

Replacement Explanatory Statement

Marine Order 507 (Load line certificates – national law) 2018 (Order 2018/7)

Authority

1. Subsection 159(1) of the *Marine Safety (Domestic Commercial Vessel) National Law* (the National Law) set out in Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* authorises the Governor-General to make regulations prescribing matters required or permitted to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to the National Law.
2. Subsection 159(3)(c) of the National Law provides that the regulations may prescribe requirements relating to the marking of domestic commercial vessels.
3. Subsection 159(5A) of the National Law provides for regulations to be made for the conduct of the survey of vessels.
4. Section 162 of the National Law provides that the regulations may prescribe:
 - (a) penalties for offences against the regulations; and
 - (b) civil penalties for contraventions of the regulations.
5. Subsection 163(1) of the National Law allows the National Regulator to make Marine Orders for any matter in the Act for which provision may be made by regulations, with some specified exceptions.
6. Section 164 of the National Law allows a Marine Order to provide for any matter by applying, adopting or incorporating any matter contained in any written instrument in force or existing from time to time.
7. This Order was made under subsection 163(1) of the National Law and is a legislative instrument for the *Legislation Act 2003*.
8. Subsection 33(3) of the *Acts Interpretation Act 1901* provides that a power in an Act to make a legislative instrument includes the power to repeal or amend the instrument, subject to any conditions that apply to the initial power.

Purpose

9. The purpose of this Order is to enable the National Regulator to issue load line certificates. The requirement for vessels to which this Order is stated to apply to have a load line certificate is a prerequisite to meet the criteria for the issue of a certificate of survey under *Marine Order 503 (Certificates of survey – national law) 2018*.
10. This Order repeals and replaces *Marine Order 507 (Load line certificates – national law) 2013*.

Overview

11. This Order provides for the issue of a load line certificate.
12. This Order also provides that a person may apply for the issue of a load line certificate. It also provides that the National Regulator has powers for dealing with load line certificates once issued, being the power of variation, suspension and revocation.
13. This Order further provides for offences for the owner and master of a vessel if the vessel is operated in breach of a condition, without or in a manner contrary to the load line certificate issued.

14. This Order repeals and replaces *Marine Order 507 (Load line certificates – national law) 2013*.

Consultation

15. A copy of the draft of this Order was sent to AMSA’s domestic commercial vessel and fishery advisory committees and to members of the Maritime Agencies Forum which represents the marine safety authorities of each State and Territory.

16. A copy was also released for external public consultation on 4 April 2018 for a four week period. No comments were received on the draft Order during this period.

17. The Office of Best Practice Regulation (OBPR) has advised that based on the information provided to it, the regulatory impacts of the amendments in this Order appear minor and no formal Regulation Impact Statement assessed by the OBPR is required. The OBPR reference number is 19255.

18. There are also consequential changes to this Order to align with the new survey regime in *Marine Order 503 (Certificates of survey — national law) 2018* (Marine Order 503) and address some minor drafting errors with the current Order. The OBPR considers that these changes made by the Order have regulatory impacts of a minor or machinery nature and no regulation impact statement is required. The OBPR reference number is 16724.

Documents incorporated by reference

19. Parts of the following documents are incorporated by reference:

(a) *Marine Order 501 (Administration — national law) 2013* (Marine Order 501);

(b) *Marine Order 503 (Certificates of survey — national law) 2018* (Marine Order 503);

(c) the National Standard for Commercial Vessels (NSCV);

(d) the Uniform Shipping Laws Code (USL Code);

(e) National Law – Marine Surveyors Accreditation Guidance Manual 2014; and

(f) the International Convention on Load Lines (the Load lines Convention).

20. The manner of incorporation for Marine Order 501 and Marine Order 503 is as in force from time to time due to the operation of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*).

21. The manner of incorporation for the NSCV, USL Code and the Marine Surveyors Accreditation Guidance Manual is specified for each instrument as existing from time to time — see subsection 17(2) of this Order. These instruments are available for free from the AMSA website at <http://www.amsa.gov.au>.

22. The Load Lines Convention is of treaty status and is incorporated as amended and in force for Australia from time to time (see definition of **Load Lines Convention** in Marine Order 501). The Load Lines Convention, including any amendments, can be found in the Australian Treaties Series accessible from the Australian Treaties Library on the AustLII website at <http://www.austlii.edu.au>. Information about obtaining hard copies of the Load Line Convention is available from the AMSA website at <http://www.amsa.gov.au>.

