

## **EXPLANATORY MEMORANDUM**

### **GENERAL**

#### **Overview of Bill**

The primary purpose of the **Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023** (the Bill) is to adopt in Western Australia a national approach to the regulation of marine safety in relation to domestic commercial vessels.

On 19 August 2011, the Council of Australian Governments (COAG) signed the Intergovernmental Agreement (IGA) on Commercial Vessel Safety Reforms to establish a national marine safety law and national marine safety regulator for all commercial vessels in Australian waters.

On 1 July 2013, the Commonwealth's ***Marine Safety (Domestic Commercial Vessel) National Law Act 2012*** (Commonwealth National Law) came into force and established:

- the Australian Maritime Safety Authority (AMSA) as the National Regulator;
- a system for the issue of national certificates relating to commercial vessel identification, survey, commercial operation, and competencies of commercial seafarers;
- general safety requirements for individuals who have a role in the production and operation of commercial vessels;
- offences for non-compliance and a system within which to conduct compliance and enforcement activities; and
- provisions for the consistent application of nationally agreed standards across Australia.

The objects of the Commonwealth National Law, which align with the IGA, are to:

- a) form a part of a national scheme for the safe operation, design, construction and equipping of domestic commercial vessels in Australia;
- b) implement Australia's international obligations for domestic commercial vessel safety;
- c) facilitate the development of a safety culture to prevent or reduce marine incidents in Australia;

- d) provide a national framework for the development and application of consistent national standards relating to the operation, design, construction and equipping of domestic commercial vessels in Australia;
- e) enhance the efficient and orderly operation of domestic commercial vessels in Australia; and
- f) provide an effective enforcement framework to prevent or reduce marine incidents and ensure compliance with international obligations and national standards in Australia.

The Bill forms a component of the national scheme for uniform national regulation of domestic commercial vessels, in accordance with Western Australia's commitment to the IGA by:

- applying Schedule 1 of the Commonwealth National Law (Scheduled National Law) as a law of Western Australia, which will apply to domestic commercial vessels not within the constitutional reach of the Commonwealth National Law; and
- making provision to enable the Commonwealth National Law and the National Law as applied by the Bill (Applied National Law) to be administered on a uniform basis as if they constituted a single law of the Commonwealth.

The Bill also:

- repeals provisions of the **Western Australian Marine Act 1982** (WA Marine Act) which are no longer required due to the commencement of the Commonwealth National Law, or will no longer be required due to the application provisions of the Bill, and makes necessary transitional amendments;
- makes consequential amendments to affected Western Australian statutes, including by removing references to the Commonwealth **Navigation Act 1912** which was repealed at the same time the Commonwealth National Law commenced; and
- substantially modernises some parts of the WA Marine Act to ensure compliance and enforcement provisions are as consistent as practicable for both recreational and commercial vessels. It also updates standards and penalties and closes loopholes in regulation making powers which prevent certain marine craft from being required to carry safety equipment and which limit the government's ability to efficiently remove safety hazards from the water.

### **Division of responsibility between State and Commonwealth**

Until 1 July 2013, regulatory control of domestic commercial vessels in Australian waters including certification of vessels and their crew, and controls on equipment and operations, was the responsibility of State and Territory governments.

The Commonwealth has been regulating commercial vessels on overseas or interstate voyages, which included most large ships, since the commencement of the now superseded Navigation Act 1912. These ships included trading vessels on overseas and interstate voyages, fishing vessels on overseas voyages and offshore drilling rigs. The States and Territories continued to have legislative responsibility for trading vessels on intra-state voyages, fishing vessels on intra-state and interstate voyages and hired vessels operating in State and Territory waters.

Since the Commonwealth National Law commenced on 1 July 2013, AMSA has had regulatory control of design, construction, equipping, fit out, operation and crewing of commercial vessels.

The Commonwealth National Law applies to the exclusion of State or Territory marine safety laws which relate to domestic commercial vessels. However, laws relating to certain matters are excluded from the application of the Commonwealth National Law. State and Territory legislation (such as the WA Marine Act) continues to apply to domestic commercial vessels where it relates to functions including:

- waterways management rules such as speed restrictions, navigation aids, wreck removal and water closures;
- drug and alcohol controls;
- management of ports, harbours and moorings, including harbour master powers to direct commercial vessels in ports; and
- emergency and environmental management.

The Commonwealth National Law preserves the operation of State and Territory laws which regulate occupational health and safety. In Western Australia, this enables the oversight of WorkSafe to continue in workplaces in the commercial marine sector.

While initially AMSA delegated its powers as the National Regulator to State and Territory Directors General of marine safety regulators, who in turn subdelegated these functions to departmental officers to administer the regime, AMSA took over responsibility for service delivery of the Commonwealth National Law from 1 July 2018.

## **Gap Vessels**

While the Bill would apply the Commonwealth National Law as a law of Western Australia, it already applies to most domestic commercial vessels in Western Australia. Commonwealth Parliament legislated to the extent of its constitutional powers to regulate nearly all domestic commercial vessels Australia wide. To the extent that any domestic commercial vessels were not captured by those powers, States and the Northern Territory agreed to apply the Commonwealth National Law in their jurisdiction as if it were a law of the Commonwealth.

As set out in section 5 of the Commonwealth National Law, those powers are:

- Trade and commerce power (section 51(i));
- Foreign corporations and trading or financial corporations power (section 51(xx));
- External affairs power (section 51(xxix));
- Incidental power (section 51(xxxix));
- Power to confer original jurisdiction on the High Court (section 76(iii)); and
- Territory power (section 122).

This scheme was designed to ensure there was no ‘gap’ in vessel regulation resulting from limits to the Commonwealth’s powers. However, marine safety regulators, including the Department of Transport, do not have the kind of financial and operational details about commercial vessel operators that would allow them to conclusively determine whether a vessel would fall in the ‘gap’ of Commonwealth regulatory power.

All States and the Northern Territory have applied the National Law except Western Australia, where a regulatory ‘gap’ still exists. Certain domestic commercial vessels, estimated to be approximately 5-10% of all commercial vessels, are within this ‘gap’ and are therefore regulated under Western Australian law, which involves different certification requirements, safety equipment and crew qualifications. Different compliance and enforcement provisions also apply to these vessels, which makes compliance activity complicated for some Department of Transport and Western Australia Police officers who have enforcement powers under both the Commonwealth National Law and Western Australian marine law.

This Bill would ensure all ‘gap’ vessels are subject to the National Law, which would apply in Western Australia to ‘gap’ vessels as if it were a law of the Commonwealth. There would no longer be two separate commercial regimes applying in Western Australia, and enforcement powers would be consistent for all commercial vessels, and where appropriate, recreational vessels too.

### **Application Mechanism**

The mechanism to apply the Commonwealth National Law is very similar to that used in the *Legal Profession Uniform Law Application Act 2022* and the *Fair Trading Amendment Act 2022*. The Bill applies the Scheduled National Law as a law of Western Australia as in force on a specified date, rather than as amended from time to time. The Bill provides for an amending Act (defined as a Commonwealth Act that amends the Commonwealth National Law on or after 15 May 2023) to be laid before each House of Parliament within 18 sitting days of the House after the day on which the amending Act receives the Royal Assent.

The Bill provides for disallowance of amending Acts. If an amending Act is not disallowed, it will be applied in WA by proclamation at a later date to when that Act amended the Commonwealth national Law.

This does not apply to subsidiary legislation made under the Commonwealth National Law. This will apply in Western Australia automatically because of clause 6 of this Bill, but will be subject to tabling and disallowance requirements as detailed in clauses 12-15 of the Bill.

## **Drafting Conventions**

As the WA Marine Act has not had a significant review in 40 years, the Bill contains numerous amendments to reflect changes in drafting style and to correct minor typographical errors.

Some provisions which might be described as ‘Henry VIII clauses’ are present in the Commonwealth National Law. For example, section 165(2) of that Act provides that transitional regulations may have effect despite anything else in Commonwealth National Law. This clause was necessary to allow for transitioning for vessel owners and operators, particularly during the first few years after the Commonwealth National Law commenced.

There is also a transitional regulation making power proposed at section 137 of the WA Marine Act. The ability to make transitional regulations would exist for two years from commencement but these regulations could not have the effect of modifying primary legislation.

## **Definition of ‘vessel’**

The proposed definition of ‘vessel’ in section 3 of the WA Marine Act could be characterised as a ‘Henry VIII clause’ as it allows regulations to specify that a prescribed class of thing is or is not a class of vessel for the purposes of the definition of vessel.

This is also the case in the Commonwealth National Law definition of ‘vessel’ in section 8, which provides at (3) that regulations may provide that a specified thing, or a thing included in a specified class, is or is not a vessel. Due to this ability to regulate craft in or out of its vessel definition and therefore the scope of the Commonwealth National Law, it is necessary for Western Australia to also have this ability to ensure no craft are left in a regulatory gap.

## **Structure of Bill**

The Bill is divided into 10 Parts:

- Part 1 sets out preliminary matters including the purpose of the Bill and definitions.

- Part 2 provides for the application of the Commonwealth National Law as a law of Western Australia, how amendments to the Commonwealth National Law may be applied, and matters relating to interpretation.
- Part 3 sets out the functions and powers of the National Regulator and other authorities and officers under the Applied National Law, including specifying that delegation by the National Regulator under the Commonwealth National Law applies to the corresponding Applied National Law.
- Part 4 provides that offences against the Applied National Law are to be treated as if they were offences against a Commonwealth law and are accordingly subject to Commonwealth criminal laws such as the *Proceeds of Crime Act 2002*. The Part also contains provisions relating to the functions and powers of Commonwealth officers and authorities relating to offences and provides that there is no double jeopardy against the National Law and the applied provisions.
- Part 5 provides for the application of certain Commonwealth administrative laws to the Applied National Law.
- Part 6 contains provisions requiring fees, penalties and fines payable by a person under the National Law Western Australia to be paid to the National Regulator rather than the State, to ensure that the National Law is administered uniformly as a law of the Commonwealth. This Part also contains a provision to provide for any payments which the National Regulator may make to the State for things done under the National Law by a delegate or accredited person. This allows for flexibility in the administration of the national system, for example by enabling Department of Transport officers to carry out functions under the National Law on the National Regulator's behalf.
- Part 7 provides for several miscellaneous matters relating to the relationship between the Commonwealth National Law and the Applied National Law, and disclosure of information to the National Regulator. This Part also contains provisions providing that the Governor may make regulations required or permitted by the Bill, and that the Bill is to be reviewed after 5 years from commencement.
- Part 8 provides for the making of regulations dealing with transitional matters within two years of commencement of the Bill.
- Part 9 makes substantial consequential amendments to the WA Marine Act.
- Part 10 makes consequential amendments to eight other Western Australian statutes and repeals two statutes dated 1987 and 1990 that were intended to amend the WA Marine Act but were never proclaimed. They are out-dated and not required.

## Clause Notes

### PART 1—PRELIMINARY

Part 1 of the Bill is based on the provisions of a model Bill for applying the Commonwealth National Law developed by the joint Parliamentary Counsel's Committee. The model Bill was developed to provide a consistent basis for State and Territory application statutes.

- 1 Clause 1 sets out the short title of the proposed Act, which is based on the Commonwealth National Law and mirrors the application laws of the other States and the Northern Territory.
- 2 Clause 2 provides for commencement of the Bill: Part 1 on the day on which the Bill receives Royal Assent and the rest of the Bill upon proclamation(s). This ensures the relevant subsidiary legislation can commence at the same time as the Bill. This will avoid any regulatory gaps which may arise if the regulations are not ready to commence at the same time as the Bill's Part 1. Significant redrafting of regulations made under this Act, particularly the *Navigable Waters Regulations 1958*, will be required before some amended provisions of this Act can commence.
- 3 Clause 3 states the purpose of the Bill: to adopt a uniform national approach to the regulation of marine safety in relation to domestic commercial vessels by applying the Commonwealth National Law as a law of Western Australia. While subclause (2)(b) provides that State officials may administer the National Law as delegates of the Commonwealth, service delivery by the States ceased on 1 July 2018 when the National Regulator took over all functions.

#### 4 **Terms Used**

Subclause (1) defines several terms:

***amend*** is defined to include replace.

***amending Act*** is defined to mean a Commonwealth Act to the extent that it amends the Commonwealth National Law and that receives the Royal Assent on or after 15 May 2023. This covers the Scheduled Law, regulations and other instruments under that Law, but not the Commonwealth savings and transitional provisions.

***applied provisions*** is defined to mean the Domestic Commercial Vessel National Law that applies as a law of this State because of clause 6.

***commencement day*** is defined to mean the day on which clause 6 comes into operation.

***Commonwealth administrative laws***, which are applied by clause 24 to the Applied National Law, are defined to be four specific Commonwealth statutes: the *Administrative Appeals Tribunal Act 1975*, *Freedom of*

*Information Act 1982, Ombudsman Act 1976 and Privacy Act 1988* as well as regulations and instruments in force under those Acts.

