



Maritime Legislation Amendment Bill 2005

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Maritime Legislation Amendment Bill 2005

Date Introduced: 23 June 2005

House: Senate

Portfolio: Transport and Regional Services

Commencement: Various dates, ranging from Royal Assent to six months after Royal Assent.

Purpose

The Bill amends various pieces of maritime legislation relating to ship safety, marine environment, general maritime navigation and miscellaneous administrative matters. Some of the provisions substantially increase existing penalties, including the possibility of imprisonment, so to provide a greater deterrent for breaches of the law.

Background

The bulk of the amendments contained in the Maritime Legislation Amendment Bill 2005 relate to the *Navigation Act 1912* (the NA). The NA is the main Commonwealth Act dealing with shipping movements and safety, crewing matters, wrecks and salvage. It does not apply to all ships or all situations. In general, it tends to concentrate on commercial shipping engaged in interstate or international voyages. The application of the NA to crewing matters depends on the registration of the ship, nationality of crew, and other circumstances.

During the late 1990s, the NA was extensively reviewed by the Commonwealth in two stages, the first focussing on crewing matters. The resulting Navigation Amendment (Employment of Seafarers) Bill 1998 was extensively amended in the Senate in 2000 and seems to have never passed the Parliament. The second stage of the review focussed on 'those parts of the legislation that restrict competition or trading opportunities, are anachronistic or redundant, or which impose costs or confer benefits on business. Part VI (the coasting trade) is excluded from the review as it has been the subject of a separate review process'.¹ The report of this second stage review is at <http://www.dotrs.gov.au/transinfra/pdf/navactfinatreport.PDF>. The most recent Parliamentary reference to the review appears to be by the (then) Minister for Transport and Regional Services, Mr Anderson, who in a May 2003 said:²

The implementation of the recommendations is being considered in the context of the Government's legislative program, bearing in mind the experience of earlier attempts to amend aspects of the Navigation Act 1912 that would have modernised and

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simplified the regulatory framework for ship operations. In addition to the Navigation Amendment (Employment of Seafarers) Bill 1998 referred to above, the Maritime Legislation Amendment Bill 2000 which sought to revise the trading ship safety regulatory framework under the Navigation 1912 was also passed by the House of Representatives but obstructed in the Senate.

A small number of issues canvassed by the review, such as pilot immunity from civil liability, are also included in the Bill. However, in general the current Bill does not seem to be directly related to the review. The review is not mentioned in either the *Explanatory Memorandum* or the second reading speech.

Main Provisions

Schedule 1 – Amendment of the Lighthouses Act 1911

Under existing section 19 of the *Lighthouses Act 1911* (LA), it is an offence to damage, destroy, obstruct, remove, interfere with, or trespass on, any navigational aid or associated equipment under the control of the Australian Maritime Safety Authority (AMSA).³ The current maximum penalty for an individual is \$200, or five times that for companies.⁴

Item 5 substitutes new offence provisions, with a graduated range of penalties according to the level of culpability involved. For example, if a person intentionally damages or destroys a navigational aid or associated equipment, the penalty is up to 10 years imprisonment. If the damage or destruction was a result of (only) negligence, the responsible person can be fined up to 200 penalty units (\$22 000), or five times that for companies. It is a defence that the relevant conduct was necessary to save a life or a ship, or prevent pollution, and that all reasonable steps were taken to avoid causing the damage, destruction etc.

Note that existing section 19A makes the person responsible for the damage or destruction to the navigation aid liable to AMSA for the cost of repair or replacement, unless that person can prove they were not at fault. This is unchanged by the Bill. Costs that are not recovered through section 19A are at least partially borne by the shipping industry via levies imposed under the *Marine Navigation Levy Act 1989*.

Schedule 2 – Amendment of the Navigation Act 1912

Existing section 3 of the Navigation Act (NA) provides ships ‘belonging’ to the Australian Defence Force (ADF) or to foreign naval, military or air forces, are *not* subject to the NA. **Item 1** extends this to include ships ‘operated by’ the ADF or foreign forces. This will for example allow the exemption from the NA to apply to vessels leased by the ADF.

Existing section 14 of the NA allows AMSA to prescribe the minimum number of seamen and officers to be carried on a class of ships or an individual ship. The *Explanatory Memorandum* to the Bill comments that these orders:⁵

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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.