Commencement

23. This Order commenced on 1 July 2018.

Contents of this instrument

24. Division 1 (Preliminary) has 5 provisions.
25. Section 1 sets out the name of this Order.
26. Section 1A states that this Order commences on 1 July 2018.
27. Section 1B provides for the repeal of *Marine Order 507 (Load line certificates – national law) 2013*.
28. Section 2 sets out the purpose of this Order.
29. Section 3 states the application of the Order.
30. Division 2 (Issue of certificates) has 5 provisions.
31. Section 4 states that an application for a load line certificate for a domestic commercial vessel must be in accordance with Marine Order 501. Section 9 of Marine Order 501 specifies the form and content of an application.
32. Section 5 provides that the National Regulator must issue a load line certificate if the criteria for the issue of the certificate set out in that section are met. These criteria require, among other things, that an application for a load line certificate is made in accordance with section 4 of this Order, that the vessel has completed an initial or renewal survey in accordance with Part 2 of the National Law – Marine Surveyors Accreditation Guidance Manual 2014, and that the National Regulator is satisfied that the vessel complies with the Load Lines Convention or Section 7 of the USL Code.
33. Section 6 states that the National Regulator may renew a load line certificate if the criteria for the renewal of the certificate set out in that section are met. These criteria require, among other things, that the vessel has a load line certificate in force within the 2 year period before the application for renewal is made, and that the vessel continues to meet the criteria specified in section 5 of the Order. Subsection 6(2) provides that merits review applies to a decision to refuse to renew a certificate.
34. Section 7 sets out the conditions that a load line certificate for a domestic commercial vessel is subject to. These conditions include that the deck line and load line marks on the vessel are correctly and permanently indicated in accordance with the load line certificate, and that the vessel be periodically surveyed in accordance with the survey frequency required for the vessel under Marine Order 503.
35. Section 8 specifies that the duration of a load line certificate for a domestic commercial vessel is 5 years after it is issued if the certificate does not specify an earlier date on which it ceases to be in force.
36. Division 3 (Variation, suspension and revocation of certificate) has 4 provisions.
37. Section 9 specifies that an application for the variation, suspension or revocation of a load line certificate must be made by the owner of the vessel in the approved form.
38. Section 10 sets out the power for the National Regulator to vary a load line certificate and the criteria that must be met. There is a new criterion for variation of a load line certificate, on the National Regulator’s own initiative, which will enable the National Regulator to vary a certificate in circumstances where there has been in change in relation to conditions imposed on the certificate. This could be for example where the National Regulator has become aware that a condition previously imposed on the certificate is no longer appropriate or necessary.
39. Section 11 provides that the National Regulator must suspend a load line certificate in specified circumstances. This criteria is the same as the criteria in the repealed Marine Order 507.

40. Section 12 sets out that the National Regulator must revoke a load line certificate in specified circumstances. This criteria is the same as the criteria in the repealed Marine Order 507.
41. Section 13 creates an offence for the master of a domestic commercial vessel if the master fails to comply with a condition of a load line certificate. The requirement is a strict liability offence with a civil penalty applying.
42. Section 14 creates an offence for the owner of a domestic commercial vessel if the master fails to comply with a condition of a load line certificate. The requirement is a strict liability offence with a civil penalty applying.
43. Section 15 creates an offence for the master of a domestic commercial vessel if the vessel operates without a load line certificate being in force for the vessel, or the vessel fails to display a load line mark, or any associated mark, specified in the load line certificate to be displayed, or where the vessel operates so that the load line mark or any associated marking is submerged by water. The requirement is a strict liability offence with a civil penalty applying. Defences are set out in subsections 15(4) and (5).
44. Section 16 creates an offence for the owner of a domestic commercial vessel if the vessel operates without a load line certificate being in force for the vessel, or the vessel fails to display a load line mark, or any associated mark, specified in the load line certificate to be displayed, or where the vessel operates so that the load line mark or any associated marking is submerged by water. The requirement is a strict liability offence with a civil penalty applying. Defences are set out in subsections 16(4), (5) and (6).
45. Five provisions with offences specify defences but impose on the defendant a stronger, legal burden of proof, requiring the defendant to positively prove the defence:
 - (a) subsections 15(4) and (5), defence to offences in relation to a master operating a domestic commercial vessel where the load line mark, or any associated mark, specified in the load line certificate is submerged by water;
 - (b) subsection 15(5), defence to offences in relation to an owner causing or permitting a domestic commercial vessel to be operated without the vessel displaying the load line mark, or any associated mark, specified in the load line certificate; and
 - (c) subsections 16(1)(5) and (6), defence to offences in relation to an owner causing or permitting a domestic commercial vessel to be operated so that the load line mark, or any associated mark, specified in the load line certificate is submerged by water.
46. The above subsections have been retained from the previous version of this Marine Order. The relevant offence and defence provisions are therefore not new.
47. The Australian Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where it is peculiarly within the knowledge of the defendant and it would be significantly more difficult for the prosecution to disprove than for the defendant to establish the matter.
48. The purpose of a vessel's load line is to identify the legal limit to which a ship may be safely loaded in order to maintain buoyancy. These markings help ensure that a vessel is not overloaded. They also ensure that all persons, including crew and shore

based personnel, involved in the loading and unloading of the vessel can be aware of stability parameters. Awareness of a vessel's particular stability parameters could prevent the vessel becoming unseaworthy and possible catastrophic loss of the vessel, involving loss of life and threat to the marine environment.

