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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MARITIME LEGISLATION AMENDMENT BILL 2005

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Minister for Transport and Regional Services,
the Honourable John Anderson MP)

MARITIME LEGISLATION AMENDMENT BILL 2005

OUTLINE

The Maritime Legislation Amendment Bill 2005 amends four Acts:

- the *Lighthouses Act 1911*
- the *Navigation Act 1912*
- the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*
- the *Shipping Registration Act 1981*

Amendments to the *Lighthouses Act 1911* (the Lighthouses Act)

The Lighthouses Act provides for the establishment and maintenance of marine navigational aids. Schedule 1 of the Bill revises the penalties set out in the Lighthouses Act.

Amendments to the *Navigation Act 1912* (the Navigation Act)

The Navigation Act is the principal Commonwealth Act relating to the safety of ships. Schedule 2 of the Bill makes a number of amendments to the Navigation Act. In summary, those amendments:

- extend the exemption that applies to ships belonging to Australian or foreign military forces so that the exemption also applies to ships operated by military forces
- revise those sections of the Act that allow a declaration to be made, at the ship owner's request, in respect of certain ships to which the Navigation Act does not otherwise apply, so that the Navigation Act will apply to the ship with effect that:
 - declarations can be made to apply for a specified time
 - declarations can be revoked to remove obsolete records
- clarify matters that may be made under regulations with respect to qualifications and watchkeeping obligations of masters, officers and seamen
- revise provisions relating to pilotage, including the regulation-making power
- provide that notice that is to be given to a consul of the flag State of a detained ship may, as an alternative, be given to another representative of the flag State
- provide for the issue of survey certificates by classification societies authorised by the Australian Maritime Safety Authority (AMSA) on behalf of AMSA
- clarify the documentary evidence of seaworthiness required for small foreign-registered ships
- provide that a ship that poses a threat to the environment will be treated as unseaworthy so that it may be detained until deficiencies are rectified
- clarify the regulation-making power concerning loading, unloading, stowing and carriage of cargo
- revise provisions relating to the reporting of the movement of ships

- remove the requirement for six month's notice before the Minister may cancel a continuing voyage permit
- revise provisions relating to alcohol and other drugs to:
 - correct inconsistent terminology which prevents the making of regulations to allow breath testing to determine blood alcohol levels
 - allow for the taking of a mouth swab to test for alcohol or other drugs
- provide that the requirement for ships to carry charts can be met by a ship carrying suitable electronic charts
- extend the requirement for ships to carry charts so that it applies to all ships subject to the Navigation Act, not just Australian ships
- provide that pilots and pilotage providers are immune from civil liability claims
- allow for the gazettal of provisions of the National Standard for Commercial Vessels
- revise some penalties for major offences under the Act
- amend incorrect references to Acts.

Amendments to the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (the Pollution Prevention Act)

The Pollution Prevention Act implements in Australia the International Convention for the Prevention of Pollution from Ships (MARPOL). Schedule 3 of the Bill amends the Pollution Prevention Act to:

- require Australian chemical tankers to prepare and carry a Shipboard Marine Pollution Emergency Plan for Noxious Liquid Substances
- provide that security where paid by the owner or master in the event of a pollution breach must cover the maximum amount of penalties and other expenses that may be payable by all members of the crew
- clarify that documents that may be served on a ship's agent include documents that may be served on the owner, the master or any other member of the crew.

Amendments to the *Shipping Registration Act 1981* (the SRA)

The SRA fixes conditions for the registration of ships in Australia, grants ships Australian nationality and provides for the registration of mortgages over ships. Schedule 4 of the Bill amends the SRA to:

- provide that mortgages can be removed from the Register at the request of the mortgagee
- provide that the powers of the Minister and of the Registrar of Ships may be delegated to a member of the staff of AMSA
- allow access to the Australian Register of Ships by electronic means, including via the Internet.

FINANCIAL IMPACT STATEMENT

There is no significant financial impact.

ABBREVIATIONS

AMSA	Australian Maritime Safety Authority
ATC	Australian Transport Council
CVP	Continuing voyage permit <i>or</i> continuing permit
GBR Marine Park Act	<i>Great Barrier Reef Marine Park Act 1975</i>
GMDSS	Global Marine Distress and Safety System
IMO	International Maritime Organization
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
Lighthouses Act	<i>Lighthouses Act 1911</i>
MARPOL	International Convention for the Prevention of Pollution from Ships
MEPC	Marine Environment Protection Committee
Navigation Act	<i>Navigation Act 1912</i>
Noxious liquid substances plan	Shipboard Marine Pollution Emergency Plan for Noxious Liquid Substances
Pollution Prevention Act	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>
SOLAS	International Convention for the Safety of Life at Sea
SRA	<i>Shipping Registration Act 1981</i>
STCW Convention	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
SVP	Single voyage permit

MARITIME LEGISLATION AMENDMENT BILL 2005

NOTES ON CLAUSES

Clause 1: Short title

Clause 1 is a formal provision specifying the title of the proposed Act.

Clause 2: Commencement

This clause provides for commencement of the Bill.

Subclause 2(1) provides that each provision of the Bill specified in column 1 of the table incorporated in that subclause commences or is taken to have commenced on the day in column 2 of the table.

Item 1 of the table provides that clauses 1 to 3 and anything not covered elsewhere in the table commence on the day the proposed Act receives Royal Assent.

Items 2, 8, 10, 12, 15, 18, 20, 23 and 27 of the table provide that specified items in the Schedules, which insert or amend penalty provisions relating to offences, will commence on the 28th day after the day on which the proposed Act receives Royal Assent.

Items 4, 6, 11, 13, 17, 19, 22, 25, 29, and 31 of the table provide that specified items in the Schedules will commence 6 months after the proposed Act receives Royal Assent. This delayed commencement is necessary to allow for the making of regulations under amended provisions of the Navigation Act, Pollution Prevention Act and the SRA.

The remaining items in the table specify items in the Schedules that will commence the day after Royal Assent.

Subclause 2(2) provides that column 3 of the table incorporated in subclause 2(1) is for additional information that does not form part of the proposed Act, and that such additional information in that column may be added to or edited in any published version of the proposed Act.

Clause 3: Schedules

Clause 3 is a formal clause indicating that each Act specified in a Schedule to the Bill is amended as set out in the relevant Schedule.

Schedule 1 – Amendments of the Lighthouses Act 1911

The Lighthouses Act provides for the establishment and maintenance of marine navigational aids. Schedule 1 of the Bill revises the penalties set out in the Act and recasts offences applying a tiered approach according to culpability by separately specifying the different fault elements of intention, recklessness and negligence.

The level of the existing penalties in the Act is grossly inadequate in light of the serious implications for safety of life at sea and the marine environment if an incident was to occur as a result of the destruction, fouling, damage to, interference with, obstruction or removal of a marine navigational aid.

The network of marine navigational aids around the Australian coastline plays an important role in ensuring the safe movement of shipping in potentially hazardous waters. The grounding of ships not only presents immediate safety issues for crew, passengers, and property but may also pose a significant threat to sensitive coastal habitats and ecosystems resulting from the pollution by dangerous substances carried by ships.

In terms of economic cost, such incidents potentially expose the shipowner and shipping industry, the local community, and government on both a short and long term basis. This is due to the significant resources necessary for clean up and rehabilitation of damaged coastlines and the adverse impact on fishery and tourism activities. Additionally, a shipowner's liability for the pollution damage may be waived if it can be shown that an incident occurred because a marine navigational aid was not in operation, with the associated costs transferring to the government and hence to the wider community.

The cost of repair of damage resulting from trespass and vandalism of navigational aids also represents a continued impost on the commercial shipping industry. Such repair costs are funded from the levies paid by trading ships under the *Marine Navigation Levy Act 1989* for maintenance and operation of the marine navigational aid network.

The increase in trespass and vandalism of navigational aid sites indicates that a greater deterrence is required than the low level of penalties currently provided in the Lighthouses Act, particularly when considered in light of the potential for significant risk to human life and the environment caused by the non-operation of any marine navigational aid.

Item 1

Item 1 replaces subsections 10(1) and (2) of the Lighthouses Act.

Existing subsection 10(1) allows AMSA, by notice, to require the owner of a marine navigational aid¹, lamp or light, where AMSA considers it desirable for "the safety or

¹ *Marine navigational aid* is defined in section 3 of the Lighthouses Act to mean:

"(a) a lighthouse, lightship, beacon or buoy; or

(b) any other structure, mark, device or apparatus that is an aid to marine navigation, including a radio beacon or an electronic aid, but not including any device or apparatus used, or for use, on a ship, not being a lightship".

convenience of navigation", to carry out certain specified actions in relation to the aid, lamp or light. The owner may be required to remove it, modify it or refrain from using it, either entirely or for a specified period. Subsection 10(2) provides that it is the duty of the owner of the marine navigational aid, lamp or light to comply with a notice from AMSA.

New subsection 10(1) will remove AMSA's power to order removal etc of a marine navigational aid, lamp or light where it is desirable for the "convenience" of navigation. The amendment will mean that AMSA can order removal only on safety grounds. There is an additional requirement that a notice from AMSA must specify a date by which a notice must be complied with.

Appropriate safeguards have been included. New subsection 10(1) requires the notice to be in writing and specifies the date by which the request must be complied. New subsection 10(2) provides a reasonable amount of time to comply with the notice. Existing subsection 10(3) specifies the consequence of non-compliance, that is AMSA may take possession of a marine navigational aid, lamp or light or may do, at the owner's expense, anything that the notice requires the owner to do.

New subsection 10(2) provides that a date specified in a notice under new subsection 10(1) must be at least one day after the notice is served on the owner of the marine navigational aid, lamp or light, unless there are exceptional circumstances relating to the safety of persons or ships. Generally, one day will be more than enough time for an owner to comply with a notice. For example, to remove a light will usually mean simply turning it off; modification may simply mean the erection of a curtain to prevent light going out to sea.

A Note at the end of new subsection 10(1A) advises that section 4K of the *Crimes Act 1914* (the Crimes Act) will apply to offences of failing to comply with a notice so that there is a separate offence for each day that a notice is not complied with.

Item 2

Item 2 replaces subsection 10(5) and adds subsection 10(5AA).