**Commonwealth domestic commercial vessel national law** is defined to mean the Marine Safety (Domestic Commercial Vessel) National Law of the Commonwealth; legislative instruments in force under that law; and any other provision of a Commonwealth Act or legislative instrument that is of a savings or transitional nature consequential to that law.

**Legislative instrument** is defined to be a regulation or other legislative instrument.

**Marine Safety (Domestic Commercial Vessel) National Law of the Commonwealth** means the provisions applying as a law of the Commonwealth.

**Scheduled Law** is defined as Schedule 1 of the Commonwealth National Law.

Subclause (2) provides that terms used in this Bill and also in the Commonwealth domestic commercial vessel national law have the same meanings.

## 5 **Act binds the Crown**

Clause 5 is a standard clause providing that this Act binds the Crown in right of Western Australia and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

## **PART 2 – APPLIED PROVISIONS**

## 6 **Application of Domestic Commercial Vessel National Law text as State law**

Clause 6(1) provides that for the purpose of this section, the *Domestic Commercial Vessel National Law* consists of:

- the Commonwealth National Law that is in force just before introduction of the Bill, on 15 May 2023, and as amended by each amending Act provision that has come into operation;
- legislative instruments in force under the Commonwealth National Law, subject to section 12; and
- Commonwealth Acts or legislative instruments of a savings or transitional nature.

The effect of this subclause is to incorporate all amendments up to 15 May 2023, together with any future amendments to the Commonwealth National Law that are incorporated under the new process for



incorporating amendments to the National Law provided for in new sections 9 and 10.

Clause 6(2) specifies that these provisions apply as a law of Western Australia.

Clause 6(3) states that the National Law (Applied National Law) applies despite the fact that the Western Australian Parliament does not have the constitutional power to make those laws, and despite the Commonwealth Act stating that it only applies to matters for which the Commonwealth can make laws at section 5 of that Act.

Clause 6(4) provides that Western Australian laws relating to marine safety that are not excluded by the Commonwealth Act are also not excluded by clause 6(2) of the Bill. Section 6(2) of the Commonwealth Act sets out the kinds of State laws that it does not override. These include laws dealing with ports, environmental management, speed limits, removing obstructions and other matters.

Clause 6(5) provides that regulations made under section 33 may provide that the National Law applies as if amendments made to that law had not taken effect. This allows the Western Australian Parliament to have control over whether to apply amendments that the Commonwealth Parliament may make to the National Law in Western Australia.

Clause 6(6) provides that the National Law would apply as part of this Act, and legislative instruments would apply as subsidiary legislation for the purposes of this Act.

The Applied National Law will apply to the extent that the Western Australian Parliament has jurisdiction: to 'gap vessels'. The Commonwealth Parliament has jurisdiction over most domestic commercial vessels operating in Western Australia waters by virtue of the *Commonwealth Constitution*.

## 7

### **Tabling amending Acts**

Clause 7 requires an amending Act to be laid before each House of Parliament within 18 sitting days of the House after the day on which the Act receives the Royal Assent.

The tabling requirement and potential disallowance of amending Acts will ensure that a Commonwealth amending Act that will amend the Commonwealth National Law will be subject to scrutiny by Western Australian Parliament before becoming part of the Applied National Law. The mechanism provides that an amending law can be disallowed by either House of Parliament.

The provisions will ensure that consistency is maintained between the Commonwealth National Law and the National Law Western Australia by enabling Commonwealth amendments to apply in a timely manner. They protect sovereignty by ensuring that they do not come into effect until they have been reviewed by Western Australia's Parliament.

A similar provision is provided in section 8 of the *Legal Profession Uniform Law Application Act 2022*.

It will be the responsibility of the Department of Transport to ensure that amending Acts are tabled in the Western Australian Parliament. Parliamentary Counsel's Office is not proposed to monitor amendments to the Commonwealth National Law.

## **8 Disallowance of amending Acts**

Clause 8 provides that when a Commonwealth amending Act is tabled, notice of a disallowance resolution may be given in either House within 14 sitting days of tabling of the amending Act (the **notice period**).

If no notice is filed within the notice period in either House, the amending Act will come into effect. If a notice is filed, a period of 30 sitting days (the **disallowance period**) is then provided for a vote to be held on the disallowance resolution. If no vote is held within the disallowance period, or if any disallowance resolution in respect of any notice has been lost, withdrawn or discharged, the amending Act will be incorporated into the Applied National Law.

Under section 8 if a valid notice of disallowance is passed, the amending Act will not be incorporated into the Applied National Law.

Subsection (3) provides that the periods for giving notice and voting on the resolution will continue to run, notwithstanding the proroguing, dissolution or expiry of a term of Parliament. It also provides that a notice in respect of necessary for the process of consideration of the application of an amendment will not lapse in those cases. As a result, it will not be Commonwealth amendments to start again in the new Parliament.

A similar provision is provided in section 9 of the *Legal Profession Uniform Law Application Act 2022*.

## **9 Commencement of provisions of amending Acts**

Clause 9 provides that if, under section 8(2), an amending Act has effect, the Governor must declare that fact by proclamation as soon as practicable.

If an amending provision is in operation in the Commonwealth prior to the proclamation, then the amending provision comes into operation on a day fixed by proclamation.

Otherwise, an amending provision comes into operation when the amending provision comes into operation in Commonwealth in accordance with the amending Act.

A similar provision is provided in section 10 of the *Legal Profession Uniform Law Application Act 2022*.

Once the Department of Transport has tabled an amending Act, and if it has not been disallowed under clause 8, the Department will need to instruct Parliamentary Counsel's Office on the drafting of a proclamation notifying that the Act now applies in Western Australia and when it commences in accordance with clause 9. Parliamentary Counsel's Office will then draft the proclamation, and the Department will arrange for it to be published.

10 **Amending Acts enacted on or after 15 May 2023 but before commencement day**

Clause 10 provides that the mechanism set out for incorporation of amendments and the disallowance process set out in sections 7 to 9 will apply to any Commonwealth amendment Acts that receive Royal Assent on or after 15 May 2023. Any amendments made after this Bill has been considered by a House of Parliament but before its commencement will be subject to review and disallowance.

This ensures that all amendments incorporated into the Western Australian legislation will be considered by Parliament, either in the course of consideration of the Bill (for those made prior to 15 May 2023), or through the disallowance process (for those made on or after 15 May 2023).

A similar provision is provided in section 19D of the *Fair Trading Act 2010*.

11 **Tabling of amending Act taken to be publication for Standing Orders**

Clause 11 clarifies that Commonwealth amendments tabled before each House of Parliament under section 7 will be taken to be published for the purposes of any Standing Orders which provide for the referral of instruments to a committee established by either or both Houses of Parliament (Parliamentary Committee) on publication. If standing orders provide specifically for Commonwealth amendments to be considered by a Parliamentary Committee, then this clause will not apply.

This provides an extra layer of scrutiny of Commonwealth amending laws and ensures Western Australian Parliament's sovereignty and law-making powers are maintained.

It also clarifies that the purpose of the Commonwealth amendments being taken to be published is for referral to a parliamentary committee, but also provides Parliament with the flexibility to provide in standing orders for referral to a different Parliamentary Committee should it see fit.

A similar provision is provided in section 19E of the *Fair Trading Act 2010*.

**12 Legislative instruments under Scheduled Law**

Clause 12 provides that legislative instruments made under the Scheduled Law on or after 15 May 2023 have effect for the purposes of their application under section 6(2), subject to sections 13, in relation to legislative instruments made under or for the purposes of amending Act, or section 15, in relation to tabling a disallowance of such legislative instruments.

**13 Legislative instruments made under or for purposes of amending Act**

Clause 13 applies to a provision of a legislative instrument made under the Scheduled Law if it is made under or for the purposes of a provision inserted into the Scheduled Law by a provision of an amending Act, or a provision of the Scheduled Law as amended by a provision of an amending Act.

The provision of the legislative instrument is to commence on the day on which the provision of the amendment Act comes into operation, or the day on which the legislative instrument comes into operation in the Commonwealth.

If, however, under section 8 a valid notice of disallowance is passed, the amending Act will not be incorporated into the Applied National Law, and therefore the legislative instrument will not have effect for the purposes of its application under section 6(2).

**14 Publication of legislative instruments made under Scheduled Law**

Clause 14 provides that legislative instruments made under the Scheduled Law on or after 15 May 2023 must be published in the *Gazette* or on the WA legislation website no later than 18 days after they were made.

However, if the legislative instrument is made on or after 15 May 2023 but before commencement date, this clause applies as if the legislative instrument were made on commencement date.

A similar provision is provided in section 15 of the *Legal Profession Uniform Law Application Act 2022*.

**15      Tabling and disallowance of legislative instruments under Scheduled Law**

Clause 15 provides that a legislative instrument published under section 14 must be laid before each House of Parliament within 6 sitting days of the House after publication.

If the legislative instrument is not published under section 14, is not laid before each House of Parliament, or notice of resolution to disallow is given and agreed to in whole by the House, then the published legislation ceases to have effect as subsidiary legislation of the State.

Further, subsection (6) provides that if the published legislative instrument is amended or repealed, then the original legislative instrument is revived.

Subsection (7) provides the periods for giving notice and voting on the resolution will continue to run, notwithstanding the proroguing, dissolution or expiry of a term of Parliament. It also provides that a notice in respect of an amendment will not lapse in those cases. As a result, it will not be necessary for the process of consideration of the application of Commonwealth amendments to start again in the new Parliament.

A similar provision is provided in section 16 of the *Legal Profession Uniform Law Application Act 2022*.

**16      Application of savings and transitional provisions consequent on Scheduled Law**

Clause 16 provides that a savings or transitional provision referred to in section 6(1)(c) commences on the day on which the provision of the amending Act comes into operation, or the day on which it comes into operation in the Commonwealth.

If, however, under section 8 a valid notice of disallowance is passed, the amending Act will not be incorporated into the Applied National Law, and therefore the legislative instrument will not have effect for the purposes of its application under section 6(2).

**17      Interpretation of applied provisions**

Clause 17 applies the Commonwealth *Acts Interpretation Act 1901* as a law of Western Australia in relation to the interpretation of the applied provisions, rather than the Western Australian equivalent - the *Interpretation Act 1984*. This is to ensure a consistent reading of the Commonwealth National Law.

A similar provision is provided in section 23 of the *Fair Trading Act 2010*.

### **PART 3 - FUNCTIONS AND POWERS UNDER APPLIED PROVISIONS**

Part 3 provides for consistency of powers and functions under the Commonwealth National Law and Applied National Law.

#### **18 Functions and powers of National Regulator and other authorities and officers**

Clause 18 gives authorities and officers the same functions and powers under the National Law Western Australia they have under the Commonwealth National Law.

#### **19 Delegations by National Regulator**

Clause 19 gives delegations by the National Regulator under the Commonwealth National Law effect for the purposes of the corresponding provision of the National Law Western Australia.

### **PART 4 – OFFENCES**

Part 4 establishes a uniform compliance regime in Western Australia for all domestic commercial vessels, whereby an offence against a provision of the National Law Western Australia is a Commonwealth offence for certain purposes.

#### **20 Object of Part**

Clause 20 provides that for certain purposes, an offence against the National Law Western Australia is to be treated as an offence against the Commonwealth National Law.

Purposes listed in subclause (2) include investigation, prosecution, legal proceedings, fines and infringements.

If enforcement action is taken by the National Regulator, it is taken within the Commonwealth legal framework and prosecutions occur in the federal jurisdiction.

Subclause (3) clarifies that offences include contraventions for which a civil penalty may be imposed.

#### **21 Application of Commonwealth criminal laws to offences against applied provisions**

Clause 21(1) defines **relevant Commonwealth criminal law** for the purpose of this section to mean a law of the Commonwealth relating to a purpose referred to in section 20(2).

Clause 21(2) applies relevant Commonwealth criminal laws as laws of Western Australia in relation to an offence against the applied provisions, as if the applied provisions were laws of the Commonwealth.

Clause 21(3) provides that an offence against the applied provisions is taken to be an offence against the laws of the Commonwealth and not an offence against Western Australian law.

Clause 21(4) provides an exclusion to subclause (3). If regulations have been made by the Governor under section 33, offences against those provisions are not against the laws of the Commonwealth.

## **22 Functions and powers conferred on Commonwealth officers and authorities relating to offences**

Clause 22 provides that a Commonwealth criminal law applying because of clause 21 that confers on a Commonwealth officer or authority a function or power in relation to a Commonwealth National Law offence also confers the corresponding power or function in the applied provisions.

Clause 22(2) requires a Commonwealth officer or authority to act in performing a function or power conferred by this section as nearly as practicable as the officer or authority would act in performing the same function or power in relation to the corresponding provisions of the Commonwealth National Law.

## **23 No double jeopardy for offences against applied provisions**

Clause 23 prevents a person from being punished for an offence under the Applied National Law if the person has been punished for the same offence under the Commonwealth National Law.