49. Paragraphs 15(1)(c)(iii) and 16(1)(c)(iii) create strict liability offences for the master and owner of a vessel for operating a vessel with the load line submerged.
50. Subsections 15(4) and (5) set out possible defences for an owner or master respectively on the basis the load line was submerged only because the vessel was listing (leaning) in the water. Similarly, subsections 15(5) and 16(6) set alternative possible defences on the basis the load line was submerged only because of the density of the water.
51. The reversal of legal and evidential burden is appropriate for these offences because the operational circumstances which may lead to a vessel's load line being submerged are peculiarly within the knowledge of the owner or master. This defence is only relevant if a prosecution can first establish that an offence has been committed.
52. For example, the owner or master are uniquely positioned to explain and prove why their vessel may have been listing legitimately as a result of uneven loading, flooding or damage. Similarly, the owner or master are uniquely positioned to explain and prove that local variations in water salinity, type, or temperature at the specific time and location may have caused their vessel's load line to become submerged.
53. Subsection 16(4), sets out a possible defence for an owner from the same offence on the basis that the owner had appropriately caused a load line mark to be displayed and had no means of knowing that it was no longer displayed. Owners should be aware of their obligations under the law and should take all reasonable steps to ensure compliance with the law (noting that under the National Law, owners may also be the operator of their vessels).
54. The reversal of legal and evidential burden is appropriate because it is peculiarly within the knowledge of an owner whether or not they have taken any and all reasonable steps to ensure compliance with the load line requirements, and that they had no means of knowing the load line mark had been removed.
55. Section 17 sets out the definitions for the Order.
56. Section 18 sets out transitional and savings matters for the Order.

Statement of compatibility with human rights

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

Overview of the legislative instrument

58. The instrument is made under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* and sets out requirements for the application for, issue by the National Regulator, and conditions that apply to, load line certificates for domestic commercial vessels.

Human rights implications

59. This instrument creates offences of strict liability for operation of a vessel in breach of a condition of a load line certificate; operation of the vessel without a load line certificate or operation of the vessel in certain other specified

circumstances. Strict liability offences allow for the imposition of criminal liability without the need to prove fault (see section 6.1 of the Criminal Code).

60. Strict liability offences may engage and limit the presumption of innocence mentioned in Article 14 of the International Covenant on Civil and Political Rights. Civil penalty provisions may engage the criminal process provisions under Articles 14 and 15 of the ICCPR.
61. However, strict liability is imposed to reduce the risk to safety that would arise from commission of the offences. The penalties are to ensure a vessel is marked with appropriate deck line, load line, subdivision load line and draught marks. These markings help ensure that a vessel is not overloaded. They also ensure that all persons (including crew and shore based personnel) involved in the loading and unloading of the vessel can be aware of stability parameters. Awareness of a vessel's particular stability parameters could prevent the vessel becoming unseaworthy and possible catastrophic loss of the vessel, involving loss of life and threat to the marine environment. The penalties are relatively low (50 penalty units for an offence) and are within the limitation imposed by section 162 of the National Law. For offences under sections 15 and 16 of the Order, some specific defences are available, as mentioned in those sections.
62. Furthermore, Article 14.2 of the ICCPR states that, "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."
63. In regards to provisions where the legal burden of proof is reversed, the nature of the offences suggest that it is not unreasonable for the defendant to prove, on the balance of probabilities, that he or she held a reasonable belief about his or her own conduct or acted according to law, than the prosecution to have to disprove it.
64. Paragraphs 15(1)(c)(iii) and 16(1)(c)(iii) create strict liability offences for the master and owner of a vessel for operating a vessel with the load line submerged.
65. Subsections 15(4) and (5) set out possible defences for an owner or master respectively on the basis the load line was submerged only because the vessel was listing (leaning) in the water. Similarly, subsections 15(5) and 16(6) set alternative possible defences on the basis the load line was submerged only because of the density of the water.
66. The reversal of legal and evidential burden is appropriate because it is peculiarly within the knowledge of an owner whether or not they have taken any and all reasonable steps to ensure compliance with the load line requirements, and that they had no means of knowing the load line mark had been removed.
67. By imposing on the defendant the evidential or legal burden of proof, it ensures that people will be on notice as to any potential contravention; requiring that proper care is taken in the exercise of duties when operating, or permitting or causing to be operated a domestic commercial vessel to which the Order applies, and that the vessel is safe to be operated.
68. Any potential defendant would still be protected by their general rights at law. It is also noted that the decision to charge a person under these provisions would remain subject to Commonwealth Prosecution Policy.

Conclusion

69. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* because to the extent that it may limit human

rights, those limitations are reasonable, necessary and proportionate to ensure safe navigation, protection of life and the marine environment.

Making the instrument

70. This instrument has been made by the Chief Executive Officer of the Australian Maritime Safety Authority, in accordance with subsection 49(4) of the *Australian Maritime Safety Authority Act 1990*.