New subsection 10(5) increases the maximum penalty for failure to comply with a notice under new subsection 10(1) to remove etc a marine navigational aid, lamp or light from a fine of \$100 to a fine of 40 penalty units².

New subsection 10(5AA) provides that there is no further continuing offence for failure to comply with a notice on or after the sixth day after a notice was required to be complied with. The effect is that the maximum penalty for failure to comply with a notice to remove etc a marine navigational aid, lamp or light is 200 penalty units.

Item 3

² In accordance with subsections 4AA(1) and 4B(3) of the Crimes Act, one penalty unit is currently equivalent to a fine of \$110 for an individual and \$550 for a body corporate.

Item 3 provides that a notice under new subsection 10(1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (the Legislative Instruments Act). This provision is included to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Item 4

Item 4 is a savings provision to provide that any notices that were issued under subsection 10(1) before it was replaced by item 1 have effect as if they were served under the replacement subsection 10(1).

Item 5

Item 5 repeals the existing subsections 19(1), (1A) and (1B) of the Lighthouses Act, and replaces them with new subsections 19(1) to 19(1T). Both the existing and new subsections apply only to marine navigational aids that are the property of, or are under the control of, AMSA.

In brief, existing subsections 19(1), (1A) and (1B) provide that it is an offence, with a maximum penalty of \$200, if a person injures, damages, destroys, runs foul of, removes or trespasses upon a marine navigational aid or otherwise obstructs the view of, or interferes with the operation of, a marine navigational aid.

New subsection 19(1) provides that it is an offence, with a maximum penalty of 10 years imprisonment, if a person intentionally engages in conduct that results in the destruction, fouling of, or damage to, an AMSA marine navigational aid, a light on such an aid or a ship or anything else used by or on behalf of AMSA in the establishment, maintenance or servicing of AMSA marine navigational aids. The penalty of imprisonment for 10 years is comparable to the penalty for intentional damage of Commonwealth property under the Crimes Act.

A term of imprisonment is considered an appropriate penalty for breach of this and subsequent subsections because a non-operational marine navigational aid can have very serious consequences including loss of life, destruction of a ship and major pollution of the marine environment.

New subsection 19(1A) is similar to new subsection 19(1) but refers to reckless conduct rather than intentional conduct. The maximum penalty for a breach of subsection 19(1A) is imprisonment for 7 years.

New subsection 19(1B) is similar to new subsections 19(1) and (1A) but refers to negligent conduct rather than intentional or reckless conduct. The maximum penalty for a breach of subsection 19(1B) is a fine of 200 penalty units. A person's culpability is lower for this offence as the defendant is criminally liable based in part on objective standards rather than their own subjective mental state.

New subsection 19(1C) provides that absolute liability applies to paragraphs 19(1)(d), 19(1A)(d) and 19(1B)(d). This is consistent with property offences in the Crimes Act and in the *Criminal Code*.

The effect of applying absolute liability to paragraphs 19(1)(d), 19(1A)(d) and 19(1B)(d) is that, in a prosecution for an offence under new subsection 19(1), 19(1A) or 19(1B), absolute liability will apply to the fact that the marine navigational aid is the property of, or is under the control of, AMSA. This means that a person charged with an offence under subsection 19(1), 19(1A) or 19(1B) cannot use as a defence the fact that he or she was under the mistaken belief that the marine navigational aid that was damaged etc did not belong to, or was not under the control of, AMSA.

New subsection 19(1D) provides that it is an offence, with a maximum penalty of imprisonment for 10 years, if a person engages in conduct with the intention of causing the obstruction of the view of an AMSA marine navigational aid. The penalty of imprisonment for 10 years is comparable to the penalty for intentional damage of Commonwealth property under the Crimes Act.

New subsection 19(1E) provides that it is an offence, with a maximum penalty of imprisonment for 7 years, if a person engages in conduct and is reckless as to causing the obstruction of the view of an AMSA marine navigational aid.

The obstruction of, or interference with the operation of or use by a person of, a marine navigational aid referred to in subsections 19(1E) and (1J), can potentially have the same impact as if a person were to engage in conduct resulting in the destruction of, fouling of, damage to, or removal of, that aid as referred to in subsections 19(1A) and (1O). Such conduct may result in a situation where an aid cannot be properly observed by a ship.

New subsection 19(1F) provides that it is an offence, with a maximum penalty of 200 penalty units, if a person engages in conduct and is negligent as to causing the obstruction of the view of an AMSA marine navigational aid. A person's culpability is lower in this offence as the defendant is criminally liable based in part on objective standards rather than their own subjective mental state.

New subsection 19(1G) provides that absolute liability applies to paragraphs 19(1D)(d), 19(1E)(d) and 19(1F)(d). This is consistent with property offences in the Crimes Act and in the *Criminal Code*.

The effect of applying absolute liability to paragraphs 19(1D)(d), 19(1E)(d) and 19(1F)(d) is that, in a prosecution for an offence under new subsection 19(1D), 19(1E) or 19(1F), absolute liability will apply to the fact that the marine navigational aid is the property of, or is under the control of, AMSA. This means that a person charged with an offence under subsection 19(1D), 19(1E) or 19(1F) cannot use as a defence the fact that he or she was under the mistaken belief that the marine navigational aid whose view was obstructed did not belong to, or was not under the control of, AMSA.

New subsection 19(1H) provides that it is an offence, with a maximum penalty of imprisonment for 10 years, if a person engages in conduct with the intention of causing interference with the operation of, or use by a person of, an AMSA marine navigational aid. The penalty of imprisonment for 10 years is comparable to the penalty for intentional damage of Commonwealth property under the Crimes Act.

New subsection 19(1J) provides that it is an offence, with a maximum penalty of imprisonment for 7 years, if a person engages in conduct and is reckless as to causing interference with the operation of, or use by a person of, an AMSA marine navigational aid.

New subsection 19(1K) provides that it is an offence, with a maximum penalty of 200 penalty units, if a person engages in conduct and is negligent as to causing interference with the operation of, or use by a person of, an AMSA marine navigational aid. A person's culpability is significantly lower in this offence as the defendant is criminally liable based in part on objective standards rather than their own subjective mental state.

New subsection 19(1L) provides that absolute liability applies to paragraphs 19(1H)(d), 19(1J)(d) and 19(1K)(d). This is consistent with property offences in the Crimes Act and in the *Criminal Code*.

The effect of applying absolute liability to paragraphs 19(1H)(d), 19(1J)(d) and 19(1K)(d) is that, in a prosecution for an offence under new subsection 19(1H), 19(1J) or 19(1K), absolute liability will apply to the fact that the marine navigational aid is the property of, or is under the control of, AMSA. This means that a person charged with an offence under subsection 19(1H), 19(1J) or 19(1K) cannot use as a defence the fact that he or she was under the mistaken belief that the marine navigational aid which was interfered with did not belong to, or was not under the control of, AMSA.

New subsection 19(1M) provides a defence for prosecutions under subsections 19(1), (1A), (1B), (1D), (1E), (1F), (1H), (1J) and (1K) where the conduct was necessary to save a life or a ship, or prevent pollution, and the defendant took all reasonable steps to avoid causing the destruction, fouling, damage, obstruction or interference. A defence is made available for the situation where the conduct is necessary to avoid harm to life or ship or to decrease the likelihood of pollution.

The note in subsection 19(1M) places a legal burden on the defendant to prove the defences proposed in that subsection. The defences in paragraphs 19(1M)(a) and (b) are defences that lie peculiarly within the knowledge of the defendant to the extent that it will make it significantly more difficult and costly for the prosecution to disprove rather than for the defendant to establish the matter included in the defence.

There are precedents in other Commonwealth legislation for the "safety at sea" defences that impose a legal burden on the defendant: subsection 404(4) of the *Offshore Minerals Act 1994*, section 59H of the *Great Barrier Reef Marine Park Act 1975* (GBR Marine Park Act), subsection 140D(2) of the *Petroleum (Submerged Lands) Act 1967* and subsection 232(2) of the *Migration Act 1958*.

There is no defence available for subsections 19(1N), (1O), (1Q) and (1S) as these subsections relate to the removal of, and trespassing on, marine navigational aids and the trespassing on ships, vessels or property used to establish or maintain marine navigational aids. There are no circumstances which envisage the need for a person to take such action in order to reduce the risk of pollution or to save a life.

New subsection 19(1N) provides that it is an offence, with a maximum penalty of imprisonment for 10 years, if a person engages in conduct with the intentional of causing the removal, alteration, riding by, or making fast to, an AMSA marine navigational aid. The penalty of imprisonment for 10 years is comparable to the penalty for intentional damage of Commonwealth property under the Crimes Act.

New subsection 19(1O) provides that it is an offence, with a maximum penalty of imprisonment for 7 years, if a person engages in conduct and is reckless as to the removal, alteration, riding by, or making fast to, an AMSA marine navigational aid.

New subsection 19(1P) provides that absolute liability applies to paragraphs 19(1N)(d) and 19(1O)(d). This is consistent with property offences in the Crimes Act and in the *Criminal Code*.

The effect of applying absolute liability to paragraphs 19(1N)(d) and 19(1O)(d) is that, in a prosecution for an offence under new subsection 19(1N) or 19(1O), absolute liability will apply to the fact that the marine navigational aid is the property of, or is under the control of, AMSA. This means that a person charged with an offence under subsection 19(1N) or 19(1O) cannot use as a defence the fact that he or she was under the mistaken belief that the marine navigational aid which was removed, altered, rode by or made fast to did not belong to, or was not under the control of, AMSA.

New subsection 19(1Q) provides that it is an offence, with a maximum penalty of 10 penalty units, if a person trespasses upon or goes on an AMSA marine navigational aid. This is consistent with the penalty for trespass on Commonwealth land under the Crimes Act.

New subsection 19(1R) provides that absolute liability applies to paragraph 19(1Q)(c). This is consistent with property offences in the Crimes Act and in the *Criminal Code*.

The effect of applying absolute liability to paragraph 19(1Q)(c) is that, in a prosecution for an offence under new subsection 19(1Q), absolute liability will apply to the fact that the marine navigational aid is the property of, or is under the control of, AMSA. This means that a person charged with an offence under subsection 19(1Q) cannot use as a defence the fact that he or she was under the mistaken belief that the marine navigational aid which he or she trespassed upon or went on did not belong to, or was not under the control of, AMSA.

