

Explanatory Statement

Marine Order 58 (Safe management of vessels) 2020 (Order 2020/2)

Authority

1. Section 98 of the *Navigation Act 2012* (the Navigation Act) provides that regulations may be made about safety certificates.
2. Section 314 of the Navigation Act provides that regulations may be made about 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 340(1)(a) of the Navigation Act provides that regulations may be made to give effect to the International Convention for the Safety of Life at Sea (SOLAS).
5. Subsection 341(1) of the Navigation Act provides that the regulations may provide for the imposition of penalties and civil penalties for a contravention of the regulations.
6. Subsection 342(1) of the Navigation Act allows the Australian Maritime Safety Authority (AMSA) to make orders, to be known as Marine Orders, for any matter in the Act for which provision must or may be made by regulations.
7. 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.
8. This Marine Order was made under subsection 342(1) of the Navigation Act and is a legislative instrument for the *Legislation Act 2003*.

Purpose

9. This Marine Order provides for the safe management and operation of vessels and pollution prevention by giving effect to Chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) which requires compliance with the International Safety Management (ISM) Code.

Overview

10. This Marine Order provides for matters concerning safety management systems on vessels and gives effect to Chapter IX of SOLAS which requires compliance with the ISM Code. Under the ISM Code, the owner of a vessel who has agreed to take over all the duties and responsibilities imposed by the ISM Code must ensure that the vessel's safety management system, approved by its Administration under the ISM Code, is applied on the vessel in accordance with the ISM Code and the ISM Guidelines.
11. The Marine Order requires that owners of foreign vessels and regulated Australian vessels have a document of compliance or an interim document of compliance. It is an offence under the Marine Order for a master to take a vessel to sea without having on board a document of compliance or an interim document of compliance. The Marine Order also requires that foreign vessels and regulated Australian vessels have a safety management certificate or an interim safety management certificate. Under the Navigation Act masters and owners of regulated Australian vessels and foreign vessels must not take a vessel to sea without certificates that they are required to have.
12. Before this Marine Order was made AMSA had the task of issuing safety management certificates, interim safety management systems, documents of

compliance and interim documents of compliance. This Marine Order transfers that task from AMSA to recognised organisations (ROs).

13. This Marine Order repeals and replaces *Marine Order 58 (Safe management of vessels) 2015* following a review of the Order as part of AMSA's ongoing review of instruments.

Consultation

14. A draft of this Marine Order was placed on the AMSA website on 10 February 2020 for public comment by 08 March 2020. Over 150 stakeholders were consulted. These included vessel operators with ISM certification issued by AMSA, recognised organisations, shipping and cargo industry bodies, training organisations, seafarer representative organisations and government agencies. Responses were received from the Maritime Union of Australia and the Chinese Classification Society. These comments were taken into account in preparing the final instrument.

15. The Office of Best Practice Regulation (OBPR) considers that the changes made by this Marine Order have regulatory impacts of a minor or machinery nature only and no regulation impact statement is required. The OBPR reference number is 25930.

Documents incorporated by reference

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

- International Convention for the Safety of Life at Sea (SOLAS)
- *International Safety Management (ISM) Code* (ISM Code)
- *Marine Order 1 (Administration) 2013*
- *Revised Guidelines on the implementation of the International Safety Management (ISM) Code by Administrations* (ISM Guidelines)

17. The manner of incorporation of SOLAS is as in force from time to time (see section 6 of *Marine Order 1 (Administration) 2013* and definition of **Safety Convention** in section 14 of the Navigation Act). The Convention is a treaty and is available for free on the Australian Treaties Database at <http://www.info.dfat.gov.au/treaties>.

18. 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 Marine Order. This Order can be accessed on the AMSA website at <http://www.amsa.gov.au> for free and is also available on the Federal Register of Legislation for free.

19. The ISM Code is incorporated as in force from time to time. The ISM Code was adopted by IMO Resolution A.741(18) and has been amended on several occasions. The ISM Guidelines were adopted by IMO Resolution A.1118(30) and are incorporated as amended from time to time. Information on obtaining copies of any International Maritime Organization (IMO) Resolution or IMO document mentioned in this Order is available from the AMSA website Marine Order link at <http://www.amsa.gov.au> where AMSA provides information on how to navigate the IMO website to download documents. Information is also provided concerning access to the ISM Code through libraries. IMO documents may also be purchased from the IMO — see the IMO website at <http://www.imo.org/publications>. A copy of the ISM Code and ISM Guidelines may also be viewed at an AMSA office.