# **PART 5 – ADMINISTRATIVE LAWS**

Part 5 deals with the application of administrative laws to the provisions of the Applied National Law so that the application and interpretation of the Applied National Law provisions is the same as the Commonwealth National Law provisions. This ensures seamless operation of the National Law in Western Australia, regardless of the underlying constitutional framework.

## **24 Application of Commonwealth administrative laws to applied provisions**

Clause 24 applies Commonwealth administrative laws (defined in clause 4 to be primarily the *Administrative Appeals Tribunal Act 1975*, *Freedom of Information Act 1982*, *Ombudsman Act 1976* and *Privacy Act 1988*) to the Applied National Law. This ensures that a provision in the Applied National Law (applying to 'gap vessels') is not subject to Western

Australian law in relation to freedom of information for example, because the identical provision of the Commonwealth National Law is subject to Commonwealth freedom of information laws in relation to domestic commercial vessels not in the 'gap'.

Clause 24(2) provides that for the purposes of the law of the State, a matter arising in relation to the Applied National Law is taken to be a matter arising in relation to laws of the Commonwealth and not of the State.

Clause 24(3) provides an exclusion to subclause (2) - it does not apply to matters arising in relation to regulations made by the Governor under section 33.

Clause 24(4) provides that any provision of a Commonwealth law applying because of this clause that purports to confer jurisdiction on a federal court has no effect. This is consistent with the High Court decision in Wakim's case (*Re Wakim; Ex parte McNally* (1999) 198 CLR 511) that a State law cannot confer jurisdiction on the Federal Court.

Clause 24(5) provides that a reference in the *Administrative Appeals Tribunal Act 1975* (Commonwealth), as that provision applies as a law of the State, to Part IVA of that Act, is taken to be a reference to that Part as it has effect as a Commonwealth law. Part IVA of that Act is titled 'Appeals and References of Questions of Law to the Federal Court of Australia.' This clause is replicated from the model Bill developed by Parliamentary Counsel's Committee in 2012. It ensures appropriate review rights exist under the Applied National Law as if they arose under the Commonwealth National Law.

Clause 24(5) reflects the constitutional constraint that prevents the States conferring jurisdiction on the Federal Court.

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### **Functions and powers conferred on Commonwealth officers and authorities**

This clause provides that a function or power conferred on a Commonwealth officer or authority by a Commonwealth administrative law applying because of clause 24, is also conferred on the officer or authority in relation to the Applied National Law.

Subclause 25(2) requires a Commonwealth officer or authority to act, in performing a function or power conferred by this section, as nearly as practicable as the officer or authority would act in performing the same function or power in relation to the corresponding provisions of the Commonwealth administrative law.



## PART 6 – FEES AND FINES

During development, the Commonwealth considered setting fees and charges under the Commonwealth National Law. However, due to the wide variation in fees and charges between States and differing levels of cost recovery, it was decided to allow the States and Northern Territory to set and charge their own fees for an interim period.<sup>1</sup> This occurred until 1 July 2018 when the Commonwealth took over service delivery of the national system and Western Australian staff no longer acted as sub-delegates of the National regulator.

### 26      **Fees payable to officers or employees of State acting as delegates**

Clause 26 enables regulations to be made with respect to fees payable to the State for things done under the Applied National Law by an officer or employee of the State who is acting as a delegate of the National Regulator or an accredited person. This is enabled by section 9 of the Commonwealth National Law, which provides that a State is not prevented from charging a fee in relation to a thing done under the Commonwealth National Law by a delegate of the National Regulator or an accredited person who is an officer or employee of that State. While the National Regulator took over service delivery of the national system on 1 July 2018, this power is still required to enable Western Australia to recover costs in case the current service delivery arrangements change.

Clause 26(1) defines '**accredited person**' for the purpose of subclause (2).

Clause 26(2) enables regulations that may be made under clause 33 to provide for fees to be payable to the State for things done under the Commonwealth National Law or under the Applied National Law by a delegate of the National Regulator or accredited person who is an officer or employee of the State or otherwise engaged by the State.

### 27      **Infringement notice fines**

Clause 27 provides that amounts paid to the State by the National Regulator in respect of infringement notices issued under the Commonwealth National Law are to be paid into the Consolidated Account.

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<sup>1</sup> Accordingly, paragraph 50(f) of the IGA states that the National Regulator will not provide reimbursement to the States and Territories for services carried out on behalf of the National Regulator.

28      **Fines, fees, other money not otherwise payable to State**

Clause 28 requires all fees, penalties, fines and other amounts payable pursuant to the Bill to be paid to the National Regulator. This is because the National Regulator is responsible for making final decisions in relation to enforcement action resulting in fines and so on.

Subclause (2) specifies that this does not apply to fees referred to in section 26 in relation to regulations made under clause 33.

**PART 7 – MISCELLANEOUS**

29      **Things done for multiple purposes**

Clause 29 provides that documents issued or things done for the purposes of the applied provisions are valid even though they may have also been for done for the purpose of the Commonwealth domestic commercial vessel national law (term defined in clause 4). This has the effect that documents issued or things done may serve the purposes of both the Commonwealth National Law and Applied National Law simultaneously.

30      **Reference in Commonwealth law to a provision of another law**

Clause 30 provides that if a Commonwealth law refers to another Commonwealth law (whether within the same or a different Act) this is to be a reference to that law that applies in Western Australia because of clauses 21 and 24. Clauses 21 and 24 deal with the application of Commonwealth criminal and administrative laws respectively.

31      **References to Domestic Commercial Vessel National Law**

Clause 31 provides that a reference to the Domestic Commercial Vessel National Law means all of:

- (a) the Commonwealth Domestic Commercial Vessel National Law; and
- (b) the applied provisions; and
- (c) the Domestic Commercial Vessel National Law of the other participating jurisdictions, that is, the Commonwealth Domestic Commercial Vessel National Law that applies (whether modified or not) as a law of those other jurisdictions.

Subclause (1) provides that '**participating jurisdiction**' means a State or Territory that applies the National Law as a law of that jurisdiction, whether modified or not, which will be all jurisdictions upon commencement of this Bill.

32      **Disclosure of information to National Regulator**

Clause 32 allows information obtained under a written law, for example the WA Marine Act which previously regulated all domestic commercial vessels, to be disclosed to the National Regulator. Clause 152 of the Commonwealth National Law provides that certain persons may disclose information including personal information which may be relevant to the administration of that Act. This applies whether the information is obtained before or after the commencement date of this Bill.

33      **State regulations**

Clause 33 enables the Governor to make regulations with respect to any matter required or permitted by the Bill.

34      **Review of Act**

Clause 34 requires the Minister for Transport to carry out a review of the Bill after 5 years from commencement and prepare a report to be laid before each House of Parliament within 12 months.

**PART 8 – TRANSITIONAL AND SAVINGS PROVISIONS**

35      **Transitional regulations**

Clause 35 enables regulations of a transitional, savings or application nature to be made in relation to the enactment of the Bill, including in relation to the amendment of other Acts.

Clause 35(1) provides relevant definitions: ***publication day*** and ***transitional regulations***.

Clause 35(2) enables the relevant regulations to be made.

Clause 35(3) limits the time in which such transitional regulations may be made to two years from commencement.

Clause 35(4) provides that transitional regulations may apply retrospectively but may not apply before the commencement of the Bill.

Clause 35(5) limits the retrospective application under subclause (4) to provisions that do not prejudice the rights of or impose liabilities on any person that existed before the transitional regulations were published, other than the State.

## PART 9 – WESTERN AUSTRALIAN MARINE ACT 1982 AMENDED

As the WA Marine Act regulated domestic commercial vessels before the commencement of the Commonwealth National Law on 1 July 2013 and continues to regulate some domestic commercial vessels due to the 'gap' in Commonwealth power, it is necessary to substantially amend the Act at the same time as the Bill commences.

A substantial portion of the Act purports to regulate those things that the Commonwealth National Law now regulates, including commercial vessel design, construction and crewing. Upon commencement of the Bill, the Act will primarily be concerned with regulation of recreational vessels and waterways management.

### 36      **Act amended**

Clause 36 states that Part 9 of the Bill amends the Act.

### 37      **Long title replaced**

Clause 37 deletes and replaces the long title of the Act to make clear that the Act will regulate both safe navigation and use of Western Australian waters. This title does not limit the Act to dealing only with vessels, as some important aspects of marine safety are unrelated to vessel use. The Bill includes, for example, provisions related to the use of watercraft and the safety precautions to be taken by divers.

The reference to 'shipping' has been removed, due to its association with large vessels which are regulated by the *Navigation Act 2012* or in some cases, the National Law.

### 38      **Part I heading amended**

Clause 38 amends the heading 'Part I – Preliminary' to 'Part 1 – Preliminary'.

### 39      **Section 3 amended**

Clause 39(1) amends section 3 'Terms used' by deleting definitions of words and phrases which are obsolete or no longer required due to commencement of the Commonwealth National Law. Repealed terms include: ***agreement, Australian coastal and middle water operations, Australian fishing vessel, Australian ship, boilers and machinery, casualty*** (replaced by the definition of marine incident in section 64), ***commercial vessel*** (replaced by the definition of domestic commercial vessel), ***Disciplinary Appeal Tribunal, fishing vessel, floating restaurant, Government vessel, incompetent, inshore operations, Manning Committee, misconduct, Navigation Act*** (replaced by the definition of former Navigation Act), ***official*** (replaced by a new definition),

***offshore operations, ply, port, repealed Act, restricted offshore operations, safety manning, seaman, special personnel, surveyor, trading ship and wages.***

Clause 39(2) deletes the definitions of ***inspector, master, officer, pleasure vessel*** and ***ship or vessel*** as they have been redefined (the latter as 'vessel').

Clause 39(3) inserts a number of terms which are defined for the first time and which are used in the Act as a result of commencement of the Commonwealth National Law. The following terms are inserted and defined: ***detained vessel, domestic commercial vessel, foreign vessel, former Navigation Act, identity card, personal watercraft, prescribed, prescribed vessel, regulated Australian vessel, Scheduled Domestic Commercial Vessel National Law, specified, State waters, territorial sea*** and ***vessel***.

'Prescribed vessel' is a new concept for this Act. It is explained in detail in the explanation for clause 69, which replaces section 99 of the Act.

'State waters' is the same as the current definition of 'waters', located in sections 66(5) and 71(5).

Clause 39(3) also inserts definitions of the terms ***authorised person, infringement notice*** and ***pleasure vessel*** which have been moved from various Parts as they are also used in other Parts of the Act. The definitions of ***marine qualification information, mooring information*** and ***vessel information*** have been inserted due to new information sharing provisions in Part 8.

The new definition of "***vessel***" is based on the National Law's definition, which is broader than the current vessel definition in the Act. This is potentially problematic in circumstances where the National Regulator does not recognise particular craft as vessels, leaving the regulation of these craft to the State. It is necessary for the State to have a statutory framework to regulate such craft where desirable.

Clauses 39(4), (5) and (6) make minor amendments to the definitions of ***equipment, owner, and passenger*** respectively.

Clause 39(7) deletes subsection (2) and replaces it with new subsection (2) which allows regulations to specify that a prescribed class of thing is, or is not, a class of vessel. This is to enable government to put beyond doubt its ability to regulate novel craft that are rapidly being developed or, in some cases, modified.

This new vessel definition allows more flexibility in determining what is and what is not a vessel for the purposes of the Act by specifying craft to be vessels or non-vessels in regulations. It could be characterised as a ‘Henry VIII clause’, however it follows the National Law’s definition of ‘vessel’ in section 8, which provides at (3) that regulations may provide that a specified thing, or a thing included in a specified class, is or is not a vessel. Due to this ability to regulate craft in or out of its vessel definition and therefore the scope of the National Law, it is necessary for Western Australia to also have this ability to ensure no craft are left in a regulatory gap.

The current definition of “vessel” is “any kind of vessel used or capable of being used in navigation by water, however propelled or moved.” This lack of specificity requires consideration of the UK common law definition of ‘vessel’ which excludes craft smaller than row boats, or which are not of a traditional concave shape. This is problematic for the regulation of novel craft being introduced on State waters.

Note that it is not intended to make all craft capable of navigation in water ‘vessels’ under the regulations. For instance, unmotorised surfboards, body boards, aquatic toys and stand-up paddleboards will not be specified in the regulations as vessels unless they have a motor attached.

Things which may be specified as vessels include (but are not limited to):

- amphibious craft – when they are used as vessels on water, they should be subject to laws applying to vessels;
- canoes and other paddlecraft – to align with the National Law;
- electric hydrofoil boards – can be high powered, high speed and high risk; and
- personal watercraft including motorised surfboards, motorised body boards, personal watercraft with an aerial device or a docking hull attached – to put beyond doubt.

These amendments will ensure consistency between the operation of the Act and the National Law.

### **Sections 3A and 3B inserted**

Clause 40 inserts a new section 3A, specifying the vessels and people to which the Act applies. To align with the National Law and *Navigation Act 2012* and ensure all vessels connected to the State or in State waters are captured by the Act, these application provisions are replaced with provisions that focus on vessel location and connection to the state rather

than voyage type. Including vessels connected with the State rather than only those in State waters is necessary as while certain vessels are in waters beyond the territorial sea adjacent to the State, neither the National Law nor the *Navigation Act 2012* will apply laws regarding safety equipment, for example.