New subsection 19(1S) provides that it is an offence, with a maximum penalty of 10 penalty units, if a person trespasses upon or goes on a ship, vessel or property used by, or on behalf of AMSA, in the establishment, maintenance or service of marine navigational aids. This is consistent with the penalty for trespass on Commonwealth land under the Crimes Act.

New subsection 19(1T) provides that absolute liability applies to paragraph 19(1S)(c). This is consistent with property offences in the Crimes Act and in the *Criminal Code*.

The effect of applying absolute liability to paragraph 19(1S)(c) is that, in a prosecution for an offence under new subsection 19(1S), absolute liability will apply to the fact that the ship, vessel or property is used by, or on behalf of AMSA, in the establishment, maintenance or service of marine navigational aids. This means that a person charged with an offence under subsection 19(1S) cannot use as a defence the fact that he or she was under the mistaken belief that the ship, vessel or property which he or she trespassed upon or went on was not used by, or on behalf of, AMSA in the establishment, maintenance or servicing of marine navigational aids.

Item 6

Item 6 adds new subsection 19(4) to define the terms **conduct** and **engage in conduct**, both of which are necessary elements of the offences in new subsections 19(1)-(1T) inserted by item 5. The definitions are consistent with section 4.1 of the *Criminal Code*.

Item 7

If a person or a ship damages an AMSA marine navigational aid, the person or master of the ship is required by section 19B of the Lighthouses Act to report the damage. Item 7 increases the penalty in subsection 19B(1) for failure to report damage from \$200 to 60 penalty units. This penalty reflects the seriousness of the offence of failing to report the damage to AMSA, and the penalty is of an appropriate level to discourage non-compliance.

Schedule 2 – Amendments of the Navigation Act 1912

The Navigation Act is the principal Commonwealth Act relating to the safety of ships. Schedule 2 of the Bill makes a number of amendments to the Navigation Act, including:

- revision of provisions relating to pilotage to allow for compulsory pilotage in areas specified by regulation
- revision of provisions relating to the reporting of movement of ships and the scope of the regulation-making power concerning reporting requirements
- revision of provisions relating to alcohol and other drugs and to allow for the taking of mouth swabs to test for alcohol and other drugs
- provision that pilots and pilotage providers are immune from civil liability claims
- revision of penalties for major offences to ensure the provision of adequate deterrence in relation to activities that may pose a significant threat to safety of life or the environment.

Item 1

Item 1 replaces existing section 3. Section 3 provides that the Navigation Act does not apply to a ship belonging to the Defence Force of Australia or to the naval, military or air forces of a country other than Australia. To recognise modern chartering and procurement arrangements for defence vessels, the replacement section will extend the exemption to apply it to ships belonging to, or operated by, the Defence Force of Australia or by the naval, military or air forces of a country other than Australia.

Item 2

Item 2 inserts a definition of *Australian coastal sea* in subsection 6(1). The same definition in subsection 8(1) is repealed by item 8. Definitions in subsection 6(1) apply to the whole of the Navigation Act. As the term *Australian coastal sea* is used in a number of places, it is appropriate that it be defined in subsection 6(1).

Item 3

Item 3 inserts a definition of *exclusive economic zone* into subsection 6(1). This term is used in new paragraph 186A(1)(b) (added by item 25).

Item 4

Item 4 amends the definition of *Government ship* for consistency with new section 3 which is replaced by item 1.

Item 5

Item 5 inserts a new definition of *regulated ship* into subsection 6(1). This term is used in new Division 2 of Part IIIA (added by item 32).

Item 6

Item 6 amends the definition of *the Customs Act* in subsection 6(1) to correct the citation of that Act by deleting the reference to “1966”.

Item 7

Item 7 amends the definition of *the regulations* in subsection 6(1) to delete the reference to section 426 which was repealed by the *Australian Maritime Safety Authority Act 1990*.

Item 8

Item 8 repeals the definition of *Australian coastal sea* from subsection 8(1) consequential upon the insertion of the definition into subsection 6(1) by item 2.

Item 9

Item 9 inserts new subsection 8A(2A) which provides that a declaration under subsection 8A(2) that an off-shore industry vessel is a vessel to which the Navigation Act applies is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is inserted to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Item 10

Item 10 repeals subsection 8AA(4) and substitutes it with a new subsection 8AA(4). Existing subsection 8AA(4) provides that AMSA may, on the application of the owner, revoke a declaration that a trading ship is a ship to which the Navigation Act applies. New subsection 8AC, inserted by item 14 will provide for the revocation of declarations.

New subsection 8AA(4) provides that a declaration under subsection 8AA(2) that the Navigation Act applies to a trading ship even when it is proceeding on an intrastate voyage is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is inserted to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Item 11

Generally, the Navigation Act applies to a fishing fleet support vessel only when it is proceeding on an overseas voyage. A fishing fleet support vessel is one that supports the operations of fishing vessels. Activities carried out by such vessels include storage and transport of fish, provision of food, fuel and other supplies, and the transport of crew members to and from fishing vessels.

Existing section 8AB allows the Minister to declare that the Navigation Act applies to a fishing fleet support vessel for all voyages, including interstate and intrastate voyages.

Item 11 repeals subsection 8AB(1) and inserts new subsections 8AB(1) and (1A) to ensure that section 8AB is consistent with sections 8A and 8AA which provide a similar declaration mechanism for off-shore industry vessels and trading ships. Following the amendments, a declaration that the Navigation Act applies to a fishing fleet support vessel for all voyages, including intrastate and interstate voyages, will be made by AMSA rather than by the Minister.

Item 11 also inserts new subsection 8AB(1B) which provides that a declaration under subsection 8AB(1A) that the Navigation Act applies to a fishing fleet support vessel even when it is not proceeding on an overseas voyage is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is inserted to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Item 12

Item 12 amends subsection 8AB(2) consequential upon the insertion into section 8AB of a new subsection (1A) by item 11.

Item 13

Item 13 is a transitional provision consequential upon the fact that, after the commencement of the amendments made by items 11 and 12, declarations relating to fishing fleet support vessels under section 8AB will be made by AMSA rather than by the Minister. Any existing declarations made before that time by the Minister will continue in force as if they were made by AMSA.

Item 14

Item 14 inserts a new section 8AC relating to the expiry and revocation of declarations made under sections 8A, 8AA and 8AB. Declarations under those sections provide a mechanism to allow off-shore industry vessels, trading ships and fishing fleet support vessels, not normally subject to the application of the Navigation Act, to opt in to its coverage irrespective of the nature of voyages undertaken.

In administering the declaration system, it has become apparent that some owners do not provide AMSA with subsequent amendments to ship details following their initial application. Also in some cases, owners do not request the revocation of a declaration where, for example, a ship no longer exists, is sold, or ceases to operate in Australia.

In such circumstances, the information concerning the ship provided to AMSA becomes obsolete. An additional problem occurs when ownership of a ship is transferred, but the new owner is unaware of the existence of a declaration that has the potential to trigger obligations under the Navigation Act, and also under the *Occupational Health and Safety (Maritime Industry) Act 1993* and the *Seafarers Rehabilitation and Compensation Act 1992*.

New section 8AC allows AMSA to specify a period of validity for declarations at the time of their making and to specify the circumstances in which AMSA is permitted to revoke declarations to overcome the problems outlined above.

New subsection 8AC(1) provides that a declaration will cease to have effect, unless sooner revoked, at the end of a period, if any, specified in the declaration.

New subsection 8AC(2) provides that a declaration must be revoked by AMSA on the request of the owner.

New subsection 8AC(3) provides that AMSA may revoke a declaration if the vessel or ship no longer exists or has been lost, its name or other details have been changed since the making of the declaration, or the vessel or ship no longer operates in Australia.

Item 15

Item 15 substitutes the existing section 9A with a new section 9A. The new section defines terms for purposes of Part II of the Navigation Act. It includes the existing definition of *ship* and inserts a new definition of *STCW Convention* for purposes of new subsection 15(1A) (inserted into the Navigation Act by item 18).

The STCW Convention is the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, adopted by the International Maritime Organization (IMO) on 7 July 1978, and which has been amended five times. The STCW Convention prescribes the minimum standards relating to training, certification and watchkeeping for seafarers which countries are obliged to meet or exceed.

Item 16

In accordance with section 14 of the Navigation Act, AMSA may by order set out the minimum number of seamen and officers to be carried on ships. AMSA may also grant exemptions from such an order. An exemption may apply to a particular ship or class of ships. A manning order may be subject to conditions and may apply for a specified period of time or to one or more particular voyages.

Manning orders have a safety objective to ensure that a ship is seaworthy by requiring that it is manned with a sufficient crew of competent persons. An order is issued following assessment of an application to AMSA from a shipowner. A manning proposal includes information about the numbers and grades/capacities in a ship's complement, information on construction, machinery, equipment or operation and maintenance of the ship, which may affect the safe manning level, and how the ship's crew will handle emergency and peak workload situations.

Subsection 14(8) provides that it is an offence to contravene a manning order or a condition of an exemption. Item 16 repeals the existing penalty for the offence in subsection 14(8) of \$2,000 and replaces it with a penalty of 60 penalty units. The increase in the penalty ensures that the safety objective of manning ships with sufficient crew of competent persons is properly recognised.

Item 17

Item 17 repeals subsection 14(12) which refers to section 426. Section 426 was repealed by the *Australian Maritime Safety Authority Act 1990*.

Item 18

Item 18 inserts new subsections (1A) and (1B) into section 15 to clarify the existing regulation-making power.

New subsection 15(1A) provides that regulations made with respect to the qualifications of masters, officers and seamen may give effect to the STCW Convention. The term *STCW Convention* is defined in new section 9A (inserted by item 15).

New subsection 15(1B) provides that regulations to give effect to the STCW Convention will not exclude the operation of State or Territory laws which give effect to the Convention. This is to ensure that, even if there is an inconsistency between Commonwealth regulations made to give effect to the STCW Convention and State or Territory laws, the regulations will not render the State or Territory laws invalid.

