

REGULATORY IMPACT STATEMENT

Port and Harbour and Navigation Safety

Executive Summary

1. As the result of investigations into a series of serious incidents involving large ships in the approaches to or within New Zealand harbours in 2002/03, Maritime New Zealand (MNZ) developed the New Zealand Port and Harbour Marine Safety Code 2004. The Code is structured around risk assessment and the development of safety management principles, supported by good practice guidelines. The Code is not mandatory because no legislative basis exists for establishing and requiring compliance with harbour management systems.
2. The lack of legislative support for harbour safety management systems creates uncertainty over long term compliance and safety outcomes. Public consultation on harbour safety management options was undertaken in late 2007/early 2008. Legislative changes are now recommended to establish a simple framework of functions, duties and powers that provides clear authority for a harbour safety management regime. The key elements proposed are:
 - a harbour safety management function for regional councils;
 - a requirement for regional councils to appoint a suitably qualified harbourmaster;
 - aligning harbourmasters' functions and powers with harbour safety management;
 - a safety duty on port facility operators;
 - provision for making maritime rules for harbour safety management systems; and
 - audit, inspection and compliance powers to support safety management requirements.
3. It is also proposed that the relationship between national navigation safety standards and regional navigation bylaws be clarified and harmonised.

Adequacy Statement

4. The Ministry of Transport has reviewed this Regulatory Impact Statement and considers it adequate according to the adequacy criteria agreed by Cabinet.

Status Quo and Problem

5. The safety of shipping in and around New Zealand ports and harbours is influenced by a wide range of operational, environmental and regulatory factors. Operational factors include harbour pilotage, towage, channel lighting, other aids to navigation, traffic control and radio communications. Environmental factors include wind, visibility, tidal and sea conditions, and channel depth.
6. Some of these matters are regulated by MNZ under the Maritime Transport Act 1994. Some are regulated by regional councils and harbourmasters under the Local Government Act 1974. Others rely on service providers' operational procedures and decisions. There is no legislative provision for bringing these different aspects of harbour activity into a coordinated system for the management of harbour safety as a whole.

7. A series of serious incidents occurred at New Zealand ports in 2002/03, most notably the *Jody F Millennium* grounding and oil spill at Gisborne. MNZ accident investigations revealed a pattern of failures in port safety governance and operational procedures. A wider survey of port and harbour safety management practices revealed systemic problems not confined to the ports where the incidents happened.
8. In collaboration with industry, local government and relevant central government organisations, MNZ developed the New Zealand Port and Harbour Marine Safety Code 2004 (the Code). The Code provides comprehensive guidance for the safe management of ships in ports and harbours (which encompasses prevention of injury, property damage and harm to the environment).
9. The Code has been established on an administrative basis because of the absence of a legislative basis for such measures, and is being implemented voluntarily, with support from regional councils and port facility operators. Regional councils have carried out harbour risk assessments, which provide the basis for the development of harbour safety systems that will be subject to MNZ audit and approval under the Code.
10. General navigation safety is regulated under a mix of national navigation safety controls under the Maritime Transport Act 1994, maritime rules and local controls under the Local Government Act 1974, and regional navigation bylaws.

Problem definition - port and harbour safety

11. The New Zealand Port and Harbour Marine Safety Code was developed to meet a need for urgent action to address serious systemic deficiencies in the standard of harbour safety management. In the absence of suitable regulatory powers, administrative measures were the only option available but do not remedy weaknesses in the regulatory framework that led the systemic deficiencies. If the voluntary harbour safety management regime loses momentum, and if events occur that require prompt, decisive intervention, Maritime New Zealand, as the principal maritime safety agency, would be in no better position to act than it was in 2002.
12. This level of uncertainty over the future of harbour safety management is unacceptable in an environment where shipping carries around 98 percent of New Zealand trade by volume, and coastal and inter-island ferry services are vital to the domestic transport system. The safety of shipping in and around New Zealand ports is important not only economically, but also in terms of potential risk to life, property and the environment from a serious shipping accident.
13. The risks of safety management failure were amply demonstrated by the *Jody F Millennium* grounding at Gisborne, which resulted in New Zealand's largest ever oil spill and legal actions involving claims of some \$20 million. Groundings of oil tankers entering Whangarei harbour had the potential to involve far more serious consequences.

Problem definition – navigation safety

14. Currently, maritime rules set national navigation safety standards but apply only to geographical areas not covered by regional council navigation bylaws. Bylaws duplicate many requirements of the national rules for local application. The geographic application of bylaws within a region varies from region to region. Rules are enforceable by MNZ and bylaws by regional councils.

15. Consequently, core national navigation safety standards appear in fifteen sets of bylaws, rather than as a single, uniformly applicable national code that is readily accessible to the public. In addition to presenting the public with a confusing mix of bylaws and rules, including national standards in bylaws alongside specific local navigation controls can create inconsistencies and interpretational difficulties.

Objectives

Port and harbour safety management

16. The main objective of the proposal is to secure a reliable, enduring and legally sustainable basis for the coordinated management of operational and regulatory activities that influence the safety of shipping in New Zealand ports and harbours.

