements for use and carriage of low sulphur fuel.

Contents of this instrument

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

23. Section 2 provides for the commencement of the Marine Order.

24. Section 3 provides that Schedules 1, 2 and 3 amend Marine Order 97.

Schedule 1

25. This Schedule commences to operate on the same day as amendments to the Pollution Prevention Act for enforcing the new level of sulphur in fuel oil that is used on board a vessel (1 January 2020). Internationally, the new sulphur levels for use of fuel on board vessels are required to operate from 1 January 2020.

26. Item 1 substitutes a new section 30 in Marine Order 97 setting out the new lower limit for sulphur in fuel oil, including a different limit for emission control areas, areas of special care mentioned in the Pollution Prevention Act. These limits were already in Marine Order 97 and stated to commence operation in 2020, but the new provision has removed outdated limits that no longer apply.

27. Item 2 substitutes three new sections, 30A, 30B and 31. Section 30A prescribes the limit for the emission of sulphur oxides in certain situations mentioned in the Pollution Prevention Act. Section 30B prescribes matters for the operation of an exhaust gas cleaning system. Under the Pollution Prevention Act, an exhaust gas cleaning system can be approved as an Annex VI approved equivalent and used as an alternative to the use of low sulphur fuel oil. Section 31 prescribes certain matters about notification of the non-availability of low sulphur fuel. The Pollution Prevention Act provides that notification must occur in circumstances where low sulphur fuel cannot be sourced, otherwise an offence will be committed.

28. Item 3 prescribes fuel oil sulphur limits for the Pollution Prevention Act for Australian vessels flushing a vessel's fuel oil system before entering an emission control area. These limits were already in Marine Order 97 before these amendments but the new provision removes older limits that no longer apply.

29. Items 4 and 5 prescribe fuel oil sulphur limits for the Pollution Prevention Act for the records that Australian vessels must make about fuel changeovers before entering and leaving emission control areas. These limits are in line with proposed section 30 of Marine Order 97 which prescribes the limits for the Pollution Prevention Act for sulphur fuel content for use by Australian vessels in emission control areas.

30. Item 6 inserts a new section 33A in Marine Order 97 to prescribe matters for new section 26FEKA of the Pollution Prevention Act. Section 26FEKA of the Pollution Prevention Act provides for the regulations to provide for the approval of an Annex VI approved equivalent. The Pollution Prevention Act enables the use of an Annex VI approved equivalent as an alternative to the use of low sulphur fuel. New section 33A of Marine Order 97 gives AMSA power to approve an exhaust gas cleaning system as an Annex VI approved equivalent and provides that a decision by AMSA is a reviewable decision.

Schedule 2

31. Schedule 2 commences to operate on the same day as amendments to the Pollution Prevention Act for enforcing the new level of sulphur in fuel oil that is carried on board a vessel (1 March 2020). Internationally, the new sulphur levels for fuel carried on board a vessel are required to operate from 1 March 2020.

32. Schedule 2 has one item which amends new section 31 inserted in Marine Order 97 by Schedule 1. The amendments to section 31 relate to notification required under the Pollution Prevention Act which will, on 1 March 2020, apply not only to the use of fuel on board a vessel but also to the carriage of fuel on board a vessel for use as fuel.

Schedule 3

33. Item 1 of Schedule 3 inserts a new definition in section 6 of the Marine Order. This definition was previously in Division 7 of Marine Order 97.

34. Item 2 inserts in section 6 a new definition for mass by mass.

35. Item 3 adds to the list of terms that are mentioned in section 6 as defined in the Navigation Act or Pollution Prevention Act.

36. Item 4 replaces section 7 of Marine Order 97 to add a new subsection providing that, for Australia, the competent authority mentioned in MARPOL Annex VI is AMSA.

37. Item 5 amends section 8, the application provision of Marine Order 97, as some parts of that section are now covered by new section 6A of the Pollution Prevention Act, inserted by the Pollution Prevention Amendment Act. New section 6A of the Pollution Prevention Act covers the application of the Act to naval and government vessels.

