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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NAVIGATION AMENDMENT BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Infrastructure and Transport,
the Honourable Anthony Albanese, MP)

NAVIGATION AMENDMENT BILL 2011

OUTLINE

The purpose of the Navigation Amendment Bill 2011 is to amend the *Navigation Act 1912* (Navigation Act) to implement the Maritime Labour Convention (MLC) in Australia and to make some minor amendments relating to vessel tracking services.

Maritime Labour Convention

The MLC, which was adopted by the International Labour Organization (ILO) in February 2006, sets minimum requirements for working and living conditions for seafarers working on ships engaged in commercial activities. The MLC does not apply to ships engaged in fishing or in similar pursuits or to ships of traditional build such as dhows and junks.

The MLC modernises a wide range of existing international labour standards going back over eight decades. It:

- consolidates and updates more than 60 earlier ILO Conventions and Recommendations;
- sets minimum requirements for seafarers to work on a ship;
- addresses conditions of employment, accommodation, recreational facilities, food and catering, health protection, medical care, welfare and social security protection;
- promotes compliance by operators and owners of ships by giving governments sufficient flexibility to implement the MLC's requirements in a manner best adapted to their individual laws and practices; and
- strengthens enforcement mechanisms at all levels including:
 - provisions for complaint procedures to be made available to seafarers;
 - the shipowners' and masters' supervision of conditions on their ships;
 - the flag States' jurisdiction and control over their ships; and
 - port State control inspections of foreign ships.

The amendments contained in Part 1 of Schedule 1 of this Bill:

- remove inconsistencies between the MLC and the Navigation Act;
- provide for the making of regulations to give effect to the details of the MLC;
- provide for the issue of declarations of maritime labour compliance and maritime labour certificates to Australian ships and require the carriage of the certificate by any Australian ship with a gross tonnage of 500 and over while such a ship is engaged in an international voyage; and
- allow for the inspection of all ships at Australian ports by surveyors employed by the Australian Maritime Safety Authority (AMSA) to ensure that the ships comply with the requirements of the MLC.

Vessel Tracking Services

Vessel tracking services (VTS) are used to monitor the positions of ships. Part 2 of Schedule 1 of the Bill makes minor amendments to the Navigation Act in relation to VTS to amend the definition of "vessel tracking service" to refer to guidelines adopted by the International Maritime Organization and any amendments to those guidelines. There is also an amendment to the regulation-making power in the Navigation Act to specifically provide for the making of regulations relating to VTS.

FINANCIAL IMPACT STATEMENT

There is no financial impact arising from this Bill.

Abbreviations

AAT:	Administrative Appeals Tribunal
AMSA:	Australian Maritime Safety Authority
Fair Work Act:	<i>Fair Work Act 2009</i>
ILO:	International Labour Organization
IMO:	International Maritime Organization
MLC:	Maritime Labour Convention
Navigation Act:	<i>Navigation Act 1912</i>
VTS:	Vessel traffic services

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NOTES ON CLAUSES

Clause 1: Short Title

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

Clause 2: Commencement

The table in clause 2 sets out when the provisions contained in the Bill will commence. Each provision of the Bill specified in column 1 of the table commences on the day specified in column 2 of the table.

Clauses 1 to 3 will commence on the date that the proposed Act receives Royal Assent.

Item 1 in the table in subclause 2(1) provides that Part 1 of Schedule 1 commences on a single day to be fixed by Proclamation. A Proclamation must not specify a day prior to the day on which the MLC comes into force for Australia. However, if Part 1 of Schedule 1 does not commence within six months from the day on which the MLC comes into force for Australia, it will commence on the day after the end of that period. If Part 1 of Schedule 1 commences in this way, the Minister must announce by notice in the *Gazette* the day on which Part 1 of Schedule 1 commences.

Item 1 in the table also provides that a notice by the Minister is not a legislative instrument. This provision is merely declaratory of the law and is included to assist readers of the proposed Act.

The MLC will come into force generally 12 months after the date on which there have been registered ratifications by at least 30 ILO Members with a total share in the world gross tonnage of ships of 33 per cent. As at 11 May 2011, there were 12 registered ratifications with more than a 48 per cent share in the world gross tonnage of ships. The second condition for coming into force has therefore already been met. It is not known when the first condition for coming into force will be met.

If Australia is one of the original 30 countries whose ratifications are registered, then the MLC will come into force for Australia at the same time as it comes into force generally. Otherwise, the MLC will come into force for Australia 12 months after the registration of Australia's instrument of ratification.

It is intended that Part 1 of Schedule 1 of the Bill will be proclaimed to commence at the same time as the MLC comes into force for Australia.

