

Chair
Cabinet Legislation Committee

MARITIME TRANSPORT AMENDMENT BILL - APPROVAL FOR INTRODUCTION

Proposal

1. I propose that the Cabinet Legislation Committee approve the introduction of the Maritime Transport Amendment Bill (the Bill).

Executive summary

2. The Bill amends the Maritime Transport Act 1994 (the Act) by:
 - 2.1. implementing New Zealand's accession to the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the Supplementary Fund Protocol)
 - 2.2. providing for the implementation of reservations to the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976 (the 1996 Protocol)
 - 2.3. allowing regional councils to keep infringement fees paid in respect of infringement notices served for breaches of maritime rules
 - 2.4. allowing the Minister of Transport greater discretion to make maritime rules that provide for detail to be determined by others, such as the Director of Maritime New Zealand (the Director)
 - 2.5. requiring physical copies of incorporated material to be available for inspection at only the Head Office of Maritime New Zealand
 - 2.6. clarifying that a transfer of a responsibility for the local regulation of a maritime activity made under section 33X of the Act (which empowers the delegation or transfer of council's responsibilities) may be varied or reversed by those involved
 - 2.7. removing an ambiguity in the definition 'marine protection product'
 - 2.8. requiring commercial maritime operators to develop and implement drug and alcohol management plans (DAMPs) that include provision to carry out random drug or alcohol testing of safety sensitive staff
 - 2.9. empowering the Director, without prior notice, to carry out drug and alcohol testing of a maritime operator's safety sensitive staff in accordance with the DAMP

- 2.10. creating a power to make subordinate legislation to set out the procedural requirements for DAMPs and random drug or alcohol testing.

Policy

3. The Bill implements the following policy decisions agreed to by Cabinet:
 - 3.1. New Zealand's accession to the Supplementary Fund Protocol [EGI MIN (14) 20/6 refers]
 - 3.2. deposition of reservations to the 1996 Protocol [EGI-15-MIN-0145 refers]
 - 3.3. miscellaneous amendments [EGI-16-MIN-0063 refers]:
 - 3.3.1. providing the ability for regional councils to retain fees from infringement notices issued for breaches of maritime rules
 - 3.3.2. allowing the Minister of Transport greater discretion to make maritime rules that provide for detail to be determined by others, such as the Director
 - 3.3.3. improving competition and resilience of coastal shipping services to non-mainland ports by amending section 198(6) of the Act to make it easier for foreign-registered ships to carry freight between New Zealand and its offshore islands (including the Chatham Islands)
 - 3.3.4. requiring physical copies of incorporated material to be available for inspection only at the Head Office of Maritime New Zealand
 - 3.3.5. enabling territorial authorities to transfer responsibilities in relation to maritime activity to council-controlled organisations and port operators
 - 3.3.6. enabling territorial authorities to transfer responsibilities for maritime regulation under section 331(1)(b) to another public authority
 - 3.3.7. clarifying the ability of a regional council to withdraw the transfer of a responsibility for the local regulation of a maritime activity to another public authority
 - 3.3.8. clarifying the wording of section 388(n) of the Act (which will be inserted into the Act by the Biosecurity Law Reform Act 2012) to enable the Director to issue guidelines consistent with the requirements and procedures of the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004
 - 3.3.9. clarifying the definition of 'marine protection product' in section 225 of the Act, for the purposes of marine protection rules

- 3.4. new law providing for the management of health and safety risks arising from drug and alcohol impairment in the maritime sector [EGI-16-MIN-0068 refers], specifically:
 - 3.4.1. a requirement for commercial maritime operators (DAMP operators) to have DAMPs that include provision to carry out random drug or alcohol testing of staff who perform safety sensitive activities
 - 3.4.2. provision for the Director to carry out drug or alcohol testing on staff who perform safety sensitive activities without notifying them in advance
 - 3.4.3. provision to make subordinate legislation that sets out the procedural requirements for DAMPs and random drug or alcohol testing.