Exemptions may be also given, including subject to certain conditions. **Item 16** increases the existing penalty for a **subsection 14(8)** offence of contravening a manning order or a condition of an exemption from \$2,000 to 60 penalty units (\$6 600) for an individual. Companies can be fined five times this amount.

Existing section 16 provides that it is 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

These offences implement the relevant provisions of International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (the STCW Convention). In relation to the issue, the *Explanatory Memorandum* states that:⁶

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.

Item 19 increases the existing penalty for a section 16 offence from \$2,000 to 50 penalty units (\$5 500) for an individual. Companies can be fined five times this amount.

Items 25-32 deal with the pilotage of ships. Pilots are specially qualified and licensed persons taken on board larger ships for finite periods of time to navigate the ship in confined or dangerous areas.

Pilotage in and around ports is regulated by State Governments and the relevant port authorities. Outside of port areas, the Commonwealth currently only regulates pilots with respect to transits of the major shipping routes in the Great Barrier Reef area. Whilst the requirement for pilots to be taken on board certain ships⁷ in transiting these routes

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(‘compulsory pilotage’) is contained the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act), the actual licensing and general regulation of pilots is actually done by AMSA under the NA. However, because of existing section 186 of the NA, AMSA can only regulate pilots operating on ships that are within, or transit to or from, any parts of Australia’s (12 nautical mile) coastal sea that have been specified in regulations. **Item 25** extends the regulation of potential pilotage areas to include any areas of the Australia’s (200 nautical mile) Exclusive Economic Zone that have been specified in regulations.

Items 26-27 will allow regulations to be made to cover the operations of pilotage providers. Pilotage providers are defined as an individual or company that assigns or allocates a pilot to a particular ship. Presumably the lack of the Commonwealths ability to directly regulate the work practices and legal liability of such providers is considered to be a gap in the overall regulation of ship navigation.

Existing section 186E creates various offences relating to pilotage, namely

- unlicensed persons representing themselves as a licensed pilot (subsection 186E(1))
- unlicensed persons performing the duty of a licensed pilot (subsection 186E(2));, or
- employment of a person who is not licensed pilot to perform the duties that are prescribed by the regulations to be the duties of a licensed pilot. (subsection 186E(5)).

Items 29-31 increases the existing penalty for the above offences. Notably, for a subsection 186E(1) offence, the maximum penalty rises from 20 penalty units (\$220) to two years imprisonment. For the others, the increase is from 20 to 50 penalty units.

Item 32 inserts **new sections 186G-L**. These will enable the Commonwealth to require compulsory pilotage of certain ships⁸ during the transit of areas set out in regulations: **new section 186H**. The new provisions are broadly similar to these requiring compulsory pilotage for transits of the major shipping routes in Great Barrier Reef area under the GBRMP Act. As in the case under the GBRMP Act, a ships master or owner may apply for an exemption from the compulsory pilotage requirements: **new section 186K**. An exemption may be granted subject to conditions. However, unlike the GBRMP Act, there are no criteria which AMSA must use in deciding whether to grant an exemption, although possibly these could be later prescribed by regulation when declaring an area subject to compulsory pilotage. The grant of an exemption is not a legislative instrument and thus not subject to disallowance by either house of Parliament. A refusal to grant an exemption is reviewable by the Administrative Appeals Tribunal (AAT): **item 79**.⁹

Under **new section 186I**, navigation without a pilot when one is required is an offence which carries a maximum penalty for both master and owner of 500 penalty units (\$55 000), although if the owner is a company the maximum penalty is five times that (\$275 000). The same penalties apply if a condition of a granted exemption is breached. Defences of ‘stress of weather, saving life at sea or other unavoidable cause’ are available: **new subsection 186L(1)**. The owner also has a defence if they can prove that they took all

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reasonable precautions and exercised due diligence to ensure the relevant ship would not navigate a compulsory pilotage area in contravention of the NA: **new subsection 186L(2)**.