Item 2 in the table provides that Part 2 of Schedule 1 commences on the day that the proposed Act receives Royal Assent.

Clause 3: Schedules

Clause 3 is a standard clause which provides that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.

Schedule 1 – Amendments

Part 1 – Amendments relating to the Maritime Labour Convention

Item 1 replaces the definition of **agreement** in subsection 6(1) of the Navigation Act to ensure that, as well as picking up agreements between the master (as a representative of the owner) and seamen on board a ship, the definition picks up agreements between the owner of a ship and the seamen on board the ship (that is, the underlying contracts of employment).

Item 2 inserts a definition of **Maritime Labour Convention** into subsection 6(1) of the Navigation Act.

Item 3 inserts a definition of **Maritime Labour Convention ship** into subsection 6(1) of the Navigation Act. To be a Maritime Labour Convention ship, a ship must be a ship of a kind to which the MLC applies (therefore, for example, not a fishing boat) and it must be registered, or be entitled to be registered, in a country to which the MLC applies.

Item 4:

- (a) substitutes the heading of Division 8 of Part II of the Navigation Act to more accurately reflect the content of Division 8 following the changes made by this Bill;
- (b) adds a heading for a new Subdivision A to read "Employment agreements";
- (c) adds a new section 45A relating to employment agreements; and
- (d) adds a heading for new Subdivision B which includes the existing sections 46 to 59B as amended by this Bill.

New section 45A, together with revised section 46 (item 5), gives effect to the requirement in Standard A2.1 of the MLC that all crew members are required to have an employment agreement. **Employment agreement** is defined widely for purposes of the new section. It means any agreement or combination of agreements dealing with terms and conditions of employment and includes a contract of employment, articles of agreement and an enterprise agreement under the *Fair Work Act 2009*.

The master and the owner of a ship will each commit an offence, with a maximum penalty of 20 penalty units, if the master takes the ship to sea without there being employment agreements complying with the new section in force in relation to the master and all seamen on board the ship. An employment agreement that complies with regulations made for the purposes of new subsection 45A(3) will comply with new section 45A.

The offence is directed at the owner and the master of a ship. It is 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. Such persons have shared responsibility and both can be expected to be fully aware of the requirements of the legislation (and of the MLC) and, in particular, the requirement for employment agreements to be in force for all crew members, including the master, before a ship goes to sea. While the master has immediate responsibility for the ship, he or she is subject to the direction of the shipowner. Shared liability is consistent with offence provisions in other parts of the Navigation Act and in other maritime legislation such as the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

Item 5 replaces section 46 of the Navigation Act to ensure that provisions relating to articles of agreement comply with the requirements of the MLC. The master and the owner of a ship will each commit an offence, with a maximum penalty of 20 penalty units, if an agreement complying with the revised section is not in force for each seaman on board the ship. Shared liability between the master and the owner is appropriate for the same reasons as given in the previous paragraph.

An agreement will comply with revised section 46 if:

- it is in accordance with any regulations relating to the form or content of the agreement made under new subsection 46(3);
- it is signed first by the shipowner or the shipowner's representative and then by the seaman; and
- it is dated as at the time the agreement is signed by the shipowner or the shipowner's representative if the agreement is entered into when the seaman is first engaged, or otherwise it is dated as at the time the agreement is signed by the seaman.

An agreement may include any additional provisions that have been agreed between the seaman and the shipowner or a representative of the owner but any such additional provisions must be lawful and not be inconsistent with the revised section 46.

Item 6 is an application provision to provide that the revised section 46 applies only in relation to ships taken to sea on or after the commencement of the amendments. The existing section 46 will continue to apply to ships taken to sea before the commencement of the amendments.

Item 7 amends subsection 50(1) of the Navigation Act consequential upon the insertion of the revised section 46 into the Navigation Act. Section 50 relates to the period of agreements. Subsection 50(1) currently refers to agreements under section 46. The revised section 46 requires agreements to comply with that section. Subsection 50(1) is therefore being amended to refer to agreements that comply with section 46.

Item 8 replaces existing section 53 of the Navigation Act. The existing section requires a copy of the articles of agreement (other than the section of the articles of agreement containing the names and signatures of, or particulars relating to, the master and other crew members of the ship) to be posted up in a part of the ship to which all seamen have access. The revised section serves a similar purpose by requiring information about conditions of employment to be made available to the master and seamen on board a ship. Regulations to be made under the revised section will provide flexibility in how that information is to be made available. While not excluding other means of providing the information, there is a specific power to allow the regulations to provide that the information may be provided in electronic form.