Supplementary Fund Protocol

4. Oil tankers in New Zealand carry between 55,000 and 100,000 tonnes of oil as cargo. New Zealand is a party to the International Convention on Civil Liability for Oil Pollution Damage 1992, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992. These conventions provide a tiered compensation system for pollution damage caused by an oil tanker.
5. Accession to the Supplementary Fund Protocol will increase the compensation available for a tanker spill in New Zealand from \$388 million to \$1.432 billion at current exchange rates. This compensation amount more accurately reflects the cost to clean up and control an oil spill from an oil tanker.

Reservations to the 1996 Protocol

6. New Zealand is a party to 1996 Protocol. The Protocol amended the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC), which allowed ship-owners and salvors to limit their liability for maritime claims arising out of loss of life or personal injury and loss or damage of property.
7. The 1996 Protocol was introduced to update the LLMC and address the inflation-eroded liability limits set in 1976 by:
 - 7.1. increasing liability limits for maritime claims
 - 7.2. providing a mechanism for updating liability limits in future
 - 7.3. adding a new right to exclude liability limits for claims involving damage from Hazardous and Noxious Substances cargo
 - 7.4. providing the ability to alter the system of liability for claims for loss of life or injury to passengers (the ability to set higher limits), and
 - 7.5. providing the ability to make reservations any time after accession.

8. Given that the 1996 Protocol has effectively superseded the LLMC, Cabinet approved denouncing the LLMC to avoid the possibility of a ship-owner or salvor claiming the lower liability limit of the LLMC. An instrument of denunciation was recently deposited with the International Maritime Organization (IMO) which will take effect one year after its formal receipt by the IMO.
9. In line with Cabinet's decision to deposit reservations to the Convention as amended by the 1996 Protocol, the Bill contains provisions to implement reservations that exclude the following categories of claim from liability limits:
 - 9.1. the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship (Article 2(1)(d) of the Convention)
 - 9.2. the removal, destruction or the rendering harmless of the cargo of the ship (Article 2(1)(e) of the Convention), and
 - 9.3. damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the carriage of Hazardous and Noxious Substances by Sea 1996 or of any amendment or protocol thereto (Article 7(1)(b) of the 1996 Protocol).
10. If the Bill receives approval, I will arrange with the Ministry of Foreign Affairs and Trade for notice of the reservations to be deposited with the IMO Secretariat.

Requirements for commercial operators to develop drug and alcohol plans

11. Over the last decade, the Transport Accident Investigation Commission (TAIC) has reported on maritime sector fatalities and gaps in how New Zealand manages maritime drug and alcohol impairment risks. Following the hot-air balloon crash near Carterton in 2012, in which all 11 people on board died, TAIC recommended changes to the alcohol and drug impairment management in the aviation, maritime and rail sectors.
12. Since 2012, the maritime alcohol and drug impairment management regime has been strengthened, primarily for adventure tourism operators. However, the Ministry of Transport and Maritime New Zealand cannot be sure that commercial maritime operators are managing alcohol and drug-related health and safety risks appropriately and consistently.
13. The proposed amendments establish mandatory requirements for commercial maritime operators (DAMP operators) to:
 - 13.1. have DAMPs (that will become part of the broader operator safety systems that are already required), and
 - 13.2. carry out random drug and alcohol testing of staff (safety sensitive workers) who do work that could significantly affect the health or safety of any person on board a ship (safety sensitive activities). If a safety sensitive worker returns a test result that is anything other than negative, that worker may not carry out

safety sensitive work until the DAMP operator is satisfied they can do such work safely.