38. Item 6 corrects a reference in Marine Order 97.

39. Item 7 inserts new Division 1A into Marine Order 97 to clarify that all Annex VI requirements apply to vessels covered by the terms of Annex VI. This requirement was previously in section 20A of Marine Order 97.

40. Item 8 redrafts section 20A as a consequence of the new Division introduced by item 7.

41. Item 9 redrafts existing section 34 of Marine Order 97 to clarify the registration process for local suppliers of fuel oil following changes of terminology in the Act. The process for seeking registration is in accordance with Marine Order 1 which provides for an appeal against AMSA's decision. The section also requires annual declarations to be returned by a specific date and enables AMSA to remove a person's name from the Register for failing to provide an annual declaration. A decision to remove a person from the Register is also reviewable.

42. Item 10 changes a reference to the Pollution Prevention Act, which is no longer correct following amendments to the Act to implement the MARPOL changes in Australia.

Statement of compatibility with human rights

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

Overview of the legislative instrument

44. The *Navigation Act 2012* (Navigation Act) and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Pollution Prevention Act) implement Australia's obligations under the International Convention for the Prevention of Pollution from Ships (MARPOL). *Marine Order 97 (Marine pollution prevention — air pollution) 2013* (Marine Order 97) is made under both Acts. It gives effect to Annex VI of MARPOL which deals with the prevention of air pollution from vessels. Marine Order 97 provides matters for Chapter 4 of the Navigation Act and Part IIID of the Pollution Prevention Act. It provides for such matters as the certification requirements of MARPOL, emission limits for nitrogen oxides and sulphur oxides, shipboard incineration, fuel oil sampling, energy efficiency, sulphur content of fuel and record keeping.

45. This Marine Order amends Marine Order 97 to give effect to MARPOL Annex VI amendments. These amendments come into force on 1 January 2020 and 1 March 2020 and relate to the sulphur content of fuel oil used and carried by a vessel.

46. The Pollution Prevention Act was amended by the *Protection of the Sea (Prevention of Pollution from Ships) Amendment (Air Pollution) Act 2019* to enable the implementation in Australia of the changes to MARPOL Annex VI concerning sulphur limits in fuel oil. This Marine Order amends Marine Order 97 following the changes made to the Pollution Prevention Act.

47. This Marine Order amends Marine Order 97 by removing outdated sulphur fuel oil limits. It prescribes matters in relation to the use of exhaust gas cleaning systems, which can be used under the Pollution Prevention Act as an alternative to the use of low sulphur fuel oil. It also prescribes emission levels for sulphur oxides and prescribes matters for the Pollution Prevention Act about compulsory reporting of the non-availability of low sulphur fuel oil.

48. The Order also clarifies that all vessels must comply with Annex VI of MARPOL and makes provision for the Register of Local Suppliers of Fuel Oil.

Human rights implications

49. This instrument may engage and limit the right to work mentioned in Article 6 of the International Covenant on Economic, Social and Cultural Rights. Item 10 of Schedule 3 inserts a replacement section 34 into Marine Order 97. New section 34 prescribes what information is to be held on the Register of Local Suppliers of Fuel Oil required under section 26FEM of the Pollution Prevention Act. The section also provides for applications for people who wish to be on the register and the basis for approval of applications. Annual declarations must be returned by those on the register and failure to do so may result in removal from the register. Under section 26 FEL of the Pollution Prevention Act, suppliers of fuel oil must be registered.

The requirement to have a register of fuel oil suppliers is imposed by Regulation 18.9 of Annex VI of MARPOL and is binding on Australia. The purpose of maintaining a register of fuel oil suppliers is to ensure that fuel oil supplied to vessels complies with the sulphur limits imposed by MARPOL. Compliant fuel is key to controlling pollution cause by burning fuel oil on board a vessel. The register ensures that suppliers are held accountable if non-compliant fuel is detected and means that the situation can be rectified quickly. It is considered that any limitation on the right to work as a result of measures taken to establish and maintain the

Register of Local Suppliers of Fuel Oil is reasonable, necessary and proportionate for achieving the objective of prevention of pollution at sea.

Conclusion

50. AMSA considers that this instrument is compatible with the human rights 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 for the prevention of pollution at sea.

Making the instrument

51. 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*.