Items 39-40 both concern increasing penalties applicable to ships' safety offences. Existing section 190AA allows an authorised ships surveyor to go on board a ship at any reasonable time and undertake an inspection or require the production of documents. Currently the penalty for any offence under section 190AA is \$2,000. However, a failure produce certificates or documents required by a surveyor will increase to 60 penalty units: **item 39**. Where AMSA directs the ship to be taken into dock for an inspection, a failure to comply will now result in a maximum penalty of 2 years imprisonment. The *Explanatory Memorandum* comments:¹⁰

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 60 inserts a new element into the definition of 'seaworthy' into existing subsection 207(1). Specifically, ships which pose a threat to the environment cannot be considered seaworthy, and thus are potentially subject to detention by AMSA whilst in port.¹¹

If AMSA considers that a relevant ship is not constructed in accordance with certain provisions of the International Convention for the Prevention of Pollution from Ships 1973/78 (MARPOL), existing sections 267K, 267Y and 2367ZQ allow AMSA to direct that it not enter port, or enter only to certain conditions. There are strict liability offences for breaches of these directions carrying maximum penalties of 100 penalty units (\$11 000) for individuals. However, **items 66, 68 and 70** create new offences where the master or owner is reckless whether the ship fails to comply with an AMSA direction. With the introduction of fault element to these new offences, the maximum penalties are accordingly greater - 500 penalty units (\$55 000) for individuals, or five times that for companies.

Existing subsection 268(1) requires that certain shipping accidents or dangerous incidents must be reported by the Master to relevant authorities as soon as practical. Currently an offence of failing to report where required is subject to a maximum penalty of \$2,000. **Item 73** substitutes new offences that carrying progressively increasing penalties according to the seriousness of the accident or incident involved. At the higher end, where an accident results in loss of life or serious injury, a failure to report carries a maximum penalty of 500 penalty units. At the lower end, the maximum penalties are 20 penalty units.

Items 77-78 deal with ships engaged in 'coasting trade'. Under the NA, this essentially means ships transporting cargo or passengers between Australian ports and not engaging

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in international voyages. Ships engaging in the coasting trade must generally be licensed by the Commonwealth. Conditions on licences may include matters such as the crew's minimum wages and conditions. However, if the Minister is satisfied either that no licensed ship is available or the available ships are inadequate to service a particular Australian port or ports, they may issue a permit to an unlicensed ship for particular coasting trade service. The Minister must be satisfied that it is desirable in the public interest to do so. A permit may be for a single voyage only, or may be a continuing permit. Currently, the Minister must give six months notice of his or her intention to cancel a continuing permit.

Item 77 amends existing section 86 to enable the Minister to give notice of his/her intention to cancel a continuing voyage permit if the Minister 'forms the view' that the cancellation is in the public interest. The Minister must give the permit holder the opportunity to show cause within 7 days of the notice why the permit should not be cancelled. After considering any representations by or on behalf of the holder, the Minister may cancel the permit and notify the holder. The holder can apply to the AAT for the review of a decision to cancel a permit.

Existing sections 385-386J create offences regarding the misuse of alcohol and other drugs by crew. These sections also deal with how various testing is to be administered etc. A key definition within these provisions is that of an 'authorised person'. If they have a reasonable cause to believe a crew member's capacity to perform their duties is impaired due to alcohol or other drugs or the alcohol content of their blood is over a specified limit, an authorised person may require any of the ship's crew (including the master) to undergo a physical examination, allow for the taking of a blood sample, urine sample or mouth swab. In addition, an authorised person is permitted to take urine samples or mouth swabs from a member of the crew.

Persons are 'authorised' for the above purposes by AMSA. However, currently there appears to be no legislative criteria or qualifications that a person must satisfy before AMSA authorises them. Together **items 81-82** will require that a person must have training or experience prescribed by regulation before AMSA may authorise them. The *Explanatory Memorandum* comments that:¹²

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 91 appears to allow an authorised person to take a urine sample or mouth swab for the purposes of alcohol / drug testing: **new subsection 386E(2)**. Currently, only a medical practitioner can do this. The maximum penalty for refusal to submit to a lawful medical examination or direction to provide a sample, swab etc remains the same at six months imprisonment.

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Section 386A creates offences of a person being under the influence of alcohol or another drug such that their capacity to carry out his or her duties is impaired. Specifically, subsection 386A(1) sets out a general offence and subsection 386A(2) provides for a higher maximum penalty (2 years imprisonment) 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. **Item 84** replaces the latter with **new subsections 386A(2) and (3)** which together substitute new offences that carry progressively increasing penalties according to the serious of the consequences, or possible consequences, of the impairment etc. If the conduct results in the death of another person, the maximum penalty now increases to 10 years imprisonment. At the lower end of the scale, for example where the offence involves the likelihood damage to the ship or to cargo or equipment of the ship, the maximum penalty is imprisonment for 2 years.