14. As outlined in paragraphs 35-38 of the Cabinet paper *Recommendations to reduce the risks of alcohol and drug impairment in aviation, maritime and rail* [to which EGI-16-MIN-0063 refers], DAMP operators will set out alcohol and drug limits in their DAMP. A DAMP operator, or an agent on their behalf, will undertake the testing. The criteria for testing will be included in the relevant contract. If the contract is an employment agreement, it will incorporate the employment relations processes, and outline what will happen if a test returns anything other than a negative test result.
15. DAMPs will become part of an operator's maritime document and part of the same regulatory scheme as the rest of the maritime document.
16. The amendments also provide for the Director to carry out drug or alcohol testing on any safety sensitive worker without giving advance notice. The Director will test in accordance with the alcohol and drug limits set out in the DAMP operator's DAMP. The Director may test at any reasonable time and in any reasonable circumstances the Director considers appropriate, including randomly, after an incident, or with good cause to suspect, such as when a report of drug misuse is made to the Director. This will be part of the regulator's oversight and monitoring role.
17. There is also a power to make subordinate legislation to set out the procedural requirements for DAMPS and random drug or alcohol testing.
18. Setting out the requirements in legislation, and implementing them through employment agreements and other relevant contracts, will be low cost for the majority of DAMP operators, but will impact most on those who are not managing the risks.
19. The purpose of the requirements is preventive, rather than punitive. This is intended to help improve the safety culture of a workplace.

Miscellaneous amendments

20. With the exception of the following two matters, the Bill makes a number of minor amendments to clarify the intent of the legislation, correct errors and remove inconsistencies as per paragraph 3.3 of this paper.

Amendments to section 47 to allow the Director to grant exemptions as well as equivalence

21. I received Cabinet approval to amend the Act to enable the Director to grant equivalences for international maritime convention requirements. This means that the Director could grant an approval to any person, ship, or maritime product from any specified requirement in any maritime rule where there is an equivalent way of complying with the specified requirement. The Bill does not implement this approval.
22. This is because the Act currently allows the Director to grant exemptions where the requirement has been substantially complied with or where an action has made the compliance as effective or more effective than actual compliance with the requirement. Further policy work has determined that the current exemption provision

already enables the Director to exempt for equivalences. Therefore, amendments to take account of equivalences are no longer necessary.

Ability for public authority to delegate any responsibilities transferred to it by a regional council to another council controlled organisation or port operator

23. Section 33X of the Act currently allows a regional council to transfer any of its responsibilities¹ to another public authority, except the power to transfer responsibilities under that section. Section 33X further allows a public authority to delegate any of the responsibilities transferred to it by a regional council to a port operator except the power to make bylaws.
24. To encourage efficient regulation of maritime activity and in addition to those matters listed in paragraphs 3.3.5 to 3.3.7 above, I seek the Committee's agreement:
 - 24.1. to allow a territorial authority that has had regional council responsibilities transferred to it to delegate those responsibilities not only to a port authority (as at present) but also to a council-controlled organisation
 - 24.2. to amend section 33X to clarify that when (in accordance with the agreed amendment) powers transferred to a party under that section are varied or withdrawn, a process mirroring that specified in section 17 of the Local Government Act 2002 is to be followed
 - 24.3. to amend section 33X to clarify that the transfer of responsibilities described in section 33I does not have the effect of transferring ownership of any works constructed under that section.
25. The Bill has been drafted to take account of these changes.

Need for legislation

26. A Bill is required to give effect to the policy outlined above because it requires changes to the primary legislation.

Regulatory impact analysis

27. A regulatory impact statement was not prepared for the Supplementary Fund Protocol. Instead, a national interest analysis took place to inform the main policy decisions. A national interest statement was provided to the House of Representatives on 16 March 2015, in accordance with Standing Order 397(2)². A URL link to the national interest analysis is follows:
<http://www.transport.govt.nz/assets/Uploads/Sea/Documents/Supplementary-Fund-NIA-Dec2014.pdf>.

¹ Only responsibilities that are specified in Part 3A of the Act, which relate to local regulation of maritime activity.

² Presentation of national interest analyses for international treaties.