The owner of a ship will be guilty of an offence with a maximum penalty of 5 penalty units if information in accordance with the regulations is not made available. Strict liability applies to one of the elements of the offence, namely that the owner is subject to a requirement under regulations made for purposes of new subsection 53(1) to provide the information. It is appropriate that strict liability apply to this element of the offence as it will be obvious to the owner of a ship if the owner is required to provide information. A defence of honest and reasonable mistake of fact will be available in relation to this element of the offence. Applying strict liability to this element of the offence is consistent with other offences of this nature. For a prosecution to be successful, it will be necessary for the prosecution to prove the other two elements of the offence, namely:

- the owner, or a representative of the owner, has engaged in conduct; and
- the conduct resulted in a contravention of the requirement to provide information in relation to conditions of employment.

Item 9 replaces existing section 61 of the Navigation Act so that it conforms with modern drafting style. The effect of the section is unchanged. If a seaman is discharged from a ship, the master must give the seaman a written discharge and return to the seaman any previous discharges of the seaman in the possession of the master.

A penalty of 10 penalty units applies to a breach of the requirements of the revised section 61. This is the same level of penalty as applies to the existing section 61.

Item 10 replaces the existing subsections 62A(1) and (2) of the Navigation Act with a new subsection 62A(1) to reflect the requirements of paragraph 5 of Standard A2.1 of the MLC. The revised subsection 62A(1) requires that a master must give a seaman at least seven days notice of his or her discharge at a port outside Australia if the seaman has not consented to being discharged at that particular port.

A penalty of 10 penalty units applies to a breach of the requirements of the revised subsection 62A(1). This is the same level of penalty as applies to the existing subsection 62A(1).

Item 11 is an application provision relating to the amendments to sections 61 and 62A. The amendments made to those sections will apply only to notices of intention to discharge a seaman made on or after the commencement of the amendments. Section 61 and 62A continue to apply to such notices of discharge made before the commencement of the amendments as if the amendments had not been made.

Item 12 repeals the existing heading to Division 10 of Part II ("Seamen's wages") of the Navigation Act and replaces it with "Wages". This is because Division 10, as amended, makes provision in relation to the wages of masters as well as to the wages of seamen.

Item 13 repeals the existing sections 70 to 73 of the Navigation Act which relate to the payment of wages and replaces those sections with a new section 70 which provides for the making of regulations relating to the payment of wages.

The regulations may make provision for or in relation to:

- the frequency and the method of the payment of wages;
- deductions that may be made from wages;
- pay slips, including information to be included in a pay slip relating to exchange rates;
- the payment of all or part of the wages of a master or seaman to a person other than the master or seaman; and
- any charges that may be imposed if part or all of wages is paid to a person other than the master or seaman. In order to comply with the requirements of paragraph 5 of Standard A2.2 of the MLC, such charges must be "reasonable".

New subsection 70(3) makes it clear that the regulations must not provide for the quantum or amount of wages payable to masters and seamen. The amount or quantum of wages will be set out in a relevant enterprise agreement.

Items 14-16 and 20 repeal sections of the Navigation Act that are either redundant or are covered by the Fair Work Act.

Items 17-19 amend subsection 85(1), paragraph 85(4)(a) and subsection 85(5) of the Navigation Act to change references to the "wreck or loss" of a ship to "wreck, foundering or loss" of a ship. This is to conform with the terminology used in the MLC.

Item 21 is an application provision applying to the amendments or repeals made by items 13 to 20. Sections 70 and 85 of the Navigation Act will continue to apply in relation to wages earned before the commencement of the amendments as if the amendments had not been made.

The sections that have been repealed will continue to apply in relation to wages earned before the commencement of the amendments as if they had not been repealed.

Item 22 inserts new section 115 into the Navigation Act to require that provisions provided to the seamen and master of a ship shall be free. This requirement reflects the requirement of paragraph 2 of Regulation 3.2 of the MLC and the current common practice of providing free provisions on Australian ships.

Item 23 amends section 117 of the Navigation Act which requires a ship to carry provisions adequate for the voyage being undertaken. To reflect the requirements of regulation 2 of Standard A3.2 of the MLC, section 17 is amended to require that, in determining if food is of suitable quality, quantity, nutritive value and variety, the master must have regard to the cultural and religious backgrounds of the crew.

Items 24 to 33 amend a number of provisions within the Navigation Act to extend the current requirement for the owner of a ship to meet the expenses of medical care to also meet the costs of essential dental care. This reflects the requirement of paragraph 1 of Standard A4.1 of the MLC.