Navigation safety

17. The main objective is to clarify the relationship between national navigation safety standards set by maritime rules and local navigation controls established by regional council navigation bylaws.

Alternative Options

Port and harbour safety management

18. In addition to the status quo, three alternative options were considered for the management of port and harbour safety. Consideration was also given to whether, instead of the present regionally based approach to harbour safety management, the administration of harbour safety management should be centralised. In evaluating the options, consideration was given to the suitability of requiring regional councils to undertake the harbour management function in light of the general principle of local government autonomy under the Local Government Act 2002. In this instance, the responsibility for a specific port and harbour safety management function should be with regional councils because of the importance of regional councils to the effective delivery of local harbour control and the linkages between this role, management of the coastal marine area, and related council and harbourmasters' roles relating to such matters as marine oil spill response, maritime pilotage and requirements relating to carriage of dangerous goods by sea.

Alternative option 1 – Formal recognition of the Code

19. Option 1 would involve minor legislative change to elevate the Code's content to the status of a Ministerially-approved code, similar to a code of practice under the Health and Safety in Employment Act 1992. While giving Code content some official status, the key safety management requirements would remain discretionary and would not establish any higher level safety management functions, duties or powers. A formal approval process would limit flexibility to update and amend the extensive good practice guidance material presently embodied in the Code. This option would not mitigate the risk of non-compliance with a voluntary harbour safety management regime.

Alternative option 2 – Make the Code Mandatory

20. Option 2 would resolve the uncertainty of a voluntary Code by making compliance mandatory. Legislative change would be necessary to convert the Code into binding obligations and provide for its enforcement. In practice, much of the Code's content is advisory in nature and unsuitable for conversion into binding obligations. It would be

necessary to deconstruct the Code and separate it into a mixture of binding and advisory provisions, which would be costly, time-consuming and complex.

Alternative option 3 – Statutory provisions to supplement the Code

21. Rather than attempting to convert the entire Code into a binding instrument, Option 3 would focus on harbour safety management arrangements, which are pivotal to the Code. This would be achieved by specifying regional councils' functions and duties in respect of harbour safety management, port facility operators' harbour safety responsibility, bring harbour safety within the scope of Maritime New Zealand's compliance enforcement powers, and providing for maritime rules to specify requirements relating to harbour safety management.

Centralisation of harbour safety management

22. This approach would involve placing administration of harbour safety management in the hands of a central agency: either MNZ or a newly-created body. Regional councils would be relieved of responsibility for harbour safety management. Possible advantages of centralisation are greater consistency in standards, economies of scale and access to a larger pool of expertise. The idea was canvassed in the Ministry's discussion document on port and harbour and navigation safety. Submissions heavily favoured the existing regional model, on the basis that local personnel, resources and knowledge are better placed to deal with local demands, with a centralised operation carrying risks of disconnection between head office and regions.
23. Centralisation is not a preferred option. It would involve a major reorganisation of administrative and functional arrangements in order to deliver safety outcomes that can be achieved under the preferred option. Extending the role of MNZ would further stretch the organisation's capability. There is no evidence that safety outcomes could be achieved more efficiently by placing the function with a new entity. Centralisation clearly does not enjoy general regional council support.

Navigation safety

24. Only one alternative to the status quo has been considered. That alternative is to establish a clear demarcation between matters that are regulated by national standards in maritime rules and matters that are regulated by regional navigation bylaws.
25. The proposal would limit regional navigation bylaws to matters not regulated by the national rules. The national rules would apply uniformly throughout New Zealand. Regional bylaws would continue to specify additional navigation controls tailored to local needs.

Preferred Option

Port and harbour safety management

26. The preferred option is Option 3, which would provide the means to secure continued implementation of harbour safety management measures now being implemented under the voluntary Code. The key features of this option would involve:
 - specifying harbour safety management as a statutory function of regional councils;
 - requiring councils to appoint a suitably qualified harbourmaster;
 - clarifying the harbourmaster's function in relation to harbour safety management;
 - imposing a safety duty on port facility operators in respect of actions that affect the safety of shipping;