28. A regulatory impact statement was not required for the following, which meet the criteria for exemption in paragraph 3.1 of the Regulatory Impact Statement Handbook:
 - 28.1. amendments relating to the denunciation of the Convention on Limitation of Liability for Maritime Claims 1976 because this was essential in order to comply with the existing international obligations that are binding on New Zealand
 - 28.2. the miscellaneous amendments, which involve technical revisions or consolidations that substantially re-enact the current law in order to improve legislative clarity or navigability.
29. A regulatory impact statement has been prepared for the policy relating to the requirements for commercial operators to develop drug and alcohol plans. A URL link to this will be provided when the Bill is introduced in Parliament.

Compliances

30. The Bill complies with:
 - 30.1. the principles of the Treaty of Waitangi
 - 30.2. the New Zealand Bill of Rights Act 1990
 - 30.3. the Human Rights Act 1993
 - 30.4. the principles and guidelines set out in the Privacy Act 1993
 - 30.5. relevant international standards and obligations
 - 30.6. the LAC Guidelines on the Process and Content of Legislation (2014 edition), which are maintained by the Legislation Design and Advisory Committee.
31. The Ministry of Justice initially advised that it was concerned that the Bill was inconsistent with the right in section 21 of New Zealand Bill of Rights Act 1990 to be secure against unreasonable search or seizure. This is because there was nothing in the Bill preventing a DAMP operator from passing results of random testing to the New Zealand Police or another organisation. This would not be in line with the reasons for which the testing is carried out.
32. To address its concerns, I have now included a provision clarifying that the results of the statutorily required drug and alcohol testing carried out under these new provisions may not be used in a prosecution under any other Act, other than the Maritime Transport Act 1994 or any health and safety at work legislation.
33. This is in line with Cabinet's original intentions in the main [EGI-16-MIN-0063], that the purpose of the new regime is to be preventive rather than punitive. The addition to the Bill will allow for action to be taken in accordance with the health and safety at work legislation as well as the Act to ensure that the Government's health and safety goals are not undermined. This also reflects that Maritime New Zealand is responsible for enforcing health and safety legislation for work on board ships and ships as workplaces.

Consultation

34. The following government departments and agencies have been consulted on relevant parts of the Bill and their comments have been incorporated: the Department of Internal Affairs, Maritime New Zealand, the Ministry of Justice, the New Zealand Police and the Treasury.
35. The Department of the Prime Minister and Cabinet has been informed.

Binding on the Crown

36. The Maritime Transport Act 1994 already binds the Crown;³ this will not be affected by the Bill.

Creating new agencies or amending law relating to existing agencies

37. The Bill will not create any new agencies and will not amend the existing coverage of the Ombudsman Act 1975, the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987.

Allocation of decision making powers

38. The Director will be empowered to make decisions, without prior notice, to carry out drug or alcohol testing (or both) of safety sensitive workers who are subject to an operator's DAMP.

Other instruments

39. Consequential amendments will also be made to the Maritime Transport (Fund Convention) Levies Order 1996 (the Order), to give effect to the increased compensation amount available under the Supplementary Fund Protocol.
40. The Order will be renamed Maritime Transport (International Oil Pollution Compensation) Levies Order 1996.
41. New maritime rules will need to set out the procedural requirements for DAMPS and random drug and alcohol testing.

Definition of Minister/department

42. The Bill does not contain a definition of Minister, department (or equivalent government agency), or chief executive of a department (or equivalent provision). The Act being amended already contains such definitions.

³ Section 4 of the Act excludes ships and aircraft used by the New Zealand Defence Force (with exceptions) and ships and aircraft used for defence and government purposes by states other than New Zealand.