Items 34 to 37 amend section 134 of the Navigation Act. Section 134 currently provides for the making of regulations to give effect to the Medical Examination (Seafarers) Convention 1946. That Convention is one of a number of ILO Conventions that will be superseded by the MLC. References in section 134 to the Medical Examination (Seafarers) Convention 1946 are being replaced with references to Regulation 1.2 of the MLC which requires that the master and seamen working on a ship be certified as being medically fit to perform their duties.

Items 38 to 40 amend section 136 of the Navigation Act to replace references to the Accommodation of Crews Convention (Revised) 1949 and the Accommodation of Crews (Supplementary Provisions) Convention 1970 (which will be superseded by the MLC) with references to Regulation 3.1 of the MLC. Regulation 3.1 requires that "decent accommodations and recreational facilities" be provided on ships. The amendments will provide for the making of regulations relating to accommodation and recreational facilities.

Item 41 repeals section 138 of the Navigation Act which provides for the consideration by the Marine Council of plans for accommodation or the alteration of accommodation on a ship. This role is now performed by classification societies and section 138 is therefore redundant. Classification societies establish and maintain technical standards for the construction and operation of ships. They also validate that construction is in accordance with those standards and carry out regular surveys of ships to ensure compliance with the standards.

Item 42 repeals section 172A of the Navigation Act. Currently, if a seaman's agreement under section 46 includes provisions relating to a code of conduct and a master has made an entry in an official log book in relation to an occurrence under a code of conduct, the master is required by section 172A to report the making of that entry in the log book to AMSA.

As there is no provision for agreements made in accordance with the MLC to refer to codes of conduct, section 172A will be redundant when the MLC comes into force for Australia.

Item 43 amends subsection 187(2) of the Navigation Act to ensure that provisions of Part IV of the Navigation Act, as amended by this Bill, in relation to the MLC apply to all ships and that the application of those provisions is not restricted by section 2, the general application section of the Navigation Act.

Items 44 and 46 amend subsection 187(3) of the Navigation Act to insert references to the MLC into that subsection. Subsection 187(3) is a "roll-back" provision. The effect of the amendments (in combination with the amendment made by item 45) is that provisions of Part IV of the Navigation Act relating to the MLC will not apply to ships referred to in paragraphs 2(1)(a), (b), (ba), (c) and (d) of the Navigation Act to the extent that a law of a State or the Northern Territory gives effect to the MLC in relation to such ships. Those ships are as follows:

- trading ships proceeding on a voyage other than an overseas voyage or an interstate voyage;
- Australian fishing vessels proceeding on a voyage other than an overseas voyage;
- inland waterways vessels;
- pleasure craft; and
- (as a result of the amendment made by item 45), fishing fleet support vessels proceeding on a voyage other than an overseas voyage.

Items 45 and 48 amend subsections 187(3) and 187AA(2), respectively, of the Navigation Act to include a reference to paragraph 2(1)(ba) of the Navigation Act in each of those subsections. The effect is to include a reference in each subsection to fishing fleet support vessels proceeding on a voyage other than an overseas voyage. These amendments correct an oversight which occurred at the time paragraph 2(1)(ba) was inserted into section 2 of the Navigation Act.

Items 47 and 49 to 52 amend section 187AA of the Navigation Act to allow a declaration of maritime labour compliance and a maritime labour certificate to be issued under new sections 206XB and 206XC, respectively, in respect of ships referred to in paragraphs 2(1)(a), (b), (ba), (c) and (d) of the Navigation Act and to which the Navigation Act does not otherwise apply. A declaration and certificate would be issued in these circumstances following application by the owner of the ship to AMSA and after subsequent inspection to verify that a ship complies with the requirements of the MLC.

Item 53 inserts a new definition of *interim maritime labour certificate* into subsection 187A(1) of the Navigation Act. Interim maritime labour certificates will be able to be issued under regulations made under new section 206XE, to be inserted into the Navigation Act by item 70.

Item 54 inserts a new definition of *declaration of maritime labour compliance* into subsection 187A(1) of the Navigation Act. A declaration will be able to be issued under new section 206XB, to be inserted into the Navigation Act by item 70.

Item 55 amends the definition of *international voyage* in subsection 187A(1) of the Navigation Act by the insertion of a new paragraph (aa) to provide that *international voyage* has a specific meaning for purposes of the new Division 2D, to be inserted into Part IV of the Navigation Act by item 70. The amendment to the definition reflects the requirement of paragraph 1 of Regulation 5.1.3 of the MLC that applies requirements relating to declarations of maritime labour compliance and maritime labour certificates to ships of:

- "(a) 500 gross tonnage or over, engaged in international voyages; and
- (b) 500 gross tonnage or over, flying the flag of a Member and operating from a port, or between ports, in another country".