Commencement

20. This Marine Order commenced on 1 July 2020.

Contents of this instrument

21. Division 1 (Preliminary) contains 9 provisions that assist the operation, interpretation and administration of the Marine Order.
22. Section 1 sets out the name of the Marine Order.
23. Section 1A provides for the commencement of the Marine Order.
24. Section 1B provides that *Marine Order 58 (Safe management of vessels) 2015* is repealed.
25. Section 2 states the purpose of the Marine Order which is to provide for the safe management and operation of vessels and pollution prevention by giving effect to Chapter IX of SOLAS which in turn requires compliance with the ISM Code.
26. Section 3 sets out the powers in the Navigation Act which enable the Marine Order to be made.
27. Section 4 sets out definitions of terms used in the Marine Order.
28. Section 5 sets out some interpretation matters for the Marine Order.
29. Section 6 describes the application of the Marine Order to various kinds of vessels.
30. Section 7 provides for exemptions that AMSA may grant from the Marine Order or the ISM Code. Decisions about exemptions are reviewable in accordance with the procedures set out in *Marine Order 1 (Administration) 2013*.
31. Division 2 (Foreign vessels) has 2 provisions dealing with the requirements for foreign vessels.
32. Section 8 requires a foreign vessel to have a document of compliance or an interim document of compliance and a safety management certificate or an interim safety management certificate.
33. Section 9 provides that it is an offence for the master of a foreign vessel to take the vessel to sea without a copy of a document of compliance or an interim document of compliance that is in effect for the owner of the vessel.
34. Division 3 has 8 provisions and deals with the requirements for regulated Australian vessels to have a document of compliance.
35. Section 10 requires a regulated Australian vessel to have a document of compliance or an interim document of compliance.
36. Section 11 provides that a person may apply to an issuing body for a document of compliance or an interim document of compliance.
37. Section 12 provides the criteria for an issuing body to issue a document of compliance or an interim document of compliance. A decision not to issue either a document of compliance or an interim document of compliance is a reviewable decision under *Marine Order 1 (Administration) 2013*.
38. Section 13 sets out the conditions that apply to a document of compliance.
39. Section 14 sets out the times when a document of compliance and an interim document of compliance come into force and cease to be in force.
40. Section 15 sets out the criteria for variation or revocation of a document of compliance or an interim document of compliance for a regulated Australian vessel.

Any decision by an issuing body to vary or revoke or not to vary or revoke is reviewable in accordance with the procedure set out in *Marine Order 1 (Administration) 2013*.

41. Section 16 provides that AMSA may require the return of a varied or revoked document of compliance or interim document of compliance. It is an offence not to comply with a notice of return.

42. Section 17 provides that it is an offence for the master of a regulated Australian vessel to take the vessel to sea without a copy of a document of compliance or an interim document of compliance that is in effect for the owner of the vessel.

43. Division 4 has 6 provisions and deals with the requirements for regulated Australian vessels to have safety management certificates.

44. Section 18 requires a regulated Australian vessel to have a safety management certificate or an interim safety management certificate.

45. Section 19 specifies safety management certificates and interim safety management certificates as safety certificates for which an application can be made to an issuing body under the Navigation Act.

46. Section 20 sets out the criteria for the issue of a safety management certificate or an interim safety management certificate. These decisions are reviewable under the Navigation Act.

47. Section 21 sets out the conditions that apply to a safety management certificate and an interim safety management certificate. A decision to impose a condition on a safety certificate is reviewable under the Navigation Act.

48. Section 22 sets out the times when a safety management certificate and an interim safety management certificate come into force and cease to be in force.

49. Section 23 sets out the criteria for variation or revocation of a safety management certificate or an interim safety management certificate. A decision to vary or revoke is reviewable under the Navigation Act.

Statement of compatibility with human rights

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

Overview of the legislative instrument

51. This Marine Order provides for the safe management and operation of vessels and pollution prevention by giving effect to Chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) which requires compliance with the International Safety Management (ISM) Code.

52. Under the ISM Code, the owner of a vessel who has agreed to take over all the duties and responsibilities imposed by the ISM Code must ensure that the vessel's safety management system, approved by its Administration under the ISM Code, is applied on the vessel in accordance with the ISM Code and the ISM Guidelines (*Revised Guidelines on the implementation of the International Safety Management (ISM) Code by Administrations*).

53. The Marine Order requires that owners of foreign vessels and regulated Australian vessels have a document of compliance or an interim document of compliance. It is an offence under the Marine Order for a master to take a vessel to sea without having on board a document of compliance or an interim document of compliance. The Marine Order also requires that foreign vessels and regulated

Australian vessels have a safety management certificate or an interim safety management certificate. Under the Navigation Act masters and owners of regulated Australian vessels and foreign vessels must not take a vessel to sea without certificates that they are required to have.

54. Before this Marine Order was made AMSA had the task of issuing safety management certificates, interim safety management systems, documents of compliance and interim documents of compliance. This Marine Order enables recognised organisations (ROs) to also perform that task.

55. This Marine Order repeals and replaces *Marine Order 58 (Safe management of vessels) 2015* following a review of the Order as part of AMSA's ongoing review of instruments.

Human rights implications

56. Sections 9, 16 and 17 of the Marine 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.

57. Strict liability is imposed to ensure that every vessel has a safety management system and that the safety management system is complied with in the operation of the vessel. Safety management systems are a critical tool in ensuring owners and masters of vessels take responsibility for the safe operation of those vessels. In turn, this protects lives at sea and prevents pollution of the marine environment. The penalties are relatively low (50 penalty units) and are within the limitation imposed by paragraph 341(1)(a) of the Navigation Act.

58. The civil penalty provisions are directed at masters and owners of vessels 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, and 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.

59. 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 the purpose of ensuring navigation safety and the protection of the marine environment.

Conclusion

60. AMSA considers that this Marine 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

61. 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*.