The new application provision would enable ‘waterways safety management’ laws to apply all vessels on State waters (recreational, commercial or otherwise) to ensure safety outcomes are met and there is a consistent regime with respect to these matters. Previously, responsibilities for commercial vessel safety regulation were divided between the states, territories and the Commonwealth based on voyage type. As part of the national commercial vessel reforms, this voyage-based concept was removed, with AMSA becoming the sole regulator for the operation of commercial vessels, whether on international, interstate or intra-state voyages.

Section 6 of the National Law permits the continued operation of a range of State ‘waterways management’ and related laws, including laws such as those adopting the International Convention for Prevention of Collisions at Sea, speed limits and closure of waters. It is necessary to ensure that vessels subject to the National Law’s construction, crewing and operational requirements remained subject to State waterways management laws. Section 3A ensures these laws apply to commercial vessels on interstate or international voyages.

Section 3B provides definitions and clarifies that the National Law prevails over any inconsistency between the National Law and this Act.

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### **Section 6 deleted**

Current section 6 provides for the application of the Act to:

- Trading ships on intra-state voyages; and
- Australian fishing vessels, hire and drive vessels and pleasure vessels:
  - on intra-state voyages;
  - on inter-state voyages; or
  - within State waters or the territorial sea adjacent to the State.

It excludes from the application of the Act vessels that would be otherwise governed by the repealed *Navigation Act 1912*, being trading ships proceeding on overseas or inter-state voyages, or Australian fishing vessels proceeding on overseas voyages. The terms “inter-state voyage” and “overseas voyage” were defined in the superseded *Navigation Act 1912*.

Section 6 of the Act is deleted to remove the voyage-based application of the Act, consistent with the change in regulatory practice in the Commonwealth **National Law** and *Navigation Act 2012*. Domestic commercial vessels on inter-state voyages are regulated by the National Law rather than the *Navigation Act 2012*.

## **Part II replaced.**

Part II – ‘Survey, manning and operation of commercial vessels’ is replaced with Part 2 – ‘Powers of inspectors’. This will provide inspectors with a range of powers to more closely align with marine safety inspectors’ powers in the National Law and to ensure enforcement of, and compliance with the Act.

Matters to do with survey, crewing and operation of commercial vessels are now regulated by the Commonwealth government under the National Law.

Department of Transport officers currently designated as inspectors under section 117(1) of the Act will continue to be so designated under amended section 117. Some of these officers may also be appointed as marine safety inspectors under the National Law. To minimise stakeholder confusion and avoid the administrative difficulties that may arise where Department of Transport officers and other inspectors and authorised persons perform similar functions under both Commonwealth and State legislation, compliance and enforcement provisions of the Act have been updated and modernised to align with the National Law.

Most of the compliance and enforcement powers in the National Law are already contained in the Act (or are exercisable by Western Australian Water Police under other legislation). However, the provisions in the Act are out of date in comparison to other legislation (such as *the Work Health and Safety Act 2020*), and in some cases their scope is unclear, or their application is limited depending on a vessel’s type or its location.

The amendments will result in a more flexible enforcement regime that offers a greater range of tools for achieving safety outcomes than only issuing infringements or prosecution. These changes will facilitate thorough investigations of serious safety breaches when required.

## **Division 1 – Preliminary**

### **Section 6 Terms used**

Subsection (1) defines various terms used in Part 2 of the Act:

***evidential material*** is defined as a thing that is relevant to an offence (within the meaning of subsection (2)) against this Act;



**judicial officer** is defined as being a magistrate;

**occupier** is defined in relation to premises to include a person who apparently represents the occupier of the premises, and, if the premises are a vessel, the master of the vessel;

**official details** of a police officer are defined as the officer's surname, rank and, if the officer's official details are required to be stated on a document, the officer's registered number;

**official details** of a public officer are defined as the officer's full name and official title;

**premises** is defined to include a structure, building, vehicle, vessel or aircraft, a place (whether or not enclosed or built on) and a part of either of those things;

**remote communication** is defined as any way of communicating at a distance including by telephone, fax, email and radio;

**warrant** is defined as a warrant issued under section 26.

Subsection (2) provides that for the purposes of the definition of 'evidential material', a thing is relevant to an offence if it is relevant to an offence as described in section 5 of the *Criminal Investigation Act 2006*.

## **Division 2 — General powers**

### **Subdivision 1 — Powers relating to vessels, exercisable without consent or warrant**

#### **Section 7 Boarding vessels**

This section seeks to replicate the effect of sections 95, 96 and 97 of the National Law and it replaces the powers in current section 57 of this Act.

Subsection (1) provides an inspector has the power to board a vessel without consent or warrant to determine if the Act is being complied with, or to exercise any of their powers under the Act. It ensures an inspector can board a vessel regardless of whether it is underway.

Subsection (2) requires the master of a vessel to facilitate boarding, consistent with section 95 of the National Law. The requirement to facilitate boarding is not provided by current section 57. The penalty for an offence is \$2000.

Subsection (3) empowers an inspector to enter any premises which are not used as a residence to gain access to a vessel. This could include a private

shipyard or jetty, unlike current section 57 which limited the power to when a vessel is moving.

The power to board a vessel is limited to only inspectors, as they have the adequate training and skills required for boarding and assessing compliance under this Act.

Subsection (4) requires an inspector must produce their identification if requested and provides that if they fail to do so, they must leave the premises or vessel and not re-enter or re-board without producing the relevant identification. This aligns with the National Law sections 97(2)-(4).

### **Section 8 Requiring master of vessel to answer questions about vessel's nature or operations**

This section is equivalent to section 98 of the National Law. Subsection (1) permits an inspector to require the master of vessel to answer questions and produce documents about the nature or operation of the vessel.

Subsection (2) provides that it is an offence not to comply with this requirement unless a person has a reasonable excuse. The penalty is \$2000.

Given that both Commonwealth and State marine safety laws may apply to domestic commercial vessels for different matters, this provision will ensure that if an inspector is unsure whether a vessel is a pleasure vessel or domestic commercial vessel, they would be able to ask questions or examine documents and take compliance action under the relevant law.

### **Section 9 Powers in relation to vessels**

This section is equivalent to section 99 of the National Law which refers to vessel 'monitoring' powers.

Subsection (1) provides an inspector can exercise the powers listed in subsection (2) for the purposes of determining whether this Act is being, or has been, complied with. These powers can be used by the inspector for both routine and targeted compliance purposes.

Subsection (2) provides a list of inspector powers, including the power to observe or search a vessel, examine or inspect things on the vessel and require people on board the vessel to provide certain details. These powers are important for the inspector to determine compliance with the Act and the identity of a person. The power to inspect, examine, take measurements or conduct tests of anything on the vessel also applies to the vessel itself, as well as anything belonging to the vessel whether or not

it is on board; similar to the powers under current **section 57(2)(b)** of the Act.

The Bill also amends section 120A of the Act to expand the power of inspectors to request a person's details where the inspector reasonably believes to have committed an offence against the Act to include date of birth and evidence of a person's identity. This is necessary to provide for sufficient identification of suspected offenders, and to align an inspector's powers under the Act with the powers under section 99 of the National Law. This power may be exercised whether or not a person who is reasonably believed to have committed an offence is on board a vessel.

Section 9(2)(j) allows an inspector to require a master of a vessel to stop, manoeuvre, adopt a certain course or speed or take the vessel in question to a certain place. An inspector may do this by using any reasonable means. This will allow for the effective exercise of the inspector's powers under this section.

Subsection (3) allows an inspector (or a person assisting an inspector) to operate electronic equipment to determine if it contains relevant information.

If relevant information is found, subsection (4) allows an inspector to remove documents or information storage devices, or to operate the vessel's electronic equipment. If the information is to be transferred to an information storage device on the vessel rather than to one brought onto the vessel for this purpose, use of that device must be agreed to in writing by the vessel's master.

Subsection (5) provides that the inspector must only operate the electronic equipment if they reasonably believe that the equipment will not be damaged.

Subsection (6) provides that an inspector is not required to be on the vessel, nor reasonably suspect that there is evidential material on the vessel, in order to exercise the powers in subsection (2). This will allow an inspector to exercise these powers from a vessel alongside the vessel if, for example, conditions make it unsafe to board.

## **Section 10 Failing to comply with certain requirements under s. 9**

This section is equivalent to section 102 of the National Law.

Subsection (1) imposes an offence for failure to comply with a requirement under section 9(2)(e) (produce any document), (h) (demonstrate operation of machinery or equipment), (i) (give name, address, date of birth and/ or evidence of identity) and (j) (undertake certain actions with the vessel).

The maximum court-imposed penalty of \$5000 reflects the importance of being able to accurately identify suspected offenders and undertake effective investigations for enforcement of the Act.

Subsection (2) provides that it is an offence to give a false name, address, date of birth and/ or evidence of identity. The penalty of \$5000 aligns with the proposed penalty in **section 120A**.

## **Section 11 Sampling, securing or seizing things found**

This section is equivalent to section 100 of the National Law.

Subsections (1) and (2) permit an inspector to sample, seize and/ or secure anything found on a vessel during the exercise of the section 9 powers. This power may be exercised without consent or a warrant if the inspector reasonably believes that the thing is evidential material and a warrant cannot practicably be obtained in the circumstances, or action is urgently required to prevent concealment, loss or destruction of the evidential material.

Subsection (3) provides that an inspector may only seize equipment or an information storage device that has been used or operated under section 9(3) if it is not practicable to put or transfer all the evidential material it contains in the manner described in section 9(4)(a) or (b), or if they reasonably believe that its possession could be an offence against a law of the State.

Section 11 aligns with section 100 of the National Law. Whereas the National Law is silent on the possibility of objects becoming damaged when these powers are exercised, subsection (4) includes a requirement for an inspector to try, as far as is practicable, to minimise damage to any property in exercising these powers.

## **Subdivision 2 — Powers relating to premises, exercisable with consent or under warrant**

### **Section 12 Entering premises**

This section is equivalent to section 103 of the National Law.

Subsection (1) permits an inspector to enter any premises for the purposes of determining whether this Act is being, or has been, complied with.

Subsection (2) additionally permits an inspector to enter premises if they reasonably suspect there may be evidential material on the premises.

However, subsection (3) specifies that entry is only permitted if under a warrant, or if the occupier consents to entry and has been shown an identity card, police identification, or the inspector is in a police uniform.

This section does not limit an inspector's power to enter premises under other provisions of the Act.

### **Section 13 Powers of inspectors in relation to premises**

This section is equivalent to section 104 of the National Law.

Subsection (1) provides that an inspector has general powers in relation to premises entered under **section 12** for compliance purposes, whether or not they have reasonable suspicion that there may be evidential material on the premises.

Subsection (2) lists the powers an inspector can exercise. These powers are similar to those available to inspectors for monitoring domestic commercial vessels under **section 99** of the National Law, but are only exercisable with consent or under warrant.

Similar to **section 9(3)**, subsection (3) provides that these powers include operating electronic equipment to determine if it contains relevant information.

Similar to **section 9(4)**, subsection (4) allows an inspector to remove documents or information storage devices from the premises, or to operate electronic equipment on the premises to ascertain whether it contains information relevant for compliance purposes. This will allow the inspector to determine if there is any evidential material on premises. Written permission from the occupier of the premises is required to use any storage device found on the premises to transfer the information.

Subsection (5) provides that inspectors may only operate electronic equipment on the premises if they reasonably believe that such operation will not damage the equipment.

Subsection (6) provides that an inspector may secure a thing on premises for up to 72 hours if certain conditions are met. This period recognises that it may be impractical (or impossible) to obtain a warrant or bring in an expert within a lesser period in some remote areas.

### **Section 14 Enforcement powers**

This section is equivalent to section 105 of the National Law and would apply where an inspector enters premises either with the occupier's consent or under warrant.

Subsection (1) allows an inspector to exercise the powers listed in subsection (2) if they have reasonably suspect there may be evidential material on the premises.

Subsection (2)(a) and (b) provide that an inspector may search the premises and anything on the premises for evidential material with the occupier's consent, or if entry is under a warrant, search the premises for evidential material of the kind specified in the warrant and seize that evidential material.

Subsection (2)(c) allows an inspector to inspect, examine, take measurements of, conduct tests on or take samples of the evidential material referred to in (2)(a) or (b).

Subsection (2)(d) allows an inspector to take photographs, video recordings or any other recordings of the premises or the evidential material referred to in (2)(a) or (b).

Subsection (2)(e) allows an inspector to take onto the premises any equipment and materials that they require for the purpose of exercising powers in relation to the premises.

Subsection (2)(f) allows an inspector to require a person on the premises to demonstrate the operation of machinery or equipment on the premises.

Subsection (3) allows an inspector to, when on the premises, operate electronic equipment to determine if it contains evidential material referred to in subsection (2)(a) or (b).