Item 56 amends paragraph (b) of the definition of *international voyage* in subsection 187A(1) of the Navigation Act consequential upon the insertion of paragraph (aa) into the definition by item 55.

Item 57 inserts a new definition of *maritime labour certificate* into subsection 187A(1) of the Navigation Act. A certificate will be able to be issued under new section 206XC, to be inserted into the Navigation Act by item 70.

Item 58 inserts the word "or" at the end of each of paragraphs 190(a), (b) and (c) of the Navigation Act. These are simply drafting amendments to reflect modern drafting style and do not affect the meaning.

Item 59 amends section 190 of the Navigation Act to allow AMSA to appoint, as surveyors, persons who are skilled with regard to assessing the living and working conditions on board ships. This will allow for the appointment as surveyors of persons who are able to inspect ships to determine if they comply with the requirements of the MLC.

Items 60 to 62 amend section 190AA of the Navigation Act to empower surveyors appointed by AMSA under section 190 to go on board a ship at any reasonable time and to inspect the ship to ascertain whether the ship complies with the provisions of the Navigation Act and regulations and orders relating to living and working conditions of the seamen and master on the ship and to require the production of any certificates or declarations relating to those conditions issued in respect of the ship.

Item 63 adds new subsection 190A(1AA) to the Navigation Act to provide that, if the living and working conditions on board a ship in respect of which a maritime labour certificate or an interim maritime labour certificate has been issued change so that they do not comply with the requirements of the Navigation Act, then written notice of the change must be given to AMSA as soon as practicable.

Item 64 amends paragraph 190A(1A)(a) of the Navigation Act to add a reference to new subsection 190A(1AA). The effect of this amendment will be that failure to give notice as required under new subsection 190A(1AA) will result in the master and the owner of the ship each being guilty of a strict liability offence with a maximum penalty of 10 penalty units in respect of each day during which notice is not given.

The offence is directed at the owner and the master of a ship. It is 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. Such persons have shared responsibility and both can be expected to be fully aware of the requirements of the legislation (and of the MLC) and, in particular, the requirement to notify AMSA of changes to the living and working conditions of the ship. While the master has immediate responsibility for the ship, he or she is subject to the direction of the shipowner. Shared liability is consistent with offence provisions in other parts of the Navigation Act and in other maritime legislation such as the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

It is appropriate that strict liability apply to this offence as it will be easy for the master or owner to show if he or she has given the required notice to AMSA. Further, strict liability will discourage careless non-compliance as well as intentional or reckless breaches of the requirement to give written notice to AMSA of changes to living and working conditions on board a ship. A defence of honest and reasonable mistake of fact will be available in relation to this offence. Applying strict liability to this offence is consistent with other offences of this nature.

Item 65 inserts new subsection 190(2A) into the Navigation Act to allow AMSA to cancel a maritime labour certificate issued under new section 206XC or an interim maritime labour certificate issued under regulations made under new section 206XE in respect of a ship if AMSA believes that any of the following apply:

- a report referred to in paragraph 206XC(1)(c) or (2)(c) which indicates that the ship complies with the requirements of the Navigation Act in relation to the living and working conditions on board the ship has been fraudulently or erroneously made or obtained;
- the maritime labour certificate or interim maritime labour certificate was issued upon false or misleading information; or
- since the certificate or interim certificate was issued, the living and working conditions on board the ship have changed so that they do not comply with the requirements of the Navigation Act.

In addition, if AMSA considers that, since the maritime labour certificate or interim maritime labour certificate was issued in respect of a ship, the living and working conditions on board the ship have been changed so that they do not comply with the requirements of the Navigation Act, AMSA may detain the ship until it is satisfied that those conditions comply with the requirements of the Navigation Act.

Items 66 and 67 amend subsections 190A(3) and (4), respectively, of the Navigation Act consequential upon the insertion of new subsection 190A(2A) by item 65.

Item 68 inserts a new section 191AA into the Navigation Act to provide that the regulations may give effect to the MLC. In accordance with subsection 425(1AA), AMSA may, by legislative instrument, make orders to give effect to the MLC (except for the imposition of penalties). Further, the regulations can apply to ships to which the MLC does not otherwise apply by reason of the particulars of the ship or class of the ship or of the voyage or class of voyages in respect of which the ship is engaged. Regulations and orders giving effect to the MLC will not apply to the extent that a law of a State or the Northern Territory gives effect to the MLC in relation to ships referred to in paragraph 2(1)(a), (b), (ba), (c) or (d) of the Navigation Act.