Existing subsection 410B(2) provides that the owner or master of a ship remains liable for any loss or damage caused by the ship even if a pilot is on duty under State or Territory compulsory pilotage law. **Item 101** amends this to extend the provision to apply to situations where pilotage is compulsory under a Commonwealth law. The item also inserts a **new subsection 410B(3)** to the effect that neither the pilot nor the pilot's pilotage provider is liable for civil damage that results from the pilot's actions, advice etc, as long as the action, advice etc was done in the course of the pilot's duty and in good faith. According to the *Explanatory Memorandum*, the rationale for **new subsection 410B(3)** is that:¹³

Pilot immunity from civil liability claims is a longstanding convention and is necessary because of the inability of pilots to insure themselves against potential liabilities.

Item 102 inserts **new subsections 411(1)-(3)**. **New subsection 411(1)** provides that the ships' master is not relieved from responsibility for the conduct and navigation of a ship merely because the ship is subject to vessel traffic management arrangements. Such arrangements might be in place in or near a port or other busy or confined area. **New subsection 411(2)** appears to mean that the master or owner of the ship is still liable for any civil damage whilst acting on the traffic management directions, even where the directions may have been negligent. Of course, in such cases the master or owner might be able to bring a separate civil claim against the giver of the negligent directions.

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

The *Protection of the Sea (Prevention of Pollution from Ships) Act 1981* (the Pollution Act) implements the Commonwealth's obligations under the MARPOL Convention.

Item 1 inserts **new section 22A** into the Pollution Act which will require Australian ships of 150 tonnes or more, and which are certified to carry noxious liquid substances in bulk,

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to have a marine pollution emergency plan. This provision implements a recent amendment of MARPOL, and is equivalent to an existing requirement in section 11A of the Pollution Act for an oil pollution emergency plan. In line with existing section 11A, a failure to have a relevant plan is a strict liability offence, with both the ship's master and owner liable to a maximum penalty of 500 penalty units (\$55 000), and five times that for companies.

Items 2-4 make relatively minor administrative changes to the Pollution Act.

Schedule 4 – Amendment of the *Shipping Registration Act 1981*

As its name implies, the *Shipping Registration Act 1981* (SRA) is the legislative mechanism for registration of a vessel as an Australian ship. It also provides for the registration of mortgages over such ships.

Items 1-9 make various amendments to facilitate the administration of the SRA. These are principally (i) matters related to registration of mortgages and (ii) to allow for delegation of either the Minister's or the Registrar's powers to a staff member of AMSA.

Concluding Comments

Probably the only common theme to the Bill is the updating of various offence provisions, particularly the increasing of penalties so they represent an appropriate deterrent and/or punishment. The remainder of the Bill appears to be mainly devoted to updating various aspects of the *Navigation Act 1912* so that it reflects contemporary shipping practices and trends.

Finally, it is unknown whether the Government intends to act upon the recommendations of the Navigation Act Review (see Background section of this Digest) in the immediate future.

Endnotes

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- 1 Review of the *Navigation Act 1912*, Final Report, June 2000, p. 181.
 - 2 Answer to question on notice, House of Representatives *Debates*, 14 May 2003, p. 14577.
 - 3 AMSA manages a network of 430 navigational aids around Australia's coastline. See: <http://www.amsa.gov.au/shipping%5Fsafety/navigation%5Fsafety/index.asp>.
 - 4 See *Crimes Act 1914*, subsection 4B(3).

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- 5 *Explanatory Memorandum*, p. 16.
- 6 *ibid.*, p. 17.
- 7 Ships that are at least 70m in length or are loaded oil tankers, chemical or liquefied gas carriers.
- 8 See footnote 5.
- 9 The comment contained in the paper version of this digest about the lack of review by the AAT is incorrect
- 10 *Explanatory Memorandum*, p. 22.
- 11 It may also be offence for ships master or owner to send an unseaworthy ship to sea.
- 12 *Explanatory Memorandum*, p. 32.
- 13 *Explanatory Memorandum*, p. 36.

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