If evidential material is found, similar to sections 9(4) and (13(4), subsection (4) allows an inspector to remove documents or information storage devices from the premises, or to operate electronic equipment on the premises to put the evidential material in documentary form or to transfer it to an information storage device. Written permission from the occupier of the premises is required to use any storage device found on the premises to transfer the information.

Similar to sections 9(5) and (13(5), subsection (5) provides that inspectors may only operate electronic equipment on the premises if they reasonably believe that such operation will not damage the equipment.

Similar to **section 11**, subsection (6) provides that an inspector may only seize the equipment or information storage device mentioned in subsection (4)(d) if it is not practicable to put the evidential material in documentary form or to transfer the evidential material to a device as mentioned in subsection (4)(a) or (b); or if they reasonably believe that its possession could be an offence against a law of the State

Subsection (7) provides that an inspector may seize a thing if entry to the premises is under a warrant, the thing is found in the course of searching for evidential material of the kind specified in the warrant, they reasonably believe it is evidential material and that it is necessary to seize the thing in order to prevent its concealment, loss or destruction.

Subsection (8) provides an offence for failing to comply with subsection (2)(f) – failing to demonstrate the operation of machinery or equipment on the premises. The maximum court-imposed penalty of \$5000 reflects the importance of being able to undertake effective investigations for enforcement of the Act.

### **Section 15 Failing to comply with certain requirements of inspectors**

This section is equivalent to section 106 of the National Law.

Subsection (1) allows an inspector on premises entered under warrant to require any person on the premises to answer any questions and produce any books, records or documents requested.

Subsection (2) creates an offence for failing to comply with a requirement under subsection (1) without reasonable excuse and provides that the maximum court-imposed penalty is a fine of \$5000. This reflects the importance of being able to undertake effective investigations for enforcement of the Act.

### **Section 16 Using force in executing warrant**

This section is equivalent to section 107 of the National Law and permits an inspector to use force against people and things to execute a warrant if it is necessary and reasonable in the circumstances. Only an inspector can use force against a person

Its elements are quite common in other WA legislation such as s. 231 *Criminal Code* and s. 187 *Fish Resources Management Act 1994*.

The ability to use reasonable force against people is needed so that inspectors can adequately deal with situations where a person tries to interfere with the execution of the warrant. Inspectors should be able to restrain them or defend themselves if necessary.

The use of force against a thing may include:

- opening a locked door if an occupant refuses entry to premises;
- opening a locked boat hatch if the owner is being passively defiant by not providing the key;
- moving furniture to allow access to evidentiary material.

## **Section 17 Relationship with Subdivision 1**

Section 17 aligns with section 108 of the National Law. It ensures that Subdivision 2, which covers entry to premises via consent or warrant, does not limit any inspectors' powers under Subdivision 1, which covers boarding vessels, and which are exercisable without consent or warrant.

Subsection (2) clarifies that the powers in Subdivision 2 regarding premises apply to premises which are vessels. This would allow an inspector to enter a vessel on which a person lives with consent of the occupier or under warrant.

## **Subdivision 3 — Requiring certain documents under Act to be produced for inspection**

### **Section 18 Requiring certain documents to be produced for inspection**

This section is similar to section 106 of the National Law. Subsection (1) gives inspectors the power to require the production of a document issued or required to be held under the Act.

Subsection (2) provides that it is an offence not to produce a requested document without reasonable excuse and that the maximum court-imposed penalty is a fine of \$5000.

Subsection (3) provides that an inspector has the power to copy or take extracts from a produced document.

## **Division 3 — Directions and improvement notices**

### **Section 19 Power to give directions**

Subsection (1) is similar to section 109(1) of the National Law and it empowers an inspector to give directions to a person, for example, not operate an unsafe vessel, or to return to shore. It allows an inspector to give a person a direction if they reasonably believe the person is contravening (or is likely to contravene) a provision of the Act, or it is in the public interest to give the direction.

Subsection (2), like the National Law, allows an inspector to issue a direction if they reasonably believe that it is necessary to protect the environment or the safety of people. It allows for circumstances where a direction is required to maintain safety but there is no contravention of the Act, for example a need to direct vessels or people in the water to move away from an area in the immediate aftermath of an incident (such as a vessel sinking or a fire), or to direct them away from an unsafe structure (such as a jetty or bridge). The latter may be followed by a formal closure of waters order.



As this is potentially a broad power, it is limited to the use of waters or to a vessel. This power already partially exists under section 63(2) of the Act which allows an authorised person to give a direction to the person in charge of a vessel on the grounds that the vessel is in an unsafe position or locality.

Subsection (3) provides examples of the types of direction that may be given under subsections (1) and (2) which include that a vessel is not to be operated, is moved or taken to a specified place, or that an activity is or is not engaged in.

Subsection (4) makes it an offence not to comply with a direction given under subsections (1) or (2), with a penalty of \$5000.

#### **Section 20 S. 19 directions: procedural details**

Similar to section 109(2) of the National Law, subsection (1) provides that a direction given under **section 19** must be in writing, unless the inspector reasonably believes that there is an urgent need to protect the environment or the safety of people. The direction must also specify a timeframe for action and include the reasons for giving the direction.

Subsection (2) provides that the direction may include specified steps that the person must take to comply with the direction.

Subsection (3) provides that before the end of the given period, an inspector may extend it in writing.

#### **Section 21 Directions under s. 19: inspector may remedy failure to comply**

Similar to National Law section 109(5), subsection (1) provides that if person given a direction under section 19 does not take the specified action within the period specified an inspector may take the action or arrange for it to be taken.

Subsection (2) allows an inspector to do all things necessary for the purposes of subsection (1).

Similar to National Law section 109(6), subsection (3) provides that the CEO may recover reasonable costs incurred under subsection (1) and may seek a court order for that recovery.

#### **Section 22 Improvement Notices**

Section 22 aligns with section 110 of the National Law and provides an alternative compliance mechanism to the directions power. It provides the power to issue a written improvement notice where an inspector reasonably

believes that a person is contravening a provision of the Act or has contravened and is likely to do so again.

Subsection (2) requires an improvement notice to specify the provision of the Act that the inspector believes has been contravened, the reasons for that belief, the actions the person must take to remedy or prevent the contravention, and the period within which action must be taken.

Subsection (3) allows an inspector to specify actions that a person must or must not take during the period specified.

Subsection (4) provides that an inspector may extend the period in writing.

Subsection (5) makes non-compliance an offence to the extent that it relates to any matter over which the person has control, with a penalty of \$5000. This provision is intended to be used to direct a person to improve things to the extent of compliance with the Act, for example to replace expired flares.

### **Section 23 Improvement notices given in relation to vessels**

Subsection (1) aligns with section 112 of the National Law. It requires a person given an improvement notice under section 22(1) which relates to a vessel to display the notice as directed by the inspector, or if there is no such direction, in a prominent place on or near the vessel, with a maximum penalty of \$2000.

Subsection (2) provides that the inspector must give a copy of the notice to both the master and the owner of the vessel unless they have already been given the notice.

Subsection (3) provides that a failure to give the copies specified in subsection (2) does not invalidate the notice.

Similar to National Law section 113(1), subsection (4) provides an offence for tampering with or removing a notice before it ceases to have effect, with a maximum penalty of \$2000.

## **Division 4 — General provisions relating to powers under this Part**

### **Subdivision 1 — General matters concerning entry and exercise of powers**

#### **Section 24 Consent to entry**

Section 24 aligns with section 115 of the National Law in regard to inspectors obtaining consent to enter premises. Subsection (1) requires an inspector to inform the occupier of the premises of the power of entry in

section 12(3)(a), the reasons that they want to enter, and that the occupier may refuse consent.

To protect the occupier, subsection (2) specifies that consent will only have effect if it is voluntary.

Under subsection (3), consent may be limited to a particular period and has effect for that period, unless it is withdrawn or the purposes of the entry are fulfilled before the end of that period.

Subsection (4) provides that if consent is not limited to a period, it has effect until it is withdrawn, or the purposes of the entry are fulfilled.

Subsection (5) provides that if an inspector enters premises under section 12 with consent, the inspector and any person assisting, must leave the premises as soon as possible after the consent ceases to have effect.

## **Section 25 Premises with 2 or more occupiers**

Section 25 provides that where there are two or more occupiers of premises, if it is required under this Part it is sufficient to give information to; obtain consent from; or do anything in respect of, any one of the occupiers.

## **Subdivision 2 — Warrants**

### **Section 26 Warrants**

Subsection (1) allows an inspector to apply to a judicial officer for a warrant to search premises for evidential material, similar to section 135 of the National Law.

Under subsection (2), in granting a warrant the judicial officer must be satisfied by information on oath (which includes affirmation) that there are reasonable grounds for suspecting that there is or will be in the next 72 hours, evidential material on the premises. 'Premises' are defined in section 6 to include a structure, building, vehicle, vessel or aircraft or a place or part of a thing or place.

Subsection (3) prohibits a judicial officer from granting a warrant where the inspector has not provided additional information required by the judicial officer concerning the grounds on which the warrant is sought.

Subsection (4) outlines the requirements that must be specified in the warrant. This will ensure a warrant is not too broad and that it provides adequate information for the inspector as well as for the occupier of the premises.

References to 'magistrate' in the National Law have been replaced with 'judicial officer'.

Persons assisting an inspector under section 118B may attend without being named on the relevant warrant.

### Section 27 **Warrants applied for remotely**

Section 27 mostly aligns with section 136 of the National Law. Subsection (1) allows an inspector to apply, by remote communication, for a warrant in relation to premises to a judicial officer. 'Remote communication' is defined in section 6 as any way of communicating at a distance, including by telephone, fax email and radio. This is only permitted in urgent cases or if the inspector reasonably believes a judicial officer is not available within a reasonable distance. This will allow for more expedient investigation of alleged offences in regional or remote areas.

Subsection (2) ensures that the judicial officer must not grant the warrant unless satisfied that it is an urgent case or that a judicial officer is not available within a reasonable distance of the inspector.

Subsection (3) applies section 13(5) to (8) of the *Criminal Investigations Act 2006* to warrants applied for remotely. These provisions include that remote applications must be made in writing and on oath unless certain circumstances apply, and detail how a copy of the warrant must be sent.

### Section 28 **Entry under warrant: rights of occupier**

Section 28 aligns with section 116 of the National Law and provides various duties that are to be performed by an inspector relating to the rights of an occupier, when entry is to be made under a warrant.

Subsection (1) provides an inspector must announce before entering the premises (unless subsection (3) applies), that they are authorised to enter the premises and give any person at the premises an opportunity to allow the inspector entry.

Subsection (2) lists the things an inspector needs to do before entering premises if the occupier is present, unless subsection (3) applies. The inspector must:

- identify themselves to the occupier either by their identity card or by showing evidence that they are a police officer;
- inform the occupier that it is proposed to enter;
- make a copy of the warrant available to the occupier; and
- inform the occupier of their rights and responsibilities under Subdivision 2.

Subsection (3) provides that an inspector need not comply with subsections (1) & (2) if they reasonably believe that immediate entry is required to ensure the safety of a person or that effective execution is not frustrated.

Subsection (4) provides that if the duties under subsections (1) & (2) are not fully complied with before entry is made, they must be complied with as soon as practicable after the premises are entered, to the extent still relevant.

Subsection (5) provides for when unoccupied premises are entered. When this occurs, the inspector must leave a notice in a prominent position stating their official details and that the premises have been entered, along with a copy of the warrant with the completion details required under section 32(2).

Subsection (6) provides that a copy of a warrant must omit the name of the judicial officer who issued it.

#### **Section 29 Inspector must be in possession of warrant**

Section 29 aligns with section 117 of the National Law and requires an inspector to carry a warrant (or a copy of it) in relation to premises while it is being exercised.

#### **Section 30 Occupier entitled to observe execution of warrant**

Section 30 aligns with section 125 of the National Law. Subsection (1) provides that the occupier of premises subject to a warrant is entitled to observe the execution of the warrant. Subsection (2) provides that the right to observe ceases if the occupier impedes the execution.

It may be necessary for operational reasons to execute the warrant in more than one area of the premises at a time, and subsection (3) makes clear that in such circumstances inspectors would not be required to wait in order to allow the occupier to observe every part of the execution of a warrant.

#### **Section 31 Occupier to provide inspector with facilities and assistance**

Section 31 aligns with section 126 of the National Law. Subsection (1) requires an occupier to provide an inspector, or a person assisting an inspector, with all reasonable facilities and assistance for effective exercise of the inspector's powers.

Subsection (2) provides that failing to render such facility or assistance is an offence with a maximum court-imposed penalty of \$5000.

## Section 32 **Execution of warrant**

Subsection (1) provides that a warrant may be executed either by the inspector to whom it was issued or by another inspector authorised to do so by the chief executive officer.

Subsection (2) requires the inspector in charge of executing the warrant upon completion, to record on it their official details; the date and time the warrant was executed; and any other matter that is prescribed in regulations.

## Section 33 **Completing execution of warrant after temporary cessation**

Section 33 aligns with section 119 of the National Law. They provide that an inspector and any persons assisting who temporarily leave the premises may complete the execution of a warrant at a later time.