Item 69 amends subsection 191A(1) of the Navigation Act to provide that, if there is provision for a discretion in the MLC, then, in making regulations relating to the matter concerned, the Governor-General may make such provision in the exercise of that discretion as he or she thinks proper.

Item 70 inserts a new Division 2D into Part IV of the Navigation Act. The new Division, which is entitled "Declarations of maritime labour compliance and maritime labour certificates", includes new sections 206XA to 206XI.

New section 206XA applies to Australian registered ships with a gross tonnage of 500 or more and which are engaged on international voyages. Such a ship is required to have on board a maritime labour certificate, an interim maritime labour certificate or a certificate of exemption issued under new section 206XH exempting the ship from all requirements of the Navigation Act (which includes regulations and orders made under the Act) relating to living and working conditions on board the ship.

If such a ship is taken or permitted to be taken to sea without a required certificate on board, the owner and the master will each be guilty of an offence with a maximum penalty of imprisonment for four years.

The offence is directed at the owner and the master of a ship. It is 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. Such persons have shared responsibility and both can be expected to be fully aware of the requirements of the legislation (and of the MLC) and, in particular, the requirement to comply with conditions set out in a certificate of exemption. While the master has immediate responsibility for the ship, he or she is subject to the direction of the shipowner. Shared liability is consistent with offence provisions in other parts of the Navigation Act and in other maritime legislation such as the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

Failure to have a relevant certificate on board is an indication that the ship does not comply with the required working and living conditions. It is potentially a very serious occupational health and safety issue and can lead, for example, to officers who are responsible for the navigation of a ship working while fatigued, a potential cause of a major accident and consequent loss of life of, or injury to, crew members. The grounding of the *Shen Neng I* on the Great Barrier Reef in April 2010 was apparently the result of the fatigue of the Chief Mate. The final report into this incident by the Australian Transport Safety Bureau indicated that the Chief Mate had only 2½ hours of broken sleep in the previous 38½ hours.

Accidents can also result in serious environmental damage and pollution of the marine environment resulting from the spill of oil or other hazardous and noxious substances, or damage from a ship's anti-fouling paint being scraped off, as was the case following the grounding of the *Bunga Teratai Satu* in the Great Barrier Reef in May 2001.

The maximum penalty of 4 years imprisonment is consistent with penalties for similar offences in other sections of the Navigation Act including sections 206S and 206T which provide for a maximum penalty of 4 years imprisonment for taking a passenger ship and a cargo ship, respectively, to sea without required certificates.

New section 206XB provides for the issue of declarations of maritime labour compliance by AMSA and by a survey authority¹ in respect of ships registered in Australia.

Subsection 206XB(1) provides for the following steps before AMSA can issue a declaration of maritime labour compliance:

- Parts I and II of the declaration have been completed by AMSA and the shipowner respectively;
- a surveyor (appointed under section 190 as amended by item 59) has inspected the ship;
- AMSA has received a report of the inspection; and
- AMSA is satisfied that the measures set out in Part II of the declaration comply with the requirements of the Navigation Act (which includes regulations and orders under the Act) relating to compliance with requirements set out in Part I of the declaration.

Subsection 206XB(2) provides for the following steps before a survey authority can issue a declaration of maritime labour compliance:

- Parts I and II of the declaration have been completed by AMSA or the survey authority and the shipowner respectively;
- the ship has been inspected by or on behalf of the survey authority;
- the survey authority has received a report of the inspection; and
- the survey authority is satisfied that the measures set out in Part II of the declaration comply with the requirements of the Navigation Act (which includes regulations and orders under the Act) relating to compliance with requirements set out in Part I of the declaration.

A declaration of maritime labour compliance is required to be in the prescribed form. The prescribed form will follow the model set out in Appendix A5-II of the MLC.

New subsection 206XB(4), which advises that a declaration of maritime labour compliance issued under new section 206XB is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*, is merely declaratory of the law. It is included to assist readers of the Navigation Act, as amended by this Bill.

New section 206XC provides for the issue of maritime labour certificates by AMSA and by a survey authority in respect of ships registered in Australia.

Subsection 206XC(1) provides for the following steps before AMSA can issue a maritime labour certificate:

- a declaration of maritime labour compliance is in force in respect of the ship;
- a surveyor (appointed under section 190 as amended by item 59) has inspected the ship;
- AMSA has received a report of the inspection; and
- AMSA is satisfied that the ship complies with the requirements of the Navigation Act (which includes regulations and orders under the Act) relating to living and working conditions on board the ship (other than any conditions in respect of which AMSA has exempted the ship).