Commencement of legislation

43. The Bill is expected to be enacted in July 2017.
44. The provisions relating to the miscellaneous component of the Bill will come into force the day after Royal assent.
45. The provisions relating to the Supplementary Fund Protocol and the 1996 Protocol will come into force six months after the date of Royal assent. This will enable sufficient time for:
 - 45.1. finalising the accession process for the Supplementary Fund Protocol, including the three-month period before the Supplementary Fund Protocol can come into force following accession, and
 - 45.2. depositing reservations under the 1996 Protocol with the IMO Secretariat.
46. The new DAMP law will commence on the day after that date on which the Bill is enacted. However, DAMP operators will have an 18-month transition period to develop and implement DAMPs. The 18-month transition period provides for DAMP operators to learn about their new legal obligations and about the management of drug and alcohol risks, develop DAMPs and systems for implementing random drug or alcohol testing, and make changes to their employment agreements and other relevant contracts so they can comply with the new legal requirements.
47. During the transition period, Maritime New Zealand will:
 - 47.1. educate the maritime industry about the new legal environment including their obligations
 - 47.2. create resources to support operator implementation of the new law
 - 47.3. train its staff on the health and safety risks of drug and alcohol impairment and how to manage the new legal requirements
 - 47.4. operationalise the Director's power to carry out drug and alcohol testing
 - 47.5. create the systems needed to review and audit DAMPs.
48. Maritime New Zealand will review the DAMPs developed and implemented during this 18-month period at an operator's next scheduled audit. After the 18-month period ends, DAMPs will be presented as part of the application for an operator certificate, or for renewal of an operator certificate, and will be reviewed as part of that process.

Parliamentary stages

49. The Bill should be introduced in November 2016 and passed, if possible, by July 2017.
50. It is proposed that the Bill be referred to the Transport and Industrial Relations Committee.

51. The Minister responsible for the Bill will be the Minister of Transport.

Recommendations

52. The Minister of Transport recommends that the Committee:

1. **note** that the Maritime Transport Amendment Bill (the Bill) holds a category 3 priority on the 2016 Legislation Programme (to be passed if possible in the year);
2. **note** that the Bill will:
 - 2.1. give the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 the force of law in New Zealand
 - 2.2. give effect to New Zealand reservations to the 1996 Protocol
 - 2.3. implement various minor miscellaneous amendments that clarify some Maritime Transport Act 1994 provisions
 - 2.4. require drug and alcohol management plan (DAMP) operators to develop and implement DAMPs that:
 - 2.4.1. manage the health and safety risks associated with drug and alcohol impairment
 - 2.4.2. provide for DAMP operators to carry out random drug or alcohol testing of safety sensitive workers
 - 2.5. empower the Director of Maritime New Zealand to carry out drug or alcohol testing on safety sensitive workers without notice
 - 2.6. create a power to make subordinate legislation to set out the procedural requirements for random testing, and for DAMPs
3. **agree** that public authorities be allowed to delegate any responsibilities transferred to them by a territorial authority to another port operator or council-controlled organisation
4. **agree** to amend section 33X to clarify that when (in accordance with the agreed amendment) powers transferred to a party under that section are varied or withdrawn, a process mirroring that specified in section 17 of the Local Government Act 2002 is to be followed
5. **agree** that section 33X is amended to clarify that the transfer of responsibilities described in section 33I does not have the effect of transferring ownership of any works constructed under that section
6. **note** that the Bill contains a provision clarifying that the results of statutorily required drug and alcohol testing carried out under the new provisions may not be

used in a prosecution under any legislation other than the Maritime Transport Act 1994 or health and safety legislation

7. **authorise** the Parliamentary Counsel Office to make further minor drafting changes of a proofreading nature before the Bill is introduced
8. **approve** the Bill for introduction, subject to the final approval of the Government caucus and sufficient support in the House of Representatives
9. **agree** that the Bill be introduced in November 2016
10. **agree** that the Government propose that the Bill be:
 - 10.1. referred to the Transport and Industrial Relations Committee for consideration
 - 10.2. enacted, if possible, by July 2017.

Authorised for lodgement

Hon Simon Bridges
Minister of Transport