This provides reasonable flexibility in the execution of warrants, so that an inspector does not need to reapply for one on the technicality of temporary cessation of execution. For example, taking an urgent telephone call outside the premises, or attending an emergency situation or serious incident which requires twelve hours or less away from the premises would not require reapplication for a warrant.

Subsection (2) provides the inspector may complete the execution of the warrant if it is still in force and the inspector is away from the premises for no more than one hour, or twelve hours in an emergency. A longer period of cessation may be agreed to in writing by the occupier or allowed by a judicial officer.

Subsection (3) permits an inspector to apply to a judicial officer for an extension of the allowable period of absence from the premises under emergency circumstances.

Subsection (4) requires the inspector, if practicable, to give notice to the occupier of their intention to apply for an extension before they do so.

Subsection (5) empowers a judicial officer, upon application, to extend the period the inspector may be away from the premises if satisfied that are exceptional circumstances that justify the extension, and that it would not result in the period extending past the period that the warrant is in force.

## Section 34 **Completing execution of warrant stopped by court order**

Section 34 aligns with section 120 of the National Law to permit an inspector to complete the execution of a warrant that has been stopped by court order if the order is revoked or reversed and the warrant is still in force.

### **Subdivision 3 — Securing things**

#### **Section 35 Electronic equipment may be secured pending expert assistance to operate it**

Section 35 aligns with section 121 of the National Law. It permits an inspector to secure electronic equipment at premises to which a warrant applies. The inspector must reasonably believe that by operating the equipment on the premises with expert assistance, information may become available that is relevant to determining whether evidential material is present, and that this information may be destroyed or interfered with if not secured.

Subsection (2) provides that the inspector may do whatever necessary to secure the equipment for up to 72 hours, including by guarding it or locking it up. This recognises the length of time it may take to bring in an expert, particularly in regional areas. Subsection (3) provides that the inspector is required to give notice to the occupier of their intention to secure the equipment and of the maximum time period it may be secured.

#### **Section 36 Extending period for which something is secured**

Section 36 aligns with section 123 of the National Law. This provision recognises that it may be impractical to conduct an investigation or bring in an expert to assist in remote locations within 3 days.

Subsection (1) allows an inspector to apply to a judicial officer for an extension to secure something for more than 72 hours if they reasonably believe this is needed. This applies to things secured under **section 11(2)(b)** (evidential material in relation to a vessel, without consent or warrant), **section 13(6)** (evidential material in relation to premises, with consent or warrant) or **section 35(2)** (relevant information in relation to premises, with warrant).

Subsection (2) requires the inspector to give the occupier of the premises notice of an intention to apply for an extension. The occupier is entitled to be heard in relation to that application.

Subsection (3) provides that the provisions of subdivision 2, which relate to issuing warrants, also apply to extensions, with the necessary modifications.

Subsection (4) states that an extension of the time something can be secured can be granted more than once.

## **Section 37 Interfering with securing of things**

Section 37 aligns with section 124 of the National Law. It provides that a person commits an offence if an inspector is securing, or has secured, something under section 11(2)(b), 13(6) or 35(2) and the person interferes with the securing of the thing or the secured thing if the period of time allowed for securing the thing has ended.

The maximum court-imposed penalty for this offence is \$10,000. This relatively high penalty reflects the seriousness of someone interfering with evidential material or information that may be used in an investigation.

## **Subdivision 4 — Seizing and detaining things**

### **Section 38 Copies of seized things to be provided**

Section 38 aligns with section 127 of the National Law and provides that if an inspector seizes items that can easily be copied, the occupier of the premises may request a copy.

Subsection (3) provides that inspector must comply with any request as soon as practicable after seizure.

Subsection (4) provides that the inspector is not required to comply with the request if they reasonably believe that possession of the thing or information constitutes an offence in **Western Australia** or in another Australian jurisdiction.

### **Section 39 Receipts for seized things**

Section 39 aligns with section 128 of the National Law and provides that an inspector must provide a receipt for things seized under Part 2 of the Act.

Subsection (2) allows more than one item to be covered by one receipt.

### **Section 40 Return of seized things**

Section 40 aligns with section 129 of the National Law to require an inspector to take reasonable steps to return anything seized to the person it was seized from, or to the owner of the thing.

Subsection (1) provides that this requirement arises where the reason for the seizure no longer exists, the thing is not to be used in evidence, or 60 days have elapsed since the seizure.

Subsection (2) lists exceptions to the requirements in (1) – where a court makes an order to the contrary, where the thing is forfeited or forfeitable to the State, or it is subject of an ownership dispute.



Subsection (3) allows an inspector not to return the thing after 60 days if proceedings are ongoing, the thing may be retained under a judicial officer's order under **section 41**, or there is a court order or law to retain, destroy, dispose of or otherwise deal with the thing.

Subsection (4) requires the thing to be returned to the person it was seized from, or if they're not entitled to possess it, to its owner.

#### **Section 41 Judicial officer may permit seized things to be retained**

Section 41 aligns with section 130 of the National Law and provides that a judicial officer may permit things that have been seized to be retained on application by an inspector.

Subsection (1) provides that an inspector may apply to a judicial officer for an order permitting the retention of a thing seized under Part 2 if it may afford evidence in proceedings which have not yet commenced, and the application is within the 60 day period under section 40(1)(c) or before the expiry of a previous order.

Subsection (2) empowers the judicial officer to order the thing to be retained for a specified period if they are satisfied that it is necessary for investigation of, or to secure evidence of, an offence under the Act.

Subsection (3) limits the period for which something can be retained to 3 years.

Before applying to retain something which has been seized, subsection (4) requires the inspector to take reasonable steps to discover who has an interest in it or in its retention, and to notify each of these people of the intended application, if practicable.

#### **Section 42 Forfeiture and disposal of seized things**

Section 42 mostly aligns with section 132 of the National Law in relation to forfeiture and disposal of seized things, however, forfeiture of seized vessels is dealt with in section 63B of this Act.

The section applies to a thing seized under Part 2 of the Act if it is not possible for an inspector to return it. This may be because the person the thing was seized from cannot be located after reasonable efforts, they refuse to take possession of it, or the inspector has contacted the person but the person has not taken possession of it within 3 months of being contacted, or any longer period if agreed in writing by the inspector.

Subsection (2) provides that the CEO can declare that a thing is forfeited by an order published in the Gazette and subsection (3) provides that the thing so declared is forfeited to the State.

Subsection (4) applies the *Criminal and Found Property Disposal Act 2006* (CFPD Act) to the disposal of seized things that are forfeited to the State. Section 29(3) of the CFPD Act provides that the thing must be dealt with by four possible means as the chief executive officer thinks fit: retain it for use; give it to a charitable or educational institution or government agency; sell it by public auction or public tender; or destroy it.

It is necessary to enable seized things which cannot be returned to be disposed of by means other by selling them, as they may not be of saleable value or their value may be less than the cost of the sale process.

Applying the CFPD Act to the disposal of seized things provides consistency with things seized under other Western Australian legislation. Section 132 of the National Law provides that the National Regulator may dispose of a thing in such a manner as it thinks fit.

**43 Part III heading replaced**

‘Part III – Miscellaneous marine powers and duties’ is replaced by ‘Part 3 — Marine powers and duties’.

**44 Sections 57 and 58 replaced**

Clause 44 deletes sections 57 ‘General powers to stop and search vessels’ and 58 ‘Power to inspect logs and muster crew’ and inserts new section 58 – ‘Term used: unsafe vessel’. This section defines what constitutes an ‘unsafe vessel’ for the purposes of this Part and it only applies to pleasure and prescribed vessels. Such a vessel is an unsafe vessel if it is “likely to endanger any person for any reason” for any of five non-exclusive reasons: equipment, stowage, things on the vessel, overloading and crewing.

These reasons align with the definition of ‘unsafe vessel’ in section 6 of the National Law, except that terms with commercial connotations such as ‘cargo’ and ‘submergence of vessel’s load line’ have been removed because the term ‘unsafe vessel’ only applies to pleasure and prescribed vessels and the National Law regulates safety of commercial vessels in relation to these matters.”

**45 Section 58A amended**

Clause 45 deletes each occurrence of the term ‘ship’ in section 58A and replaces it with ‘vessel’ to reflect the replacement of the definition of ‘ship or vessel’ with a new definition of ‘vessel’ in section 3.

**Section 58B replaced**

Clause 46 deletes section 58B 'Offence to take unsafe ship to sea' and replaces it with new section 58B 'Unsafe pleasure or prescribed vessels not to be operated'.

Current section 58B is being replaced as the general safety duties in the National Law now apply to commercial vessels. Sections 12(3)(b) and 16(3)(b) of the National Law makes it an offence for an owner or master to operate an unsafe vessel.

Accordingly, the section has been reworded and expanded to apply to pleasure vessels as well as to prescribed vessels. The language is modernised and aligned with the National Law. Taking a "ship to sea" is now "operating an unsafe vessel". This avoids limiting the provision to vessels at sea instead of vessels on any waters to which the Act applies, as an unsafe vessel that is being operated poses a significant risk regardless of where it is being navigated or used.

Subsection (1) provides that an owner of a pleasure vessel or a prescribed vessel must ensure that it's not operated if it is an unsafe vessel' (defined in section 58). The maximum court-imposed penalty for an individual is \$5000.

Subsection (2) has been inserted to ensure that the section applies to short term accommodation vessels. These are vessels used like AirBNB on the water and are kept in a marina. They are hired out for accommodation purposes only and are not allowed to be operated by the person who hires them. To prevent someone from hiring such a vessel overnight for 4 people but having a party for many more and thus overloading it, it's a requirement that the hirer must not use it if it is an unsafe vessel. That is, even if it is not being operated or navigated, the vessel must not be overloaded. Vessels used for short term accommodation will become prescribed vessels if they are not domestic commercial vessels under the National Law. Like the offence in subsection (1), the maximum court-imposed penalty for an individual is \$5000.

**Section 59 amended**

Subclauses (1) to (4) amend section 59 by increasing the maximum penalties for not navigating a vessel safely to \$5000 each, to provide deterrence for these serious offences. These penalties, along with all the penalties in the Act, have not been increased since the Act commenced in 1982. These amendments go some way towards bringing penalty amounts into alignment with amounts in other Western Australian legislation.

48      **Section 60 amended**

Subclause (1) replaces the term ‘person in charge’ with ‘master’ because, in a commercial vessel context, the person who *has charge* of a vessel is always considered the master/ captain, but the person *in charge* of a vessel is the person who is operating it. Section 60 still applies to commercial vessels.

Subclause (2) increases the penalty of \$1000 to \$5000 to reflect the seriousness of the offence.

49      **Sections 61 to 64 replaced**

Section 61 to 64 are deleted and replaced by new sections:

Section 61 **Power to detain unsafe pleasure or prescribed vessels**

As detention of domestic commercial vessels is regulated by section 101 of the National Law, section 61 applies to pleasure and prescribed vessels only. Appropriate limitations have been placed on the State’s power to detain vessels – unlike the National Law, the grounds for detention are limited to where the chief executive officer has reason to believe the vessel is unsafe.

References to the Court of Marine Inquiry have been removed as that body is redundant and its functions are now undertaken by the National Regulator. The concepts of provisional and absolute detention were removed to align with the National Law and to simplify the detention process.

Subsection (1) provides the chief executive officer with the power to detain a vessel that is unsafe because it is likely to endanger any person for any reason (note definition of ‘unsafe vessel’ in section 58). It also allows the chief executive officer to bring an unsafe vessel to an appropriate place. Section 58 lists non-exclusive reasons why a vessel may be considered an unsafe vessel, including because of the condition or equipment of the vessel, the manner or place in which something is secured on the vessel, or the number of crew or their qualifications.

The outdated reference in current section 61(1)(a) to acting on information provided by a third party complainant and the requirement for that complainant to provide security in section 123 has been removed, as any decision to detain a vessel would only be made in accordance with administrative law principles.

Subsections (2) and (3) provide that once a decision to detain a vessel is made, notice should be given to the master of the vessel, or, consistent with section 101(2)(b) of the National Law, if the master cannot be located, the person who had possession or control of the vessel immediately before it was detained. The notice must identify the vessel, the reason for detention and a contact officer’s details.

Unlike the National Law, section 61 does not require the notice to contain information about the return of the vessel. This is because when the vessel can be returned and any conditions which might apply to its return may not yet be known at the time the detention notice is issued. At the point of an initial decision to detain a vessel, depending on the reasons for detention, the chief executive officer may not have sufficient information about the extent of issues with the vessel and what conditions should be placed on its release.

Subsection (4) provides that within 21 days of detention, the chief executive officer must give another notice stating any conditions to be complied with before the vessel may be released from detention and the period (of not less than 3 months) within which those conditions are to be complied with.

Subsection (5) ensures that the chief executive officer has the power to contract to move the vessel and for the provision of storage services. It may be the case that the Department does not have an appropriate area of secure land on which to store a vessel while it is detained, so this provision is necessary for the effective exercise of the power to detain.