¹ Subsection 6(1) of the Navigation Act defines *survey authority* to mean "a corporation or association for the survey of shipping, approved by the Authority [ie, AMSA], in writing, for the purposes of this definition".

Subsection 206XC(2) provides for the following steps before a survey authority can issue a maritime labour certificate:

- a declaration of maritime labour compliance is in force in respect of the ship;
- the ship has been inspected by or on behalf of the survey authority;
- the survey authority has received a report of the inspection; and
- the survey authority is satisfied that the ship complies with the requirements of the Navigation Act (which includes regulations and orders under the Act) relating to living and working conditions on board the ship (other than any conditions in respect of which AMSA has exempted the ship).

A maritime labour certificate is required to be in the prescribed form. The prescribed form will follow the model set out in Appendix A5-II of the MLC.

New subsection 206XC(4), which advises that a maritime labour certificate issued under new section 206XC is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*, is merely declaratory of the law. It is included to assist readers of the Navigation Act, as amended by this Bill.

New section 206XD provides that a maritime labour certificate remains in force for the period specified in the certificate. That period must not exceed the period prescribed in the regulations.

New section 206XE provides that the regulations may make provision for and in relation to interim maritime labour certificates. The matters that those regulations may provide for include the issuing and duration of interim maritime labour certificates.

Interim maritime labour certificates are likely to be issued only to new ships on delivery, when a ship changes its country of registration, or when a shipowner assumes responsibility for the operation of a ship which is new to that shipowner. In accordance with paragraph 6 of Standard A5.1.3 of the MLC, an interim maritime labour certificate may be issued for a period of up to six months.

New section 206XF lists circumstances when a maritime labour certificate or an interim maritime labour certificate ceases to be in force. These are:

- the ship in respect of which the certificate was issued ceases to be registered in Australia;
- there is a change in ownership of the ship;
- in circumstances referred to in new subsection 190A(3) (inserted by item 66); and
- in circumstances prescribed in the regulations.

New section 206XG requires the master of a ship to ensure that a copy of a declaration of maritime labour compliance and a maritime labour certificate or an interim maritime labour certificate in respect of the ship is posted up in a part of the ship to which all crew members have access and that copies are available for examination on request by any person on board the ship.

New section 206XH provides that the regulations may provide for the granting by AMSA of exemptions from the requirements of the Navigation Act (which includes regulations and orders under the Act) that relate to working and living conditions on board the ship. AMSA may issue a certificate of exemption specifying the requirements in respect of which the ship is exempt and any associated conditions. If the owner or master of a ship is not satisfied with the conditions, if any, attached to a certificate of exemption, the master or owner may, in accordance with section 377D of the Navigation Act, apply to the Administrative Appeals Tribunal (AAT) for a review of the conditions.

If conditions set out in a certificate of exemption are not complied with, the master and owner each commit an offence with a maximum penalty of imprisonment for four years.

The offence is directed at the owner and the master of a ship. It is 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. Such persons have shared responsibility and both can be expected to be fully aware of the requirements of the legislation (and of the MLC) and, in particular, the requirement to comply with conditions set out in a certificate of exemption. While the master has immediate responsibility for the ship, he or she is subject to the direction of the shipowner. Shared liability is consistent with offence provisions in other parts of the Navigation Act and in other maritime legislation such as the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

Failure to comply with the conditions of an exemption is potentially a very serious occupational health and safety issue and can lead, for example, to officers who are responsible for the navigation of a ship working while fatigued, a potential cause of a major accident and consequent loss of life of, or injury to, crew members. The grounding of the *Shen Neng I* on the Great Barrier Reef in April 2010 was apparently the result of the fatigue of the Chief Mate. The final report into this incident by the Australian Transport Safety Bureau indicated that the Chief Mate had only 2½ hours of broken sleep in the previous 38½ hours.

Accidents can also result in serious environmental damage and pollution of the marine environment resulting from the spill of oil or other hazardous and noxious substances, or damage from a ship's anti-fouling paint being scraped off, as was the case following the grounding of the *Bunga Teratai Satu* in the Great Barrier Reef in May 2001.

Due to the serious nature of the offences as described above, the maximum penalty of four years imprisonment is appropriate. This penalty is consistent with existing penalties for similar offences for failure to comply with conditions of exemptions in sections 188, 206H and 221 of the Navigation Act.

New section 206XI applies when an Australian registered ship with a gross tonnage of 500 or more seeks clearance from a Customs officer to depart from an Australian port on an international voyage. The Customs officer may require the production of the maritime labour certificate or interim maritime labour certificate that applies to the ship or a certificate of exemption that exempts the ship from all the requirements of the Navigation Act (including regulations and orders made under the Act). If neither certificate is produced as required, the Customs officer may refuse to grant clearance and the ship may be detained until a certificate is produced.