Item 19

Item 19 increases the maximum penalty in section 16 from \$2,000 to 50 penalty units. This section makes it an offence for a person to: falsely represent himself or herself as qualified; perform the duties of master, officer or seaman without holding proper qualifications; or take a person into employment to perform duties of master, officer or seaman without that person holding proper qualifications. This offence is in accordance with Australia's obligation under Regulation I/5 of the STCW Convention to ensure appropriate penalties and disciplinary measures are implemented to discourage unqualified seafarers serving on Australian-flagged vessels in the interests of safety of life and property at sea and protection of the marine environment.

Inappropriate practices concerning seafarer qualifications has been the subject of increased concern internationally in recent years. A report released by IMO in June 2001 identified fraudulent practices as globally prevalent and identified the ongoing shortage of officers and the high cost of training seafarers as creating an environment that encourages fraudulent practices. Such practices include seafarers misrepresenting their level of competency, training and experience by providing false information as well as impersonation and forgery of certificates and other documents. The report also noted that some employers facilitate this fraudulent behaviour by failing to check with the issuing authority the authenticity of seafarer's qualifications on engagement.

An unqualified person operating complex equipment and machinery without the necessary skill and competence may result in a serious shipping incident. An increase in the penalty to 50 penalty units ensures the offence retains deterrent value for unqualified seafarers serving on ships subject to Part II of the Navigation Act.

Items 20

Section 99 provides an offence if the master or a seaman of a ship to which Part II of the Navigation Act applies engages in conduct that could lead to loss of, or damage to, the ship or its cargo or to loss of life or limb of a person on board the ship. Item 20 repeals section 99. The offences currently provided for in section 99 are included in new subsection 386A(2) (added by item 84).

Items 21 - 23

Section 171 of the Navigation Act requires the master of a ship to keep and maintain an official log book. Items 21 – 23 revise penalties under this section.

Item 21 increases the maximum penalty for failure to keep a log book or to make prescribed entries in a log book from \$2,000 to 30 penalty units.

Item 22 increases the maximum penalty for failure to make a required entry in log book as soon as possible after the occurrence to which it relates or failure to include the date of the occurrence or the date of the entry from \$2,000 to 30 penalty units.

The penalty increase in items 21 and 22 are in line with other Commonwealth offences for failing to keep records: see, for example, section 89 of the *Wool Tax (Administration) Act 1964*.

Item 23 replaces the maximum penalty of \$500 for making an entry in a log book more than 24 hours after a ship arrives at a port, where that entry relates to an occurrence which happened before the arrival at the port, with the equivalent penalty of 5 penalty units.

Item 24

Item 24 inserts a heading for new Division 1 in Part IIIA. Part IIIA relates to Pilotage. Part IIIA will be divided into two Divisions:

- Division 1 – General provision applicable to pilotage
- Division 2 - Compulsory pilotage

The new Division 1 includes the existing sections (186A-186F) of Part IIIA. The new Division 2 is inserted by item 32.

Item 25

Item 25 repeals subsections 186A(1) and (2), and replaces them with a new subsection 186A(1). The existing subsection 186A(1) contains the definition of *Australian coastal sea*. That definition is inserted into subsection 6(1) by item 2 and there is no need for it to be repeated in section 186.

Existing subsection 186A(2) sets out the application of Part IIIA. Currently, Part IIIA applies to pilots and pilotage on ships in, or in transit to or from, the Australian coastal sea. New subsection 186A(1) extends the application of Part IIIA so that it applies to pilots and pilotage on ships:

- in, or in transit to or from, prescribed waters of the Australian coastal sea; or
- in prescribed waters of the exclusive economic zone.

Item 26

Item 26 amends subsection 186A(3) consequential upon the repeal of the existing subsection 186A(1) by item 25.

Item 27

Item 27 adds a definition of *pilotage provider* to section 186B which defines terms for the purposes of Part IIIA of the Navigation Act. A pilotage provider is defined as the person who assigns or allocates a pilot to a ship. The definition does not attempt to create an employer/employee relationship between pilotage providers and pilots.

Item 28

Item 28 inserts a new paragraph 186D(aa) to provide for the making of regulations in relation to pilotage providers. This amendment is an extension of the existing regulation-making power and will not create any new offence provisions. Any subordinate legislation made giving effect to section 186D will attract a maximum penalty of 50 penalty units.

Item 29

Item 29 repeals the existing penalty for the offence in subsection 186E(1) of 20 penalty units and replaces it with imprisonment for 2 years. Pilots are required to possess the highest level of skill and experience, even higher than other ship officers. For similar reasons as provided for in item 19 above, such as skill shortage (in relation to masters, officers and other crew) that facilitates the likelihood of this offence occurring, it is appropriate that a deterrent be provided to prevent unlicensed persons representing themselves as licensed pilots.

Items 30 and 31

Items 30 and 31 repeal the penalties in the offences for subsections 186E(2) and (5) of 20 penalty units and replace them with a penalty of 50 penalty units. These offences apply to a person who performs the duty of, or who employs a person who is not, a licensed pilot to perform the duties that are prescribed by the regulations to be the duties of a licensed pilot. The penalty increases to 50 penalty units are in accordance with the usual maximum penalty for offences with delegated content.

Item 32

Item 32 adds a new Division 2 – Compulsory pilotage – to Part IIIA of the Navigation Act. There are six new sections (186G – 186L) in new Division 2. The new compulsory pilotage provisions are similar to the compulsory pilotage provisions of the GBR Marine Park Act.

New section 186G provides a number of definitions for purposes of Division 2 of Part IIIA, which are modelled on section 3 of the GBR Marine Park Act. These include definitions of a *regulated ship*, the *length overall* of a vessel, and *navigates without a pilot*. This new section also makes it clear that a ship being towed is considered to be navigating with a pilot if the towing ship is navigating with a pilot.

New section 186H provides for the making of regulations relating to compulsory pilotage. The regulations may specify only waters included within the waters referred to in new subsection 186A(1) to be waters in which pilotage is compulsory for regulated ships.

Compulsory pilotage under new Division 2 will not have any effect on the compulsory pilotage requirements of the GBR Marine Park Act. A person is not liable for prosecution under that Act and the Navigation Act in respect of the same act or omission.

New section 186I provides that the owner and master of a regulated ship that navigates in a compulsory pilotage area without a pilot each commit a strict liability offence with a maximum penalty of 500 penalty units. It is a defence to a prosecution for an offence under section 186I if the defendant proves that an exemption had been granted in respect of the ship under new section 186K and the ship was operating in accordance with the terms of the exemption.

It is appropriate that an offence for breach of section 186I be a strict liability offence for consistency with the equivalent offence in the GBR Marine Park Act. The offence is directed only at the master or owner of a ship. Such a person can be expected to be fully aware of the requirements of the legislation and the need for pilotage in compulsory pilotage areas.

Information on areas where pilotage is compulsory will be widely promulgated. Such information will be included in Marine Notices which are prepared by AMSA and are distributed to industry as well as being posted on AMSA's web site. The information will also be included in Notices to Mariners issued by the Australian Hydrographic Service and will be included in relevant charts – which are required to be carried on ships by virtue of section 410A of the Navigation Act.

Compulsory pilotage will be imposed only in areas that are hazardous to navigation. Such areas are often of significant environmental significance. Compulsory pilotage is intended not only to reduce the possibility of a ship being involved in an accident but also to prevent pollution that might result from such an accident. Because of the significant economic and environmental impact that pollution can cause, it is important that there are appropriate penalties to discourage non-compliance.

The level of the penalty for an offence under section 186I is at the same level as the penalty for the equivalent offence under the GBR Marine Park Act. Section 186I sets the penalty for navigating in a compulsory pilotage area without a pilot at 500 penalty units. In agreeing to that penalty under the GBR Marine Park Act, Parliament has already considered that 500 penalty units is appropriate to deter taking a ship through the Great Barrier Reef compulsory pilotage area without a pilot.

The collective liability of the master and owner in an offence against section 186I is appropriate for a number of reasons. Firstly, although the master has immediate responsibility for taking on board a pilot and ensuring that the ship is navigated under pilotage in appropriate areas, the master is also subject to the direction of the owner. It may be the case that an owner directs a master not to take on board a pilot for economic reasons. Or it may be the case that the owner has not put in place the appropriate systems or arrangements to facilitate the master's compliance with compulsory pilotage requirements. In such a case, although it is the master who has committed the actual act of navigating without a pilot, the owner is equally culpable. Secondly, where an offending ship is foreign-owned, there is unlikely to be any jurisdictional presence of the owner, which will jeopardise any prosecution against the owner

It is also well established in shipping law that offence provisions should apply collectively to the master and the owner. There is precedent in both State and Commonwealth legislation as well as in international law. This is the basis for the comment in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* that provides "collective responsibility is well established in shipping law [where] it has been traditional for offence provisions to apply to master and owner".

In a prosecution for an offence under section 186I, defences set out in new section 186L may be available to a defendant.

New section 186J provides that, before disembarking, a pilot who has provided pilotage services for a regulated ship in a compulsory pilotage area must give the master a certificate setting out specified information about the pilotage.

New section 186K provides that, after application from the owner or master, AMSA may grant an exemption from compulsory pilotage requirements. AMSA may grant or refuse an exemption, and may grant an exemption subject to conditions. It is a defence to the principal offence in the new section 186I if a ship is operating within the terms of an exemption under section 186K. Failure to comply with the conditions of an exemption is a strict liability offence and the owner and master are each guilty of an offence with a maximum penalty of 500 penalty units, consistent with an offence against section 186I.

New subsection 186K(8) provides that an instrument under section 186K granting or refusing an exemption is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is inserted to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

An applicant for an exemption may seek a review of AMSA's decision by the Administrative Appeals Tribunal in accordance with new section 377CA (inserted by item 79).

New section 186L sets out the available defences in proceedings for offences against the compulsory pilotage provisions. New subsection 186L(1) provides a defence for the master and owner of stress of weather, saving a life at sea or other unavoidable cause.

Further, it will be a defence for the owner if the owner proves that he or she took all reasonable precautions and exercised due diligence to ensure that the ship would not navigate in a compulsory pilotage area in breach of subsection 186I(1) or 186K(6).

Item 33

Section 187 of the Navigation Act sets out the application of Part IV – Ships and Shipping. Part IV generally applies to all ships except those provisions of Part IV which give effect to Regulation 13 and 15 of Chapter V of the International Convention for the Safety of Life at Sea (SOLAS). The provisions which give effect to Regulations 13 and 15 apply only in respect of trading ships proceeding on an interstate or overseas voyage and fishing boats and fishing fleet support vessels proceeding on an overseas voyage. Regulations 13 and 15 of Chapter V of SOLAS were concerned with Manning and Search and Rescue respectively.

