

## **Explanatory Statement**

### **Marine Order 501 (Administration — national law) 2023 (Order 2023/3)**

#### **Authority**

1. Subsection 101(5) of the *Marine Safety (Domestic Commercial Vessel) National Law* (the *national law* that is set out in Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*) allows the regulations to make provision for the return of detained vessels.
2. Section 138 of the national law allows the regulations to provide for the imposition of penalties as an alternative to prosecution.
3. Section 142 of the national law allows the regulations to provide for internal review of decisions made under the regulations and the making of applications to the Administrative Appeals Tribunal.
4. Subsection 159(1) of the national law authorises the Governor-General to make regulations necessary or convenient for carrying out or giving effect to the national law.
5. Subsection 163(1) of the national law provides that the National Regulator (the Australian Maritime Safety Authority (AMSA) under section 9 of the national law) may make a Marine Order about matters that can be provided for by regulation.
6. 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.
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 is a legislative instrument for the *Legislation Act 2003*.

#### **Purpose**

9. This Marine Order replaces *Marine Order 501 (Administration — national law) 2013*.

#### **Overview**

10. This Marine Order deals with administration and interpretation of other Marine Orders made under the national law. Its purpose is to ensure Marine Orders are concise and provide common provisions to facilitate consistent interpretation.
11. The Marine Order sets out definitions to apply to all Marine Orders, a single application and review process, details for the return of detained vessels and an infringement notice scheme. It also provides for the National Regulator to approve forms.

#### **Consultation**

12. A copy of the Marine Order was placed on AMSA's website on 28 April 2023 for a 6 week consultation period. The consultation process details were posted on social media and a link sent directly to approximately 22,000 stakeholders. There were 4 submissions covering a range of issues including the application of the Marine Order and procedural matters relating to certain decisions made under the Order. These responses were taken into account when finalising the Marine Order.
13. The Office of Impact Analysis (OIA) was also consulted and considered that the changes made by the amending Order have regulatory impacts of a minor nature and no regulation impact statement was required. The OIA reference number is OIA23-04926.

## Documents incorporated by reference

14. The following are incorporated by reference:

- (a) National Law – Marine Surveyors Accreditation Guidance Manual 2014 (SAGM);
- (b) National Standard for Commercial Vessels (NSCV) Parts B, C, F and G;
- (c) the Uniform Shipping Laws Code (USL Code);
- (d) the *Australian Maritime Safety Authority Act 1990*;
- (e) the International Convention on Load Lines, done at London on 5 April 1966, as amended and in force for Australia from time to time (the Load Lines Convention);
- (f) *MARPOL* — see subsection 3(1) of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Pollution Prevention Act) for the meaning of *the Convention*.

15. The manner of incorporation for SAGM, NSCV and USL Code is specified for each instrument as existing from time to time. These instruments are available for free from the AMSA website at <https://www.amsa.gov.au>.

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*), the manner of incorporation of the *Australian Maritime Safety Authority Act 1990* is as in force from time to time because it is adopted by reference to its title in this Marine Order. The *Australian Maritime Safety Authority Act 1990* is available for free download from the Federal Register of Legislation.

17. The Load Lines Convention is of treaty status and is incorporated as amended and in force for Australia from time to time (see definition of *Load Lines Convention* in subsection 14(1) of the *Navigation Act 2012*). *MARPOL* is also of treaty status and is incorporated as amended and in force for Australia from time to time (see definition of *the Convention* in subsection 3(1) of the *Pollution Prevention Act*).

18. The Load Lines Convention and *MARPOL*, including any amendments, can be found in the Australian Treaties Series, accessible from the Australian Treaties Library on the AustLII website at <https://www.austlii.edu.au>. A link to the Australian Treaties Library is available at the Marine Orders link on the AMSA website at <https://www.amsa.gov.au>. The Marine Orders link on the AMSA website also contains information on the purchase of the Load Lines Convention or *MARPOL* and their availability at libraries.