In sections 61 and 62, decisions about the detention of a vessel, the requirements to give notice and the power to authorise the operation of a detained vessel, apply to the chief executive officer rather than an inspector, although these powers may be delegated to appropriate Departmental officers with relevant expertise. While marine safety inspectors have the power to detain a vessel in the National Law, it is preferable that such a significant power affecting personal property rests with the chief executive officer in the case of pleasure and prescribed vessels. Inspectors already have a range of powers, including the ability to issue a direction or improvement notice, which may be used to address many circumstances concerning the safety of a vessel. If further action is required, vessel detention powers may be exercised by the Department by way of the chief executive officer's delegate. For example, if a vessel master indicates that they intend to operate an unsafe vessel despite a direction notice to not do so, and this is likely to endanger the lives of persons on board, an inspector may contact the chief executive officer's delegate to recommend detention of the vessel.

Given the financial and legal responsibilities of the Department related to any detention of a vessel, such as storage and potential disposal if the owner refuses to take back the vessel, it is necessary that an officer of the Department, rather than an inspector, makes the decision to detain. This will help ensure that the entire process is managed centrally and consistently within the Department, rather than by non-departmental inspectors who are not subject to the same internal administrative arrangements.

## Section 62 **Detained vessels: unauthorised operation**

Section 62 will make it an offence to operate a detained vessel. Detention does not involve the chief executive officer obtaining any proprietary rights, but only prohibits the owner or other persons from operating the vessel until it has been released from detention.

Subsection (1) provides it is an offence if any person operates a vessel while it is detained if not authorised to do so by the chief executive officer. The maximum court-imposed penalty for an individual is \$5000, and \$25,000 for a body corporate, to reflect the seriousness of the offence.

This will ensure that only people with appropriate experience can operate the vessel while it is detained, whether or not they are departmental staff.

Current subsections 62(3) and (4) which provide an offence to take a detained vessel to sea with an official of the Department on board are deleted as they are no longer necessary. If it ever arose, this situation could be dealt with by laws such as section 333 of the ***Criminal Code Act Compilation Act 1913*** which provides an offence for deprivation of liberty.

## Section 63 **Detained vessels: inspection**

This section extends the powers available to inspectors to board and inspect vessels under sections 7 and 9 to officers of the department and other people appointed by the chief executive officer, in order to determine what is needed to make a detained vessel safe. This is necessary due to the technical expertise which may be required to determine the safety of a pleasure or prescribed vessel.

## Section 63A **Detained vessels: return**

Section 63A ensures that the chief executive officer cannot unreasonably withhold a person's vessel for an indefinite period. This is an important safeguard in dealing with the detention of property. While the details about when a vessel may be released from detention are contained in regulations under the National Law, section 63A requires the chief executive officer to release a vessel from detention if they are satisfied that: the vessel is not unsafe; all conditions for release of the vessel have been met; or the reasons for detaining the vessel no longer apply. It is appropriate that a vessel must be released if one of these prerequisites is met, as the purpose of the detention power is to ensure unsafe vessels are not operated and place people at risk. Details about the steps for returning a vessel and to whom may be provided for in regulations.

### Section 63B **Detained vessels: forfeiture and disposal**

Section 63B enables the chief executive officer to declare, by order published in the *Gazette*, that a vessel is forfeited to the State. This may only occur in the limited circumstances described in subsection (1). This provision is designed to ensure that a detained vessel is not left to the Department indefinitely. This circumstance may arise where the vessel is of little or no value and the owner wishes to avoid disposal costs by refusing to take possession of it.

For this provision to apply, the chief executive officer must have taken steps under section 63A to return the vessel and has been unable to locate the person after making reasonable efforts, the person has refused to take possession of the vessel; or the person has not taken possession of the vessel within 3 months, or longer if agreed by the chief executive officer, after being contacted about its return.

Subsection (5) requires that the disposal of a detained vessel that is forfeited to the State be subject to the ***Criminal and Found Property Disposal Act 2006***. Section 29(3) of that Act regulates disposal by the chief executive officer.

### Section 63C **SAT review of decision to detain vessel or forfeiture declaration**

Section 63C is inserted to allow a person aggrieved by a decision to detain a vessel or a declaration that a vessel is forfeited to the State to apply to the State Administrative Tribunal for a review.

This review mechanism is necessary given that any decision to detain a person's vessel or a declaration that it is forfeited to the state is a significant assertion affecting a person's legal rights ownership. It is appropriate for an aggrieved person to have a formal avenue of review of such a decision, separate from the Department.

Current section 61(1)(d) provides that a vessel master may appeal to the Court of Marine Inquiry before an order for final detention of the vessel is made. The Court of Marine Inquiry is now redundant. Under the National Law, the decision to detain a domestic commercial vessel is a reviewable decision under section 139(2)(a) which is subject to internal review as well as review by the Commonwealth Administrative Appeals Tribunal.

## Section 64 **Marine incidents: terms used**

New section 64 defines three terms for the purposes of sections 64A and 64B:

***contact details*** means the name of a person and other details which have been prescribed in regulations. These may include for example, address, phone number and date of birth.

***Identification details*** means the jurisdiction where a vessel is registered and its registration number, the vessel's name, and the owner's contact details.

***Marine incident*** means the definition given in the National Law, which includes: death of or injury to a person associated with the operation or navigation of a pleasure or a prescribed vessel (PPV); the loss or presumed loss of a PPV; collision of a PPV with another vessel or object; the grounding, sinking, flooding or capsizing of a PPV; a fire on a PPV; loss of stability of a PPV that affects its safety; a PPV's structural failure; a PPV becoming disabled and requiring assistance; a PPV fouling or damaging a navigation aid, submarine cable or pipeline; an event that results in, or could have resulted in, the death, injury, or loss of a person on board a PPV; or a prescribed incident involving a PPV. This Act's definition of 'marine incident' will exclude the National Law's 'close quarters situation' because as it is a near miss, it is not an incident as such. Two vessels can pass very close to each other without being in a close quarters situation which is one where there is a risk of imminent collision.

## Section 64A **Marine incidents: duties**

Section 64A applies duties to masters of vessels involved in a marine incident (defined in section 64).

Like current section 64, subsection (1) requires masters to stay by a vessel it has collided with until no longer needed, and to provide details to the master or owner of that vessel, as well as to any person injured.

Subsection (2) provides a penalty of \$2000 for a master's failure to stand by, render assistance, or give the details required in subsection (1). This has been increased to go some way towards reflecting the serious nature of the offence, and the importance of these requirements to people's safety as well as to law enforcement.

Subsection (3) provides that subsections (1) and (2) also apply to masters of domestic commercial vessels involved in marine incidents with pleasure and prescribed vessels, as the National Law is silent on a requirement to give details. This application is permitted because although the National Law applies to the exclusion of a State law which relates to the same matter, it applies only to the extent of any inconsistency.



## Section 64B **Marine incidents: reporting**

This section only applies to pleasure and prescribed vessels because sections 88 and 89 of the National Law adequately provide for incident reporting relating to domestic commercial vessels.

The requirement under current section 64(3)(c) for a master of a pleasure vessel involved in an incident causing injury to a person or certain damage to a vessel to report to the Department has been replaced by new section 64B.

Subsections (2) and (3) provide that a report by the master or the owner must be made to the chief executive officer as soon as is practicable and failure to do so is an offence. The maximum penalty for an individual is \$2000.

Subsection (4) provides that a written report must be provided within 72 hours and failure to do so is an offence with a penalty of \$2000 for individuals. The timeframe has been reduced from 7 days to 3 to reflect advances in technology which allow for quicker reporting. As the requirement to report is essential to investigations of marine incidents.

Subsections (3) and (5) provide that in relation to subsections (2) and (4), either the owner or the master can provide the respective report.

## Section 64C **Marine incidents: preserving evidence**

Subsection (1) provides that requirements in section 64B applies to the same vessels to which section 64B applies, being pleasure or prescribed vessels involved in a marine incident.

Subsection (2) provides that the master of the vessel must take reasonable steps to preserve material relevant to an investigation. Failure to do so attracts a penalty of \$5000 which reflects the serious nature of potentially destroying evidence.

Subsection (3) provides that the owner of the vessel must also take reasonable steps to preserve material relevant to an investigation is an offence. Failure to do so also attracts a penalty of \$5,000 for an individual and \$25,000 for a body corporate.

Subsection (4) provides that any person on board the vessel must not tamper with anything which may be relevant to an investigation of the incident. Failure to comply with this requirement also attracts a penalty of \$5,000.

Section 64C is similar to the requirement of an owner or any person to preserve evidential material under section 90 of the National Law.

**Section 66 amended**

Clause 50 amends section 66, which allows waters to be closed in an emergency or for safety reasons, is amended. The title is now simply 'Closure of waters', as the term 'navigable waters' is not necessary and not defined.

Subclause (1)(a) clarifies that the section applies in 'State waters', which are defined in section 3 in the same terms as in the definition of 'waters', which are currently defined in subsection (5).

Subclause (1)(b) removes the requirement for the chief executive officer to direct an authorised person to close waters, instead allowing the chief executive officer to directly order the closure of waters if necessary.

Subclause (2)(a) amends subsection (2) to remove the reference to 'authorised person' as a consequence of the change in subsection (1).

Subclause (2)(b) amends subsection (2)(a) to replace 'person in charge' with the more accurate term 'master'.

Subclause (2)(c) amends subsection (2)(d) to replace 'notice' with 'order' for the same reason.

Subclause (3) provides a minor drafting amendment to subsection (3) as a consequence of the change to subsection (2)(a).

Subclause (4) amends subsection (3) to increase the penalty to reflect the potentially serious safety ramifications of navigating in closed waters, especially if they have been closed for an event, for instance. Like all of the Act's penalties, this one has not been increased in over 40 years, so is increased from \$500 to \$5000.

Subclause (5) deletes subsection (5) as the definitions of 'authorised person' and 'waters' (now 'State waters') have been moved to section 3, and the term 'person in charge' is no longer used in this section.

Note: The note provides that the heading of section 66 is amended to 'Closure of waters'.

**Section 67 amended**

Similar to section 66, section 67 is amended to replace 'State waters' with 'waters', and 'notice' with 'order', amongst other things.

Subclause (1)(a) amends subsection (1) to replace 'notice' with the more accurate term 'order'.

Subclause (1)(b) clarifies that section 67 applies in 'State waters', which are defined in section 3, rather than in 'any waters'.

Subclause (1)(c) again amends subsection (1) to replace 'notice' with 'order'.

Subclause (2)(a) amends subsection (2) to replace 'notice' with 'order'.

Subclause (2)(b) deletes subsection (2)(a) as it is no longer needed thanks to the new definition of 'State waters' in section 3.

Subclauses (2)(c) and (d) amend subsections (2)© and (d) respectively to replace 'notice' with 'order'.

Subclause (3) amends subsection (3) to replace 'notice' with 'order'.

Subclauses (4) and (5) increase the penalty in subsection (3) from \$500 to \$2000 to reflect the serious safety implications of speeding.

## 52 **Section 69 replaced**

Clause 52 deletes section 69 'Offences relating to hatches' and replaces it with a new section of the same name so that its application is limited to the master or pleasure and prescribed vessels. As it no longer applies to commercial vessels, the terms 'sends' and 'takes' have been removed.

The penalty has been increased from \$1000 to \$2000 as there can be serious safety consequences in some weather conditions.

## 53 **Section 70 amended**

Section 70 has minor amendments to reflect the limitations of who is authorised by the chief executive officer, and to change 'ship' to 'vessel'. There are two other minor changes due to drafting style. The penalty remains unchanged.

## 54 **Sections 71 to 75 deleted**

Current section 71 provides power to remove a vessel which constitutes a hazard or obstruction. This power has been relocated to section 114(1A)(i) to instead allow regulations to be made to enable objects or vessels to be removed from waters, and either sold, destroyed or disposed of, and to recover of the costs of such actions from the owner. As such, this section is no longer needed.

Sections 72 to 75 are concerned with the management of passengers. These provisions were outdated in many respects, for example the requirement to refund the fare of a disorderly passenger before they are required to leave the vessel. The National Law (section 21) and the *Criminal Code* contain more appropriate and modern provisions for passenger management. In addition, new section 114(1A)(f) provides the regulation making power for the conduct and management of passengers on commercial, pleasure or prescribed

vessels. The National Law (section 6(2)(b)(xii)) allows state laws for the management of passengers to continue to have effect.

Accordingly, these four sections have been deleted.

55 **Part IV heading amended**

The heading has a minor amendment from 'Part IV –' to 'Part 4 –', still relating to International Conventions.

56 **Section 77 amended**

Subsection (1) which allows for regulations to be made prescribing penalties is repealed. It is subsumed by the primary regulation making power in section 114(2) which provides for an increased maximum penalty from \$1000 to \$15,000 for an individual and \$75,000 for a body corporate.

57 **Section 78 amended**

A minor amendment to subsection (2) is required to provide gender neutral language – 'he' is replaced by 'the Minister'.