Item 33 replaces the reference in subsection 187(2) to Regulations 13 and 15 of Chapter V of SOLAS with a reference to Regulations 7 and 14 of Chapter V of SOLAS. This amendment is because of a revision of Chapter V of SOLAS which entered into force on 1 July 2002.

Items 34 to 36

These items make minor amendments to definitions in subsection 187A(1) consequential upon amendments made to section 194 by item 47.

Items 37 and 38

These items make minor amendments to definitions in subsection 187A(1) consequential upon amendments made to section 206D by item 48.

Items 39 and 40

Section 190AA allows a surveyor to go on board a ship at any reasonable time and undertake an inspection or require the production of documents. AMSA may require the ship to be taken into dock or be otherwise dealt with for the inspection of the hull, boilers, machinery or equipment. There is currently a strict liability offence with a penalty of \$2,000 for failure to comply with a direction of a surveyor or AMSA. Items 39 and 40 revise the penalties in section 190AA.

In accordance with the amendments made by item 39, failure to produce certificates or documents required by existing subsection 190AA(1) or (2) is a strict liability offence with a penalty of 60 penalty units. The intention is to ensure that the penalty provides sufficient deterrence when weighed against the modern-day economic advantages of avoiding inspection and possible detention.

In accordance with the amendments made by item 40, the offence for failing to comply with a requirement of AMSA to take a ship into dock is a fault-based offence with a penalty of imprisonment for 2 years. There is significant economic advantage in operating a substandard or unseaworthy ship and such a ship may seek to avoid a

thorough inspection of its hull and equipment in a dock which may result in significant repairs and delays if defects are identified. These ships may pose a significant threat to life and the environment and an imprisonment term is required to counter the cost advantages stemming from non-compliance.

Item 41

Item 41 makes minor amendments to subsection 190AA(5) consequential upon the insertion of new subsection 190AA(2A) by item 39.

Item 42

Item 42 repeals subsection 190AA(6) consequential upon the amendments made to new subsection 190AA(2B) by item 39.

Item 43

Section 191 provides for the making of regulations to give effect to SOLAS. Those regulations can generally apply to all ships except any regulations which give effect to Regulation 13 and 15 of Chapter V of the International Convention for the Safety of Life at Sea (SOLAS). Any regulations which give effect to Regulations 13 and 15 apply only in respect of trading ships proceeding on an interstate or overseas voyage and fishing boats and fishing fleet support vessels proceeding on an overseas voyage. Regulations 13 and 15 of Chapter V of SOLAS were concerned with Manning and Search and Rescue respectively.

Item 43 replaces the reference to Regulations 13 and 15 of Chapter V of SOLAS with a reference to Regulations 7 and 14 of Chapter V of SOLAS. This amendment is because of a revision of Chapter V of SOLAS which entered into force on 1 July 2002.

Item 44

Item 44 corrects a drafting error by adding a reference to paragraph 2(ba) to subsection 191(4). The purpose of subsection 191(4) is to ensure that regulations and orders which give effect to SOLAS do not prevail over any State or Northern Territory laws which give effect to SOLAS. This amendment will apply subsection 191(4) to fishing fleet support vessels proceeding on voyages other than overseas voyages.

Items 45 and 46

Section 192A provides that, if a foreign ship is detained or proceedings are taken against the owner or master of a foreign ship, then AMSA is required to advise a consul of the country in which the ship is registered.

Items 45 and 46 amend section 192A to provide that a representative of the country in which the ship is registered may be advised as an alternative to a consul. This will overcome the situation where it is sometimes difficult to contact a consul. It will also allow direct contact with flag State maritime administrations which are better placed than a consul to deal with matters involved with detained ships.

Item 47

Subsection 194(4) provides for the issue by AMSA of certificates of survey, passenger certificates and certificates of equipment. Subsection 194(5) provides that AMSA may refuse to issue a certificate if it is not satisfied that the ship complies with relevant requirements of the Navigation Act.

Item 47 inserts new subsections 194(5A) and (5B) to mirror subsections 194(4) and (5) to permit survey authorities³ to issue or refuse to issue certificates.

Item 48

Section 206D provides for the issue by AMSA of passenger ship safety certificates and passenger ship short voyage safety certificates. Item 48 adds new subsections 206D(3) and (4) to mirror the existing subsections 206D(1) and (2) to permit survey authorities to issue passenger ship safety certificates and passenger ship short voyage safety certificates.

Item 49

Item 49 amends section 206F consequential upon the addition of subsection 206F(2) by item 50.

Item 50

Section 206F provides for the issue by AMSA of cargo ship safety equipment certificates. Item 50 adds new subsection 206F(2) to mirror the existing section 206F to permit survey authorities to issue cargo ship safety equipment certificates.

Item 51

Item 51 amends section 206G consequential upon the addition of subsection 206G(2) by item 52.

Item 52

Section 206G provides for the issue by AMSA of cargo ship safety radio certificates. Item 52 adds new subsection 206G(2) to mirror the existing section 206G to permit survey authorities to issue cargo ship safety radio certificates.

Item 53

³ *Survey authority* is defined in subsection 6(1) of the Navigation Act to mean " a corporation or association for the survey of shipping, approved by the Authority, in writing, for the purposes of this definition". There are currently six approved survey authorities: American Bureau of Shipping; Bureau Veritas; Det Norske Veritas; Germanischer Lloyd; Lloyd's Register of Shipping; and Nippon Kaiji Kyokai.

Item 53 amends section 206GA consequential upon the addition of subsection 206GA(2) by item 54.

Item 54

Section 206GA provides for the issue by AMSA of cargo ship safety certificates. Item 54 adds new subsection 206GA(2) to mirror the existing section 206GA to permit survey authorities to issue cargo ship safety certificates.

Item 55

Section 206V provides that a foreign non-Safety Convention ship (essentially a cargo ship with a gross tonnage less than 500) shall not go to sea unless there is in force in respect of the ship certain certificates specified in section 206V. In terms of the relevant definitions in the Navigation Act, the certificates specified mean certificates issued by AMSA. It is inappropriate to require foreign-registered ships to possess certificates issued by AMSA.

Item 55 replaces section 206V with a new section that requires foreign non-Safety Convention ships to have suitable documentary evidence attesting to the safety of the ship, without specifying the actual documentation required. The existing penalty of a fine of \$10,000 or imprisonment for 4 years or both is replaced with a term of imprisonment for 4 years.

Items 56 to 59

Section 206W provides that a Customs Officer may require the production of certain certificates before granting clearance to a ship which has applied for clearance under the *Customs Act 1901* for a voyage from a port in Australia.

Items 56 to 59 amend section 206W consequential upon the substitution of section 206V by item 55 and partly rewrite the section to make it clearer.

There is a consequential change to the heading to section 206W to include “**other documentary evidence**”.

Item 60

The object of the replacement of section 207 made by item 60 is to provide a clear power to detain ships that pose a threat to the environment.

Existing sections 207 and 207A set out when ships are considered, respectively, to be unseaworthy and substandard. Section 210 empowers AMSA to detain unseaworthy and substandard ships. New section 207 includes ships which pose a threat to the environment within the meaning of “unseaworthy ships”.

AMSA’s power to detain a ship that poses a threat to the environment will be exercised only whilst a ship is in a port, and applies to both domestic and foreign ships. The power to detain such ships is based on the broad powers Australia can exercise to prevent

pollution within its jurisdiction when a foreign ship is within its internal waters under articles 194 and 220(1) of the United Nations Convention on the Law of the Sea, and Article 5(2) of the International Convention for the Prevention of Pollution from Ships (MARPOL).

Item 61

Section 221 of the Navigation Act allows AMSA to grant an exemption from the requirements of the International Convention on Load Lines in respect of an Australian-registered ship. An exemption may be granted subject to specified safety conditions being complied with. Subsection 221(1C) provides that it is an offence if a specified safety condition in an exemption is not complied with, but a penalty provision for this offence is absent. This appears to be a drafting oversight. For consistency with existing subsection 221(4), item 61 inserts a penalty of 4 years imprisonment into subsection 221(1C).

Item 62

Item 62 replaces the penalties for the offences in subsections 221(4) and (8). The existing penalties of a fine of \$10,000 or imprisonment for 4 years, or both are replaced by a term of imprisonment for 4 years.

Item 63

Subsection 257(1) of the Navigation Act provides that the regulations may make provision for or in relation to the stowing or carriage in ships of cargo. Item 63 amends subsection 257(1) to make it clear that regulations may also be made for or in relation to the loading and unloading of cargo.

There is a consequential change to the heading to section 257 so that it will read "**Loading, stowing, carriage and unloading of cargo**".

Item 64

Section 261A provides that sections 259, 260 and 261, which relate to the division of losses and payment for damages for personal injuries which result from an incident involving two or more ships, apply to ships belonging to the Royal Australian Navy in the same manner as they apply to all other ships.

For consistency with the replacement section 3, item 64 amends section 261A to replace the reference to ships belonging to the Australian Navy with a reference to ships belonging to, or operated by, the Australian Defence Force.

Items 65 and 66

Section 267K provides that AMSA may, by notice in writing, issue a direction to the master of a foreign ship (such as the ship may not enter any ports in Australia) if AMSA considers that the ship is not constructed in accordance with Annex I of MARPOL. Annex I is concerned with the prevention of pollution of the sea from the discharge or escape of oil from ships.

In accordance with Annex I, all oil-carrying ships are required to be capable of retaining oily wastes on board for discharge to shore reception facilities. This requires the fitting of appropriate equipment, including an oil discharge monitoring and control system, oily water separating equipment and a filtering system, slop tanks, sludge tanks, piping and pumping arrangements.

Items 65 and 66 replace existing subsections 267K(4) and (5) with new subsections 267K(4), (5) and (6) to set out the elements of the offence of failure to comply with a direction issued under section 267K. New subsection 267K(4) retains the existing strict liability offence and converts the penalty of \$10,000 to the equivalent 100 penalty units.