## Commencement

19. This Marine Order commenced on 1 September 2023.

## Contents of this instrument

### Division 1

20. Section 1 sets out the name of the Marine Order.

21. Section 1A provides for the commencement of the Marine Order.

22. Section 1B provides that *Marine Order 501 (Administration — national law) 2013* is repealed.

23. Section 2 states the purpose of the Marine Order.

24. Section 3 sets out the powers that enable the Marine Order to be made.

25. Section 4 sets out the matters the National Regulator may consider when determining whether a person is a fit and proper person when deciding whether to issue the person with a certificate or to revoke a certificate issued to a person.

26. Section 5 sets out the standards that are prescribed for the purpose of the regulation making power in subsection 159(2) of the national law. These prescribed standards relate to the subject matter listed in that subsection and may be called up in the regulations (including Marine Orders).

## **Division 2**

27. Section 6 defines terms that will apply in all Marine Orders made under the national law unless an individual Marine Order provides otherwise. This will in effect be a dictionary for the Marine Orders. Terms that are used in more than one Marine Order may be included in future if required.

28. Section 7 clarifies that a requirement to have a certain certificate, licence or qualification means that the required certificate, licence or qualification must be in force.

## **Division 3**

29. Section 8 states that the Division applies to any application that a Marine Order provides is an application that may be made in accordance with this Marine Order. Another Marine Order may vary the process in this instrument as it applies to applications mentioned in the other Order. For example, it may provide for a longer deadline for deciding an application that is complex or involves consultation with other parties.

30. Section 9 provides for the form and content of an application.

31. Section 10 provides for the National Regulator to ask for further information or documents or agreements when dealing with an application. This may be from the applicant or from another person, which may include state maritime agencies (for survey records) or privately owned entities.

32. Section 11 provides that the National Regulator must tell the applicant about any request made under section 10, and the effect the request may have on the period for consideration of the application.

33. Section 12 sets out the periods for considering an application. They may be varied by a Marine Order that adopts the application process. The standard deadline is 90 days after an application is made. Depending upon the nature of the application, the National Regulator may require a vessel inspection or additional matters to be attended to before deciding an application. If the National Regulator requests further information, documents etc, the deadline for consideration of the application is 90 days after the decision maker receives what has been requested. If the National Regulator does not receive all the further information, documents etc requested and a reasonable period has elapsed to allow the applicant to fulfill that request, then a consideration period of 90 days is provided to the National Regulator after expiry of that reasonable period.

34. Section 13 sets out the procedure for dealing with an application. The National Regulator must give reasons if the decision is to refuse an application. If a decision is not made on time, the National Regulator is taken to have refused the application. However, the National Regulator can only be taken to have refused an application if the application is a valid application to the extent that it complies with section 9.

## **Division 4**

35. Section 14 provides for the information that is required for an application for review of a decision that is made under the national law — see section 140 of the national law.

## **Division 5**

36. Section 15 provides a review mechanism for decisions made under Marine Orders.

37. Section 16 provides an internal review mechanism for decisions that are made under Marine Orders. A person who is affected by a *reviewable decision* may also apply to the National Regulator for internal review of the decision. A delegate of the National Regulator who is more senior to the delegate who made the reviewable decision will review the decision. A standard internal review arrangement has been applied: notification to the applicant of the outcome of the internal review including the applicant's right to apply to the Administrative Appeals Tribunal (AAT) for review of the decision; and the right to request a statement of reasons for the decision.

38. Section 17 provides for AAT review of decisions that have been internally reviewed.

## **Division 6**

39. Section 18 provides for the application of this Division to the return of detained vessels.

40. Section 19 provides that the National Regulator may impose conditions on the return of the vessel. It also sets out circumstances to be considered by the National Regulator in deciding whether to return the vessel.

41. Sections 20 and 21 set out arrangements for the return of the vessel, including requirements for notice to be given by the National Regulator to the owner etc after it decides to return the vessel and for its return to be as soon as practicable.