- extending the scope of the Director of MNZ's audit, inspection and compliance powers to include harbour activities that affect maritime safety; and
 - extending maritime rule-making powers under the Maritime Transport Act 1994 to include harbour safety management.
27. Advantages of this option are:
- it provides the means to address the risk of a decline in commitment to safety management systems under voluntary arrangements;
 - it avoids the complexity of attempting to translate the full Code into law;
 - compliance can be effected through an extension of existing powers under the Maritime Transport Act;
 - it aligns harbour safety management with the safety management scheme that applies to commercial shipping under the Maritime Transport Act;
 - it will eliminate the legal uncertainty inherent in Maritime New Zealand auditing and approving voluntary harbour safety management systems by consent;
 - port facility operators and regional councils will need to do no more than continue with their existing Code commitments in order to meet formal harbour safety management requirements; and
 - for regional councils, a statutory harbour safety management function and related duties under safety management rules will make it clear that this is a function for which a council may recover costs from harbour users.
28. Under the voluntary arrangements, some councils and port companies have committed themselves to significant expenditure on risk mitigations. For example, Port of Wellington Ltd has commissioned a new harbour tug and the Wellington Regional Council is upgrading its harbour radio service. Councils whose harbour departments are under-resourced are looking at upgrade costs.
29. If regional councils experience harbour funding problems, that will influence their ability to implement harbour safety improvements. This situation exists under the status quo but the preferred option will provide much clearer authority for harbour safety management expenditure. Some councils have indicated that the establishment of clear responsibilities for harbour safety management would improve their ability to allocate funding to and recover costs for the relevant activities.
30. The preferred option would involve the making of rules for safe harbour management. The rules would be additional to, and would complement, rules that regulate port marine activities, such as maritime pilotage, and the navigation and operation of ships.
31. Compliance costs would be addressed at the time the relevant rules were made to formally implement safety management requirements. Because the rule requirements would in effect formalise safety management measures currently being implemented voluntarily, compliance requirements would be minimal (except to the extent that a binding rule would remove the option of avoiding costs by opting out of the voluntary Code). Regional councils and port operators have already developed or are in the process of developing a safety management system that would provide the basis for compliance with rules.

General navigation safety

32. The proposal would provide for core navigation safety standards established by maritime rules to apply uniformly throughout New Zealand. Regional navigation bylaws would continue to specify additional navigation controls tailored to local needs but

would not duplicate, for local application, measures already contained in the maritime rules.

33. To allow easier enforcement of the national rules regional councils would be provided with the ability to issue infringement notices for breaches of navigation rules, as Maritime NZ can, rather than prosecute, which is expensive.
34. Minor legislative amendments would be necessary to empower regional council enforcement personnel to enforce national rules, to exclude rule content from bylaws and to provide for transitional arrangements.
35. The proposal would not require the making of new rules or bylaws: it would simply rationalise and clarify the content and application of existing national navigation safety rules. This change would simplify compliance for the boating community. A regional council would be able to enforce core navigation safety standards throughout its region without needing to make or extend bylaws if it wished to do so. This is particularly relevant for outlying areas where there may be an occasional need for a council to enforce core standards, but not to make bylaws that apply additional, local requirements.

Implementation and Review

36. Amendments to give effect to the proposal would be implemented in a Maritime Transport Amendment Bill to be drafted in 2008 for passage by late 2009. These amendments would include transferring to the Maritime Transport Act the navigation-related provisions of Parts 39A and 43 Local Government Act 1974. This reflects decisions on the Local Government Act Review in 2001 (POL Min (01) 16/15 para 5.15 refers) that the residual provisions of the Local Government Act 1974 should remain only until separate reviews had been undertaken by the relevant government department. Once the legislation has been enacted, it will be necessary to make rules under the amended Maritime Transport Act to activate harbour safety management requirements. It is expected that the necessary rules would be made within twelve months of the legislation's entry into force.
37. MNZ will approve, audit and monitor the performance of safety management systems and will evaluate the effectiveness of the rules. Rules are kept under constant review and amended as necessary as part of the transport rules maintenance programme.
38. Regional councils will be required to refer new navigation bylaws to Maritime New Zealand to check their consistency with navigation safety rules.

Consultation

39. The following Government agencies were consulted in relation to this paper: the Ministry for the Environment, the Ministry of Economic Development, the Ministry of Fisheries, the Ministry of Agriculture and Forestry, Treasury, New Zealand Customs Service, the Ministry of Civil Defence and Emergency Management, the Department of Internal Affairs, the Ministry of Justice, the New Zealand Defence Forces, the Ministry of Defence, the Department of Conservation, the Department of Labour, the Ministry of Foreign Affairs and Trade, the Ministry of Tourism, Te Puni Kōkiri, the Environmental Risk Management Agency, Maritime New Zealand, and the New Zealand Fire Service. The Department of Prime Minister and Cabinet was informed.
40. In November 2007 the Ministry of Transport released a Port and Harbour and Navigation Safety Management discussion document for public consultation. The document asked whether there is a case for providing formal support for the voluntary

Code and invited views on the status quo and the alternative options discussed above. The discussion document also sought views on whether centralised harbour control might produce better safety outcomes than the current regional approach.

41. Finally, the document discussed whether the scope of regional council jurisdiction over navigation safety within their regions could be made clearer, together possible measures to improve the enforceability of safety controls. It also sought views on the merits of consolidating all navigation safety controls, including port and harbour safety, in one statute.
42. Of the four harbour management options explored in the discussion document, the option of statutory measures to support the Code attracted the widest support because it provides the opportunity to tailor specific measures to identified problems.
43. Centralisation of harbour control received very little support. Submitters feel local control is more attuned to local day to day operational demands, and centralisation would not guarantee better, more cost-effective safety outcomes.
44. Submissions on navigation safety considered it preferable to maintain the division between local control over navigation under local government legislation, and national control under the Maritime Transport Act. There was support for finding a way to achieve greater harmony between local and national controls.
45. A consistent message from submissions was that funding adequacy and certainty is central to effective harbour and navigational safety management, regardless of the regulatory setting.