There is a new penalty of 500 penalty units in subsection 267K(5) where the master or owner of a ship recklessly fails to comply with a direction from AMSA. There is a precedent in section 14A of the Pollution Prevention Act for failure to comply with a direction from AMSA where the objective is to prevent pollution.

The defences in existing subsection 267K(5) are in new subsection 267K(6).

Items 67 and 68

Section 267Y provides that AMSA may, by notice in writing, issue a direction to the master of a foreign ship (such as the ship may not any enter ports in Australia) if AMSA considers that the ship is not constructed in accordance with Annex II of MARPOL. Annex II is concerned with the prevention of pollution of the sea from the discharge or escape of chemicals from ships. Annex II specifies pumping and piping arrangements for ships that carry chemicals in bulk.

Items 67 and 68 replace existing subsections 267Y(4) and (5) with new subsections 267Y(4), (5) and (6) to set out the elements of the offence of failure to comply with a direction issued under section 267Y. New subsection 267Y(4) retains the existing strict liability offence and converts the penalty of \$10,000 to the equivalent 100 penalty units.

There is a new penalty of 500 penalty units in subsection 267Y(5) where the master or owner of a ship recklessly fails to comply with a direction from AMSA.

The defences in existing subsection 267Y(5) are in new subsection 267Y(6).

Items 69 and 70

Section 267ZQ provides that AMSA may, by notice in writing, issue a direction to the master of a foreign ship (such as the ship may not enter any ports in Australia) if AMSA considers that the ship is not constructed in accordance with Annex IV of MARPOL. Annex IV is concerned with the prevention of pollution of the sea from the discharge or escape of sewage from ships. Annex IV requires a ship's discharge pipeline to be fitted with standard discharge connections.

Items 69 and 70 replace existing subsections 267ZQ(4) and (5) with new subsections 267ZQ(4), (5) and (6) to set out the elements of the offence of failure to comply with a direction issued under section 267ZQ. New subsection 267ZQ(4) retains the existing strict liability offence and converts the penalty of \$10,000 to the equivalent 100 penalty units.

There is a new penalty of 500 penalty units in subsection 267ZQ(5) where the master or owner of a ship recklessly fails to comply with a direction from AMSA.

The defences in existing subsection 267ZQ(5) are in new subsection 267ZQ(6).

Item 71

Subsection 268(1) of the Navigation Act provides for a maximum penalty of \$2,000 if the master of a ship fails to report an accident or other specified incidents. Item 71 repeals subsection 268(1) and replaces it with new subsections 268(1)-(1E), which provides for a range of penalties to cover the range of conduct as described in the existing subsection. The significant difference between the current subsection 268(1) and the replacement subsections is the level of penalties. The failure to notify some events (such as an accident occasioning loss of life or serious injury) carries greater culpability than the failure to notify other events (such as putting back to port after having left that port). Item 71 splits the offences into a number of specific offences with corresponding penalties appropriately tiered. There is precedent for similar offences in section 11 of the Pollution Prevention Act.

New subsection 268(1) provides that subsection 268 applies to ships to which Part II of the Navigation Act applies and to any other ships in Australia or on a voyage to Australia.

New subsection 268(1A) provides that if a ship has sustained or caused an accident occasioning loss of life or serious injury to a person, the master must report the accident to a prescribed staff member of AMSA as soon as practicable and provide a written report. There is a maximum penalty of 500 penalty units for failure to report the accident or to provide a written report.

New subsection 268(1B) provides that if a ship has sustained an accident or otherwise received damage, or a defect has been discovered and the accident, damage or defect is likely to effect the seaworthiness or safety of the ship, the efficient operation of its equipment or the operation of life-saving appliances or other safety equipment, then the master must report the accident, damage or defect to a prescribed staff member of AMSA as soon as practicable and provide a written report. There is a maximum penalty of 200 penalty units for failure to report the accident, damage or defect or to provide a written report.

New subsection 268(1C) provides that if a ship has been in a position of great peril, been stranded or wrecked, or has fouled or damaged a pipeline, submarine cable or a marine navigational aid (other than one of the specified marine navigation aids to which section 9B of the Lighthouses Act applies) then the master must report this to a prescribed staff member of AMSA as soon as practicable and provide a written report. There is a

maximum penalty of 200 penalty units for failure to report the accident, damage or defect or to provide a written report.

New subsection 268(1D) provides that if a ship has left a port in Australia and has, for reasons of repair or maintenance, put back to that port or to another port in Australia, then the master must report this to a prescribed staff member of AMSA as soon as practicable and provide a written report. There is a maximum penalty of 20 penalty units for failure to report that the ship has put back or to provide a written report.

The new subsections 268(1) to (1D) provide that a master must report the accident to “such member of staff of the Authority as is prescribed”, in a form required by the new subsection 268(1E), which sets out the information required to be included in reports under subsections 268(1A), (1B), (1C) and (1D).

Item 72

Item 72 repeals the penalty of \$500 for the offence in section 269 of failing to notify AMSA of the loss of a ship and replaces it with a penalty of 50 penalty units. Notification of the loss of ships is required because a wrecked ship may create a hazard to navigation and/or pose a threat to the environment. There is a precedent for this penalty in section 125 of the Queensland *Transport Operations (Marine Safety) Act 1994*.

Item 73

The existing section 269A which requires the reporting of dangers to navigation is based on the Distress and Safety System that was used by most of the world’s shipping until 1992, as required by Chapter IV of SOLAS. This was a system of manual alerting and aural watchkeeping for all maritime communications. Under this system, ships would advise coast stations of danger messages via radio, and, if appropriate, the coast station would transmit the safety message to all ships on suitable radiotelegraph or radiotelephone frequencies.

Advances in technology led IMO to develop a new system based on modern technology and automation. The Global Maritime Distress and Safety System (GMDSS) was adopted by IMO in 1988, and led to the eventual closure of voice watches on radiotelephone distress and safety frequencies. The core GMDSS services are now provided by satellite technology and digital selective calling. Under GMDSS ships now alert shore stations via satellite communications and messages are retransmitted via the satellite network to all ships.

Item 73 repeals existing section 269A and replaces it with a new section 269A which better reflects current methods of reporting of danger messages via GMDSS. Voice watchkeeping, as the cornerstone of the old system and the basis for the existing section 269A, is no longer a requirement.

Item 73 also repeals the existing penalty of \$5,000 for the offence in subsection 269A of failing to report dangers to navigation and replaces it with a penalty of 200 penalty units. Failure to report a danger to navigation may result in an accident with consequential

pollution damage and loss of life. There is precedent for failing to report an incident in subsection 11(1) of the Pollution Prevention Act.

In accordance with new subsection 269A(1), the master of a ship must reports dangers to navigation by all means of communication at his or her disposal. In such cases, the master must send the prescribed safety signal followed by a danger message which contains prescribed information. The master is also required to make a report to shore to such a person and in such a manner as is prescribed. The prescribed content in this subsection reflects the requirements of SOLAS which are subject to change. Prescribing these matters provides flexibility to allow the requirements to be more readily changed in accordance with changes to SOLAS.

Item 74

Division 14 of Part IV of the Navigation Act (sections 269B-269N) sets out requirements for the reporting of movement of ships. Item 74 repeals the current eleven sections in Division 14 and replaces them with new sections 269B-269D.

New section 269B defines the following terms for the purposes of Division 14:

- ***Australia*** is defined to include the external Territories. This definition clarifies the extent of jurisdiction under Division 14 to include all Australian external Territories and that it is not limited to the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.
- ***Australian ship*** is defined to be a ship to which Part II of the Navigation Act applies.
- The definition of ***prescribed area*** provides that the area of the sea that may be prescribed as the area in which reporting requirements apply to ships is limited to:
 - Australia's search and rescue area; and
 - any area beyond the search and rescue area in respect of which Australia is required or permitted under an international treaty to obtain reports relating to ship movements.
- The definition of ***reporting matter*** clarifies that the reporting requirements provided for in the regulations may apply to any matter related to the movement or intended movement of ships including matters referred to in international treaties to which Australia is a contracting state.

New section 269C is an expanded objects section for Division 14. The new section provides that the objects of Division 14 include the making of provisions to give effect to Australia's rights and duties imposed on Australia under customary international law or as a contracting party under international treaties that provide for matters listed in the new section and to establish reporting requirements for Australian ships.

New section 269D provides for the making of regulations relating to reporting requirements for ships that are in or are entering or leaving a prescribed area and, in addition, for Australian ships wherever they are located. The regulations that may be made cover all matters in the existing sections in Division 14 that are repealed.

The regulations may prescribe different reporting requirement for different prescribed areas and for different classes of ships.

Items 75 and 76

Items 75 and 76 repeal the penalties of \$2,000 for offences in subsections 283F(3) and 283G(4) respectively and replace them with a penalty of 60 penalty units. The offences relate to the failure to comply with a direction by AMSA with respect to off-shore industry mobile units or off-shore industry vessels and mobile units not registered in Australia, but deemed to be registered in Australia. The failure to comply with a direction under both provisions may have serious consequences relating to the safety of off-shore industry mobile units and/or have adverse effects on the environment.

Item 76 also redrafts subsection 283G(4) to make it clear, in a manner similar to subsection 283F(3), that a direction by AMSA is to be given to the master or owner of the offshore industry vessel or mobile unit.

Item 77

Section 286 of the Navigation Act provides that the Minister may issue either a single voyage permit (SVP) or a continuing voyage permit (CVP) to an unlicensed ship to engage in trade with or between any ports in the Commonwealth or in the Territories if there is no licensed ship available or the service provided by licensed ships is inadequate. The Minister may issue an SVP or CVP only if the Minister is satisfied that it is in the public interest to do so.

Subsection 286(4) provides that the Minister may cancel a CVP if the Minister gives at least six month's notice to the owner, master or agent of the ship of his or her intention to do so.

Subsection 286(5) requires the Minister to notify in the *Gazette* the granting of a CVP or the Minister's intention to cancel a CVP.

Item 77 repeals existing subsections 286(4) and (5) and replaces them with new subsections 286(4),(5), (5A), (5B) and (5C). The requirement for the Minister to give six month's notice of his or her intention to cancel a CVP permit has been removed.

New subsection 286(4) provides that, if the Minister forms the view that it may be in the public interest to cancel a CVP, he may inform the permit holder and invite the permit holder to show cause within 7 days why the CVP should not be cancelled.