## **Division 7**

42. Section 22 sets out when an infringement notice can be given. It may only be given if there are reasonable grounds for believing that a person has committed an offence under a section of the national law or Marine Orders mentioned in Schedule 1 of the Marine Order. Infringement notices may be given by the National Regulator or a marine safety inspector.

43. Section 23 provides for the information that must be contained in an infringement notice.

44. Section 24 provides how an infringement notice is to be given and that it must be given within 12 months of the alleged offence.

45. Section 25 provides for the penalty amount for an infringement notice which is the amount mentioned in Schedule 1 corresponding to the offence mentioned.

46. Section 26 provides timeframes for payment of the penalty payable under an infringement notice. It must be paid within 28 days after the notice is given, or within another period mentioned in the Marine Order.

47. Section 27 sets out arrangements for the National Regulator to grant, on application, an extension of time to pay an infringement notice penalty.

48. Section 28 allows the National Regulator, on application, to make an arrangement for the payment of an infringement notice penalty amount by instalments.

49. Section 29 sets out arrangements for the withdrawal by the National Regulator of an infringement notice if satisfied that in all the circumstances it is proper to do so. If

a notice is withdrawn, any amount of infringement notice penalty paid under the notice must be repaid.

50. Section 30 provides for what must be included in a notice of a decision to refuse to withdraw an infringement notice.

51. Section 31 provides for payment of the infringement notice penalty if the National Regulator refuses to withdraw the infringement notice.

52. Section 32 sets out the effect of payment of an infringement notice penalty. The person's criminal liability is discharged and further proceedings cannot be taken against the person for the offence.

53. Section 33 provides that admissions made by a person in an application for withdrawal of an infringement notice are inadmissible in proceedings against the person for the alleged offence.

54. Section 34 provides that if a person elects not to pay an infringement notice penalty and is convicted of the alleged offence mentioned in the notice, the court must not take into account the fact that the person chose not to pay the infringement notice penalty.

55. Section 35 provides for the kinds of certificates that can be used as evidence at a hearing of a prosecution for an offence mentioned in an infringement notice.

56. Section 36 makes clear that the National Regulator does not have to issue a person suspected of having committed an offence mentioned in Schedule 1 with an infringement notice. It also provides that nothing in this Division is to affect the liability of a person to be prosecuted for an alleged offence if an infringement notice is not given, or is given and then withdrawn, or to limit the penalty that may be imposed by a court on a person convicted of an offence.

## **Division 8**

57. Section 37 sets out arrangements for approved forms. It provides that the National Regulator may approve a form for a provision of a Marine Order and that an approved form must be used for the purpose for which it is approved. Approved forms are available on the AMSA website.

## **Statement of compatibility with human rights**

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

### **Overview of the legislative instrument**

59. The purpose of this instrument is to provide for administrative matters common to all Marine Orders made under those Acts. Its purpose is to also facilitate the consistent interpretation of Marine Orders.

60. The instrument sets out definitions to apply to all Marine Orders, an application process and a review process, details for the return of detained vessels and an infringement notice scheme. It also provides for the National Regulator to approve forms.

### **Human rights implications**

61. Division 6 sets out the process for infringement notices to be issued if there are reasonable grounds for believing that a person has contravened a penalty provision under the national law.

62. As an infringement notice involves payment of a penalty, it may be considered a type of civil penalty. Civil penalties can in certain circumstances engage Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

63. Under Article 14(1) of ICCPR, there is the right to not incriminate oneself (Article 14(3)(g)) and the right not to be tried or punished twice for the same offence (Article 14(7)). To the extent ICCPR has been engaged, there are protections reflected in Division 7 and in particular sections 32 to 34 of the Marine Order — further proceedings cannot be taken if a person has paid an infringement notice; evidence of an admission in an application for withdrawal of an infringement notice is inadmissible in a prosecution; and if a person is convicted, a court cannot have regard to the failure of payment of an infringement notice relating to the same offence.

64. The effect on human rights of the offences for which notices may be given is addressed in the explanatory statements for the Marine Orders in which the offences are created.

### Conclusion

65. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Making the instrument

66. 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*.