Item 71 amends subsection 207A(1) of the Navigation Act to provide that, if a ship is of a kind to which the MLC applies or is capable of applying, the ship will be considered to be substandard if it does not comply with the MLC. A ship that is considered to be substandard may be detained under existing subsection 210.

Item 72 amends subsection 290(1) of the Navigation Act consequential upon revised section 46. Section 290 refers to the rate of wages to be paid to seamen not engaged in Australia. Subsection 290(1) currently refers to agreements under section 46. The revised section 46 requires agreements to comply with that section. Subsection 290(1) is therefore being amended to refer to agreements that comply with section 46.

Item 73 repeals paragraph 377C(d) of the Navigation Act consequential upon the replacement of section 46 by a revised section (item 5). Paragraph 377C(d) provides that an application may be made to the AAT for the review of a decision under existing subsection 46(2A) which provides for the approval by AMSA of certain agreements between the master of a ship and AMSA. As there is no provision in the revised section 46 for the approval of agreements by AMSA, paragraph 377C(d) is redundant.

Item 74 amends section 377D of the Navigation Act consequential upon the addition to that section of a new subsection (2) by item 75.

Item 75 adds a new subsection (2) to section 377D of the Navigation Act. Existing section 377D provides for AAT review of various decisions under Part IV of the Navigation Act, including decisions relating to certificates. This will include the review of decisions relating to maritime labour certificates which may be issued under proposed new section 206XC.

The effect of new subsection 377D(2) is that the AAT may also review decisions relating to declarations of maritime labour compliance issued under proposed new section 206XB.

Item 76 amends subsection 397(2) of the Navigation Act to ensure that section 19B of the *Crimes Act 1914* does not apply where notice of changes to a ship or to the working and living conditions on board the ship has not been given as required by section 190A. The effect is that the master or owner of a ship who has been charged with an offence under section 190A cannot be discharged without proceeding to conviction or the charge cannot be dismissed because the court is satisfied, in respect of the charge, that the charge is proved, but is of the opinion, having regard to:

- the character, antecedents, age, health or mental condition of the person;
- the extent (if any) to which the offence is of a trivial nature; or
- the extent (if any) to which the offence was committed under extenuating circumstances;

that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation.

Item 77 repeals and substitutes subsection 410(1) of the Navigation Act. Existing subsection 410(1) requires ships to which Part II of the Navigation Act applies to keep a copy of the Navigation Act on board the ship. New subsection 410(1) extends this requirement to require that a copy of the MLC be available on any such ships to which the MLC applies.

Item 78 repeals subsection 424(5A) of the Navigation Act consequential upon the replacement of section 46 by a revised section (item 5). Subsection 424(5A) provides that the Marine Council may investigate any matter referred to it in accordance with a provision of an agreement under section 46 relating to a code of conduct. As there is no provision for agreements made in accordance with the MLC to refer to codes of conduct, subsection 424(5A) will be redundant when the MLC enters into force for Australia.

Item 79 inserts new paragraphs (ea) and (eb) into subsection 425(1) of the Navigation Act to allow for the making of regulations for and in relation to, respectively, the training and qualifications of masters and seamen, and maximum working hours for masters and seamen.

The current regulation-making power relating to training and qualification and minimum hours of rest do not apply to all crew members. The addition of paragraphs (ea) and (eb) will remove this anomaly.

Part 2 – Amendments relating to vessel traffic services

Item 80 amends the definition of *vessel traffic service* in subsection 411(3) of the Navigation Act. Section 411 provides that the master of a ship is not relieved from responsibility for the conduct and navigation of the ship merely because the ship is subject to vessel traffic management arrangements. Vessel traffic management arrangements are measures that affect a ship's navigation implemented under a vessel traffic service by a person not on board the ship.

The term *vessel traffic service* is currently defined, in part, to mean a navigational service implemented in accordance with guidelines for vessel traffic services adopted by the International Maritime Organization (IMO) on 27 November 1997. In order that vessel traffic services can be implemented in accordance with up-to-date guidelines, the definition is amended to refer to the guidelines adopted by IMO on 27 November 1997, and as amended from time to time.

Item 81 inserts new paragraph (dc) into subsection 425(1) of the Navigation Act to allow for the making of regulations for and in relation to vessel traffic services. The making of regulations under this new provision will facilitate the development of vessel traffic services in environmentally sensitive areas such as the Great Barrier Reef.