New subsection 286(5) provides that a notice under new subsection 286(4) is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is included to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

New subsection 286(5A) provides that if the Minister is satisfied that it is desirable in the public interest for the CVP to remain in force, having had regard to the representation

made by the permit holder under new subsection 286(4), the Minister must inform the permit holder that the CVP will not be cancelled.

New subsection 286(5B) provides that the Minister may, having had regard to any representation made by the permit holder under new subsection 286(4), cancel the CVP if the Minister is satisfied that it is desirable in the public interest to do so. The Minister must inform the permit holder of this decision and provide the date of effect and reasons for the cancellation.

The existing requirement for the Minister to publish in the *Gazette* his or her intention to cancel a CVP has been removed consequential upon the above amendments. However, in accordance with new subsection 286(5C), the granting of a continuing permit or the cancellation of a CVP must be notified in the *Gazette* within 14 days of the cancellation taking effect.

Item 78

Item 78 inserts new subsection 286(8) which provides a new definition of **permit holder** for the purposes of subsections 286(4) to (5C) (added by item 77). A permit holder means the master, owner, charterer or agent to whom a CVP was granted by the Minister in respect of an unlicensed ship.

Item 79

Item 79 inserts new section 377CA into the Navigation Act to provide that decisions relating to exemptions from compulsory pilotage requirements under new section 186K (inserted by item 32) are subject to review by the Administrative Appeals Tribunal.

Item 80

Item 80 inserts new section 377JA into the Navigation Act to provide that decisions relating to the cancellation of continuing permits granted under section 286 (amended by item 77) are subject to review by the Administrative Appeals Tribunal.

Items 81 and 82

Section 385 defines terms used in Division 2 of Part X (sections 386A to 391). Item 81 inserts a definition of **appropriately qualified** which is given meaning by the definition of **authorised person** (replaced by item 82). The appropriate training or experience required to be appropriately qualified as an authorised person for the purposes of sections 386C, 386E and 386F will be prescribed.

An authorised person may require a master or seaman to undergo a physical examination, permit the taking of a blood sample or to provide a blood sample, urine sample or mouth swab. In addition, an authorised person is permitted to take urine samples or mouth swabs from a master or seaman. Recasting the definition of **authorised person** to provide that the person must be appropriately qualified provides a safeguard to ensure the protection of the rights and liberties of persons from whom samples are taken.

Item 83

Item 83 inserts into section 385 a definition of *breath analysis machine* to mean a machine or device for taking or analysing samples of breath. Such a machine must be of a kind approved by AMSA for ascertaining the concentration of alcohol in a person's breath.

Item 84

Under the existing provisions, subsection 386A(1) provides that it is an offence if the capacity of a master or seaman to carry out his or her duties is impaired while he or she is under the influence of alcohol or another drug; subsection 386A(2) provides for a higher maximum penalty if the impairment, breach of duty or manner of operation caused or contributed to the likelihood or actual death of, or injury to, a person or damage etc to a ship, cargo or equipment.

Items 84 repeals subsection 386A(2) and replaces it with new subsections 386A(2) and (3).

New subsection 386A(2) outlines the elements relating to impairment of capacity, namely being under the influence of alcohol or any other drug, being in breach of duty as a master or seaman, or operating a ship in a dangerous manner. There is an offence if the impairment, breach of duty or operation of the ship in a dangerous manner causes or contributes to the actual or likely loss, destruction or serious damage to the ship or another ship, or to the cargo or equipment of the ship or another ship; or the death of, or injury to, another person or persons. The new subsection incorporates the offences in existing section 99 (repealed by item 20) which make it an offence if the master or a seaman on a ship to which Part II applies engages in conduct that is likely to result in damage to the ship or its cargo, or to endanger a person.

New subsection 386A(3) splits the offences into a number of specific offences with corresponding penalties appropriately tiered. It is an offence against the new subsection 386(2) if impairment, breach of duty or the manner of operation caused or contributed to:

- the likelihood of the loss or destruction of, or damage to, the ship or another ship, or to the cargo or equipment of the ship or another ship, with a penalty of imprisonment for 2 years;
- the actual loss or destruction of, or damage to, the ship or another ship, or to the cargo or equipment of the ship or another ship, with a penalty of imprisonment for 4 years;
- the likelihood of death or injury to another person, with a penalty of imprisonment for 5 years;
- injury to another person, with a penalty of imprisonment for 7 years; or
- death of another person, with a penalty of imprisonment for 10 years.

Item 85

Item 85 amends paragraph 386B(3)(a) so that the paragraph refers to a breath analysis machine rather than a breath analysis device. This is to ensure consistency in terminology, consequential upon the insertion of a definition of a *breath analysis machine* into section 385 by item 83.

Item 86

Item 86 amends subsection 386C(1). If an authorised person (as defined by item 82) has reasonable cause to believe that the capacity of a master or seaman is impaired because of alcohol or other drugs or that the blood alcohol content of a master or seaman exceeds the specified limit, the authorised person may require the master or seaman, by notice in writing given to the master or seaman to:

- undergo a physical examination by a medical practitioner
- permit a medical practitioner to take a blood sample
- provide a breath sample to, or permit the taking of a breath sample by, an operator approved by AMSA of a breath analysis machine
- provide a urine sample to, or permit the taking of a urine sample by, a medical practitioner or an authorised person
- provide a mouth swab to, or permit the taking of a mouth swab by, a medical practitioner or an authorised person.

Paragraph 386C(1)(e) introduces the requirement for mouth swab testing. Mouth swabs may be used to determine whether a person is under the influence of drugs for the purpose of section 386A.

Mouth swabs will not be used for any purpose other than to test for the presence of drugs. Mouth swabs will be taken only by a medical practitioner or an authorised person (who is defined as being a person who is appropriately qualified or trained in accordance with the definition inserted by item 82).

As an additional safeguard to masters and seamen who may be required by an authorised person to undergo a physical examination, provide a urine, blood or breath sample or a mouth swab, item 86 amends section 386C to provide that notification of such a requirement must be in writing.

Item 87

Item 87 amends paragraph 386C(2)(c) to include a reference to mouth swabs.

Item 88

Item 88 inserts new subsection 386C(3) which provides that a notice under new subsection 386C(1) is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is inserted to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Item 89

There are inconsistencies in the use of the terms “medical examination” and “physical examination”. There are requirements for a person to undergo a “physical” examination and offences if a person refuses to undergo a “medical” examination. Item 89 removes the inconsistencies, omitting the term “medical examination” wherever occurring, and substituting the term “physical examination”.

Item 90

Item 90 substitutes paragraph 386E(1)(b) to provide that it is an offence with a maximum penalty of 6 months imprisonment if a person who is required to undergo a physical examination by a medical practitioner refuses to provide a mouth swab as part of that examination.

Item 91

Item 91 replaces existing subsection 386E(2) with new subsections 386E(1) and (2) so that the existing penalty for refusing to submit to a physical examination or provide a sample is extended to apply to refusal to provide or to permit the taking of a mouth swab. The penalty remains unchanged as 6 months imprisonment.

References to “medical examination” are changed to “physical examination” for consistency.

The heading to section 386E is amended to read “**Refusal to submit to physical examinations or to provide samples**”.

Item 92

Item 92 amends subsections 386E(2A) and (3) consequential upon the insertion by item 91 of new subsection 386E(1A).

Item 93

Item 93 amends subsection 386F(1) so that it refers to “physical examination” rather than to “medical examination”. This is to ensure consistency in terminology.

Items 94 and 95

Items 94 and 95 amend paragraphs 386J(1)(a) and (b) so that reference is made to breath analysis machines rather than to breath analysis instruments.

Item 96

Item 96 amends the regulation-making power in subsection 386J(2) so that the procedures that may be set out in regulations for the taking or obtaining of samples (blood, breath or urine) may include procedures for the taking of mouth swabs in accordance with the new paragraph 386C(1)(e) (added by item 86).

Item 97

Item 97 amends subsection 397(2) consequential upon the replacement of section 206V by item 55.

Item 98

Item 98 amends subsection 397(2) consequential upon the insertion of new subsections 268(1) to (1E) by item 71.

Item 99

Item 99 amends subsection 410A(1) to require all ships, not just Australian ships, to carry suitable charts when the ships go to sea. The current requirement, which applies only to Australian ships, was added to the Navigation Act in 1921 when there was not an international obligation for ships to carry charts.

Item 100

Item 100 inserts a new subsection 410A(3) to clarify that the charts required to be carried by ships may be electronic charts; that is, the charts do not need to be in printed form.

Item 101

Section 410B provides that the master continues to be responsible for the conduct and navigation of a ship while it is under pilotage. The current subsection 410B(2) provides that the owner or master of a ship remains liable for any loss or damage caused by the ship where the ship is under pilotage in accordance with State or Territory law providing for compulsory pilotage.

Item 101 repeals subsection 410B(2) and replaces it with a new subsections 410B(2) to extend the subsection to pilotage that is compulsory under a Commonwealth law. Currently, the only compulsory pilotage area under a Commonwealth law is imposed in the Great Barrier Reef Region by the GBR Marine Park Act.

Item 101 also inserts a new subsection 410B(3) to make it clear that neither the pilot nor the pilot's pilotage provider is liable for civil damage that may result in connection with a ship while a ship is under pilotage. Pilot immunity from civil liability claims is a long-standing convention and is necessary because of the inability of pilots to insure themselves against potential liabilities.

Item 102

Item 102 inserts new section 411 to provide that the master is not relieved from responsibility for the conduct and navigation of a ship by reason only of the ship being subject to vessel traffic management arrangements (similar to air traffic control measures). Where a ship is subject to vessel traffic management arrangements which are

compulsory under Commonwealth, State or Territory law, the master and the owner are answerable for any loss or damage in the same manner as they would be if the vessel traffic management arrangements were not compulsory. This means, for example, if a ship is being directed in a harbour by a vessel traffic controller, the master retains responsibility for the ship; responsibility does not pass to a vessel traffic control officer.

Item 103

The existing section 414 makes it an offence to take a detained ship out to sea before it has been released by AMSA. Item 103 repeals the penalty for the offence in subsection 414(2) of \$5,000 or 2 years imprisonment, and replaces it with a maximum penalty of 500 penalty units. A ship is detained when it poses an immediate threat to safety or the environment, and it is important that the penalty is high enough to deter non-compliance. This level of penalty is consistent with subsection 19C(4) of the *Protection of the Sea (Civil Liability) Act 1981* and section 52C of the *NSW Marine Pollution Act 1987*.

Item 104

The existing subsection 415(1) provides for a strict liability offence to take an official to sea without consent, with a maximum penalty of \$1,000 or 6 months imprisonment. Item 104 amends subsection 415(1) making it a fault-based offence requiring proof of recklessness, and includes an element of the offence that the owner and master did not take all reasonable steps to prevent the official being taken to sea without consent. The penalty is changed to 100 penalty units.

Item 105

Item 105 replaces subsection 425(1)(h) to provide that the maximum penalty that may be imposed in the regulations for a contravention of the regulations or orders is 50 penalty units.

Items 106 to 108

The purpose of section 427 of the Navigation Act is to allow the publication in the *Gazette* of standards agreed to by the Australian Transport Council (ATC). The purpose of publication in the *Gazette* is to confirm that the standards have actually been agreed to by ATC. Agreed standards are implemented by the States and Northern Territory by reference in their marine safety legislation to give them force of law in the relevant jurisdiction and by the Commonwealth through subordinate legislation made under the Navigation Act.

The amendments to section 427 are intended to:

- reflect the fact that standards currently being produced are part of the National Standard for Commercial Vessels in addition to the older Uniform Shipping Laws Code (USL Code); and
- set out the correct name and membership of ATC.

Item 106 repeals the definition of *Council* in subsection 427(1) and substitutes it with a new definition which updates the membership to include New Zealand and Australian Capital Territory Ministers and to give it its current name, namely the Australian Transport Council rather than the Australian Transport Advisory Council.

Item 107 inserts a definition of *NSCV* in subsection 427(1) to mean the National Standard for Commercial Vessels as adopted by the Council.

Item 108 inserts a new subsection 427(3) to provide a reference to “the NSCV” as a consequence of the insertion made by item 107.

Item 108 also inserts a new subsection 427(4) which provides that evidence of matters declared in an order under subsection 427(2) or (3) is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is inserted to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

There is a consequential change to the heading to section 427 to read “**Ministerial orders concerning Uniform Shipping Laws Code and the NSCV**” as amended by items 107 and 108.

Schedule 3 – Amendments of the Protection of the Sea (Prevention of Pollution from Ships) Act 1981

The Pollution Prevention Act implements MARPOL in Australia. Schedule 3 of the Bill amends the Pollution Prevention Act.

Item 1

Item 1 inserts new section 22A into the Pollution Prevention Act to require Australian ships with a gross tonnage of 150 or more and certified to carry noxious liquid substances in bulk, to prepare and carry on board a shipboard marine pollution emergency plan for noxious liquid substances (noxious liquid substances plan). This is in accordance with requirements of Annex II of MARPOL. The new section 22A follows the precedent of existing section 11A (shipboard oil pollution emergency plan).

The purpose of a noxious liquid substances plan is to ensure that the master and crew of a ship know what to do in the case of an incident that involves the actual or potential pollution of the sea by noxious liquid substances and so therefore reduce or prevent the effects of pollution.

Development of the emergency plan means that the ship has been through a risk identification, assessment and management process and thorough consideration has been given to the planning required to respond to any incident giving rise to a potential pollution threat or OH&S threat to the ship's crew. The development of the plan will ensure that those involved are aware of their responsibilities to both the crew and the environment.

The form to be prescribed under new subsection 22A(3) will be based on the Guidelines for the Development of Shipboard Marine Pollution Emergency Plans for Oil and/or Noxious Liquid Substances adopted by IMO Resolution MEPC.85(44) in March 2000. The plan has been extensively considered and developed through the IMO processes resulting in a high level of familiarity by masters, owners, agents, etc. The advantage of such forms being agreed internationally is that ships may trade freely knowing that shipboard documentation is consistent with international standards eliminating undue delay in foreign ports.

New subsection 22A(6) provides that if a ship does not have a noxious liquid substances plan on board as required, the master and owner will each be guilty of a strict liability offence with a maximum penalty of 500 penalty units. This offence is directed only at the master or owner of a ship. Such a person can be expected to be fully aware of the requirements of the legislation and the need for a noxious liquid substances plan to be carried on board a ship. The level of the penalty is the same as the penalty for failing to carry a shipboard oil pollution emergency plan on a ship under existing section 11A of the Pollution Prevention Act. These sections are distinguished from the current section 26FC of the Act, which concerns shipboard waste management plans for garbage, with a penalty of 50 penalty units. A lower penalty applies in section 26FC as garbage waste is considerably less hazardous than noxious liquid substances and oil.

Because of the significant economic and environmental impact that pollution can cause, it is important that there is an appropriate penalty to discourage non-compliance with new section 22A.

New subsection 22A(7) makes the offence against subsection 22A(6) a strict liability offence. This is consistent with existing sections 11A and 26FC. The development of an emergency plan as required by new section 22A is a prudent action that a ship must undertake in recognition of the potential danger, to both aquatic and human life, of the chemicals that will be on board the ship.

New subsection 22A(8) provides that a shipboard marine pollution emergency plan for noxious liquid substances is not a legislative instrument for the purposes of the Legislative Instruments Act. This provision is inserted to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Item 2

Existing section 27A of the Act provides that, if a ship has been detained because of a possible pollution breach, it must be released immediately on the payment of security to cover the maximum amount of all penalties and other amounts that could be payable by the master or owner in respect of the pollution breach. Amendments to the Pollution Prevention Act in 2001 mean that penalties for pollution breaches may be imposed on persons other than the owner or master of a ship.

Item 2 amends paragraph 27A(4)(b) to provide that the amount of security to be paid must also cover the amount of all penalties and other amounts that could be payable by the master or other member of the crew, or the owner.

Items 3 and 4

Existing section 29A provides that documents to be served on the owner or master of a ship may be served on the agent of the ship instead. Amendments to the Pollution Prevention Act in 2001 mean that persons other than the owner or master of a ship may commit an offence under the Act.

Items 3 and 4 extend section 29A to provide that documents to be served on any member of the crew of a ship may be served on the agent of the ship.

Schedule 4 – Amendments of the Shipping Registration Act 1981

The SRA fixes conditions for the registration of ships in Australia, grants ships Australian nationality and provides for the registration of mortgages over ships. Schedule 4 of the Bill amends the SRA to provide that mortgages can be removed from the Register at the request of the mortgagee, provides that the powers of the Registrar of Ships and the Minister may be delegated to a member of the staff of AMSA, and allows for access to the Australian Register of Ships by electronic means, including via the Internet.

Item 1

An important function of the Australian Shipping Registration Office is to allow the Registrar of Ships to register a mortgage to protect the interests of the mortgagee. Currently, the Act allows for the removal of a mortgage from the Register if the mortgage is discharged or the ship is lost, destroyed or ceases to be entitled to be registered.

Item 1 inserts new section 44A into the Act to require the Registrar to close the registration of a mortgage at the request of the mortgagee. A fee will be prescribed to apply to applications for closure of registration.

Item 2

Item 2 amends subsection 52(1), a delegation section of the SRA, to allow the Minister to delegate his or her powers under the SRA to a staff member of AMSA. This is appropriate as the Australian Shipping Registration Office is part of AMSA.

The power of the Minister to delegate his or her powers to a person appointed or engaged under the *Public Service Act 1999* is being retained as some powers are delegated, and will continue to be delegated, to officers of the Australian Customs Service.

Item 3

Item 3 repeals subsections 52(2) and (3) because the matters covered in those two subsections are covered by paragraphs 34AB(c) and (d) of the *Acts Interpretation Act 1901*. Subsection 52(2) provides that a power exercised by a delegate is, for purposes of the SRA, deemed to have been exercised by the Minister. Subsection 52(3) provides that delegation does not prevent the exercise of a power by the Minister.

Item 4

Item 4 amends section 53, another delegation section of the Act, to allow the Registrar of Ships to delegate his or her powers under the Act to a staff member of AMSA. This is appropriate as the Australian Shipping Registration Office is part of AMSA.

The power of the Registrar to delegate his or her powers to a person appointed or engaged under the *Public Service Act 1999* is being retained as some powers are delegated, and will continue to be delegated, to officers of the Australian Customs Service.

Item 5

Item 5 repeals subsections 53(2) and (3) because the matters covered in those two subsections are covered by paragraphs 34AB(c) and (d) of the *Acts Interpretation Act 1901*. Subsection 53(2) provides that a power exercised by a delegate is, for purposes of the SRA, deemed to have been exercised by the Registrar. Subsection 53(3) provides that delegation does not prevent the exercise of a power by the Registrar.

Item 6

Section 57 of the SRA relates to the Australian Register of Ships. Item 6 replaces section 57 to authorise the Registrar of Shipping to allow the inspection of the Register electronically, to the extent that the Register is in electronic form. If the Registrar has made provision for electronic inspections, such inspections may occur using the Internet or any other prescribed communications network, otherwise than at the Australian Shipping Registration Office. There is provision for prescribing a fee for inspecting the Register and the making of copies of entries in the Register.

Item 7

Where a ship is lost, taken by an enemy, burnt or broken, section 66 of the Act requires the owner to advise the Registrar of Shipping who is then required to make an entry in the Register. The registration of the ship will be deemed to be closed except in relation to any unsatisfied mortgage of the ship. The Registrar gives notice to mortgagees and the registration in relation to mortgages is deemed to be closed 60 days after the date of that notice.

Item 7 amends subsection 66(5) to provide that the deemed closing of a mortgage is subject to the new section 44A (inserted by item 1) which allows a mortgage to be closed at the request of the mortgagee.

Item 8

Item 8 inserts a new subsection 66(5A) to make it clear that, if a mortgagee has requested that a mortgage be closed, then this may occur before the expiry of the 60 days following the notice from the Register of the ship being lost etc.

Item 9

Subsection 66(6) of the Act allows a mortgagee who has received a notice in relation to a ship that has been lost etc to make an application to a Supreme Court in relation to certain specified matters. Item 9 amends subsection 66(6) to provide that a mortgagee cannot make such an application to a Supreme Court if the mortgagee has applied for closure of registration of the mortgage under new section 44A (added by item 1).