58 **Section 79 amended**

Subclause 58(1) amends subsection (1) regarding 'Regulations giving effect to Prevention of Collisions Convention' to delete the description of the area for which regulations may be made from:

"the area constituted by —

- (a) the territorial sea adjacent to the State; and
- (b) the sea on the landward side of the territorial sea adjacent to the State that is not within the limits of the State; and
- (c) waters within the limits of the State"

to "State waters", which is a defined term inserted by clause 39 into section 3 to mean the same as the above description.

Subclause (2) makes a minor amendment to subsection (2) – the word "Penalty" is replaced with "Penalty for this subsection: a fine of" to reflect modern drafting practice. The penalty has not changed.

Subclause (3) deletes subsection (3) which provides that section 6 does not apply in respect of this section. As section 6 provides for an outdated application of this Act in terms of vessels on intra-state and inter-state voyages, it is deleted by clause 41 of this Bill.

59      **Section 84 amended**

Subclause (1)(a) amends subsection (1)(a) to insert “former” before “Navigation Act” to reflect the fact that it refers to the repealed Commonwealth *Navigation Act 1912* instead of the current *Navigation Act 2012*.

Subclause (1)(b) amends subsection (1)(e)(i) to change “section 8A(5)” to “section 8A(2)” to correct a referencing error. Subsection (5) never existed.

Subclause (2) amends subsection (2) to insert “former” before “Navigation Act” to reflect the fact that it refers to the repealed Commonwealth *Navigation Act 1912* instead of the current *Navigation Act 2012*.

60      **Section 90 amended**

Subclause (1)(a) amends subsection (1)(a) regarding “Regulations giving effect to Safety Convention” to insert ‘former’ before ‘Navigation Act’ to reflect the fact that it refers to the repealed Commonwealth *Navigation Act 1912* instead of the current *Navigation Act 2012*.

Subclause (1)(b) amends subsection (1)(e)(i) to change “section 8A(5)” to “section 8A(2)” to correct a referencing error. Subsection (5) never existed.

Subclause (2) amends subsection (2) to insert “former” before “Navigation Act” to reflect the fact that it refers to the repealed Commonwealth *Navigation Act 1912* instead of the current *Navigation Act 2012*.

61      **Part V heading amended**

“Part V – ” is replaced with “Part 5 –” to reflect current drafting practice.

62      **Section 91 amended**

Subclause (1)(a) amends subsection (1) to replace all references to ‘ship’ with ‘vessel’ to reflect replacement of the definition of ‘ship or vessel’ with a new definition of ‘vessel’ in section 3.

Subclause (1)(b) amends subsection (1)(b) to change “owner or master of the ship” to “owner and master of the vessel” as it is appropriate that a description of any dangerous goods is given to both parties at or before their placement on the vessel.

Subclause (1)(c) also amends subsection (1)(b) to replace the reference to ‘ship’ with ‘vessel’ for the same reasons as above.

Subclause (2) amends subsection (1) to replace “Penalty” with “Penalty for this subsection: a fine of” to reflect current drafting practice. The penalty remains unchanged.

Subclause (3) amends subsection (2) to replace the reference to 'ship' with 'vessel' for the same reason as above.

**63      Section 92 amended**

Subclause (1) amends subsection (1) to replace the reference to 'ship' with 'vessel' to reflect replacement of the definition of 'ship or vessel' with a new definition of 'vessel' in section 3.

Subclause (2) amends subsection (1) to replace "Penalty" with "Penalty for this subsection: a fine of" to reflect current drafting practice. The penalty remains unchanged.

Subclause (3) amends subsection (2) to replace all references to 'ship' with 'vessel' for the same reason as above.

Subclause (4) amends subsection (2) to replace "Penalty" with "Penalty for this subsection: a fine of" to reflect current drafting practice. The maximum court-imposed penalty for the offence is increased from \$1000 to \$2000 to align with the potential gravity of knowingly falsely describing the sender.

**64      Section 93 amended**

Subclause (1)(a) amends subsection (1) to replace the reference to 'ship' with 'vessel' to reflect replacement of the definition of 'ship or vessel' with a new definition of 'vessel' in section 3.

Subclause (1)(b) amends subsection (1) to replace "he" with "the owner or master" to reflect gender neutral language.

Subclause (2) amends subsection (2) to replace all references to 'ship' with 'vessel' for the same reason as above.

**65      Section 94 amended**

Subsection (1) is amended to replace the reference to 'ship' with 'vessel' to reflect replacement of the definition of 'ship or vessel' with a new definition of 'vessel' in section 3.

**66      Section 95 amended**

Subclause (1)(a) replaces all references to 'ship' with 'vessel' to reflect replacement of the definition of 'ship or vessel' with a new definition of 'vessel' in section 3.

Subclause (1)(b) replaces two instances of the term "her" with "its" to reflect non-gendered language.

Subclause (2) replaces “Penalty” with “Penalty: a fine of” to reflect current drafting practice. The penalty remains unchanged.

**67 Section 96 replaced**

Clause 67 deletes section 96 ‘Regulations as to dangerous goods’ and replaces it with a new section of the same name to reflect current drafting practices. For example, “The Governor may make regulations prescribing matters...” is replaced with “The regulations may deal with...” as the Governor is mentioned in relation to the principal regulation making power in amended section 114. References to ‘ships’ are replaced with ‘vessels’ to reflect replacement of the definition of ‘ship or vessel’ with a new definition of ‘vessel’ in section 3. No substantive changes are made to this section.

**68 Section 97 amended**

Section 97, which governs the carrying of explosives on passenger vessels, is amended.

Subclause (1)(a) amends subsection (1) to replace the reference to ‘ship’ with ‘vessel’ to reflect replacement of the definition of ‘ship or vessel’ with a new definition of ‘vessel’ in section 3.

Subclause (1)(b) amends subsection (1) to delete the reference to “authorised officer” so that only the chief executive officer may direct the how explosives shall be protected on passenger vessels. This is considered appropriate to ensure that a decision of this gravity is made by the CEO or their delegate.

Subclause (2) amends subsection (2) to replace the reference to ‘ship’ with ‘vessel’ for the same reason as above.

Subclause (3) amends subsection (2) to replace the word “Penalty” with “Penalty: a fine of” to reflect current drafting practice. The penalty remains unchanged.

Subclause (4) amends subsection (3) to replace the reference to ‘ship’ with ‘vessel’ for the same reason as above.

Subclause (5)(a) amends subsection (4) to replace ‘authorised officer’ with ‘inspector or authorised person’ and to provide that subsection (4) does not limit any power conferred on an inspector or an authorised person under this Act. It is necessary to include authorised persons as well as inspectors due to the nature of explosives and depending on the situation, a person with expertise in this area may be better placed to handle them than an inspector.

Subclause (5)(b) amends subsection (4) to replace the reference to ‘ship’ with ‘vessel’ for the same reason as above.

Note: The note provides that the heading of section 97 is also amended so that “ship” is replaced with “vessel”.

69

## **Part VI replaced**

The heading “Part VI – Pleasure vessels” is replaced by “**Part 6 – Pleasure vessels and prescribed vessels**” so that it captures prescribed vessels. These are vessels which the State considers to be operating for commercial purposes, but which are excluded from the application of the National Law for domestic commercial vessels.

The National Law does not apply to certain commercial craft that have until now been covered by Part II of this Act, either because:

1. they are not covered by the constitutional reach of the National Law. These vessels are currently in the legislative ‘gap’ and are the reason for this Application Bill which will apply the National Law to them;
2. they do not meet the National Law definition of ‘vessel’ or ‘domestic commercial vessel’.

The National Law definition expressly provides that certain vessels are not domestic commercial vessels, including school vessels and community group vessels unless they are used for a prescribed purpose or activity. In addition, regulations made under the National Law provide that specified things are not vessels or are not domestic commercial vessels, and they are therefore not subject to the National Law.

The second group will become ‘prescribed vessels’ under this Act because they cannot meet its definition of ‘pleasure vessel’ due to their commercial nature. The following craft may be prescribed if used for hire or reward: surf skis; sit-on-top kayaks; motorised surfboards and body boards; sailboards; electric hydrofoils; and non-motorised inflatable craft. The following may also be prescribed: State Government-owned boats used only for training primary or secondary school students; and vessels owned by community groups which are used for hire, charter or training for a fee by people who are not members of the community group. These lists are not exclusive and other vessels or craft may be prescribed in the future.

Some prescribed vessels would come under the definition of ‘hire and drive vessels’ in current Part II Division 16 which is deleted via clause 42 of the Bill. Current section 54 ‘Regulations in respect of hire and drive vessels’ deals with many of the matters that are being inserted into section 99.

Both ‘prescribed vessels’ and ‘pleasure vessels’ may also refer to craft which have been specified to be vessels in regulations made under section 3(2).



Section 98 provides definitions for terms used in current Part VI and allows the Minister to declare that the Part applies to any vessel not otherwise required to be licensed under the Act. It is deleted as it is no longer needed because:

- the definitions of ‘authorised person’ and ‘pleasure vessel’ have been moved to section 3 as the terms are used in other Parts;
- the definition of ‘owner’ has been deleted as it’s covered by the global definition in section 3; and
- subsections (2) – (4) are no longer needed due to the concept of ‘prescribed vessels’.

Section 99 ‘**Regulations in respect of pleasure vessels**’ has been replaced in order to clarify the different applications of similar regulation-making powers: regulations that will only apply to pleasure vessels and prescribed vessels remain in section 99, whereas those which will not be limited in application are moved to section 114.

Section 99 is retitled to include prescribed vessels, vessels which are used commercially but are not covered by the National Law.

The mantle of the regulation making powers in subsection (1) is extended to prescribed vessels, and the broad “necessary or convenient” wording has been replaced by a list of more specific head powers, which is not intended to be limiting. The term “Governor” has been removed as it’s already included in the general regulation making power in section 114. Fourteen subparagraphs have been inserted or amended in subsection (1), as follows:

New subparagraph (a) provides that regulations can be made to prescribe **duties for owners, masters and operators** of pleasure vessels or prescribed vessels. This is to clarify that regulations can impose duties on these people, rather than implying this by requiring equipment ‘to be provided on’ vessels, which is currently the case in paragraph (1)(d), for example. ‘General safety duties’ are now a common feature of legislation including modern workplace health and safety legislation and the National Law. Duties could still be imposed in respect of all vessels, such as the duty to comply with the ***Prevention of Collisions at Sea Regulations 1983***, if it is not desirable to limit a duty to an owner, master or operator.

Subparagraph (a) has been renumbered (b) and amended to extend the regulation making power for **registration, and transfer of registration**, to prescribed vessels.

Subparagraph (b) has been renumbered (c) and amended to provide that regulations could be made to **prohibit navigation** of pleasure vessels or prescribed vessels in a class that the CEO has determined cannot be safely

navigated. A similar power has been added to section 114(1A)(d) which applies to all vessels. The difference between this power and the one proposed in section 114 is that these regulations would allow the CEO to determine that a class of pleasure or prescribed vessel cannot be navigated safely and prohibit their navigation in Western Australian waters, whereas in section 114, an inspector may determine that an individual vessel cannot be navigated safely and prohibit its navigation, or place conditions or restrictions on its navigation. The CEO may give notice of the determination in the *Gazette* under new subsection 99(2). The regulations may cover emerging types of vessels which are considered a high safety risk.

Subparagraphs (c) and (d) (regarding **maintenance and equipment**) have been renumbered (d) and (e) respectively) to apply them to prescribed vessels as well as to pleasure vessels.

Subparagraph (f) replaces (e) and enables regulations to provide for inspectors to conduct **inspections or surveys** of pleasure and prescribed vessels or, if specialist skills are required (such as those of a marine surveyor), for authorised persons to carry out inspections. Such people will be authorised under section 117 of the Act. Inspections of pleasure and prescribed vessels may be undertaken for a variety of reasons, including to ensure that a vessel has an Australian Builders Plate (ABP) and that the information displayed on the plate is correct. An ABP displays safety information about a recreational vessel's buoyancy, maximum engine power and its loading capacity, including maximum number of people and engine weight.

New subparagraph (g) is a new power to enable regulations to be made prescribing **design and construction** requirements for pleasure vessels and prescribed vessels. Although the National Law regulates the design and construction of domestic commercial vessels, the State retains responsibility for this matter for pleasure and prescribed vessels. The regulations will detail what information must be included on an ABP; the form of an ABP and the manner in which it is to be fixed to a vessel; the persons who may affix, alter or remove an ABP; and will make it an offence to sell or supply a vessel that does not comply with the *National Standard for the Australian Builders Plate for Recreational Boats*, in line with all other State jurisdictions.

Subparagraph (g) regarding the **age of persons who may be in charge** has been renumbered (h) and amended so it applies to prescribed vessels as well as to pleasure vessels.

Subparagraphs (f), (ha), (i) and (j) are moved to section 114(1A) (subparagraphs (a), (b), (c) and (d) respectively) so as not to be limited in application.

Subparagraph (h) has been renumbered (i) to provide that regulations may be made for the **crewing** of pleasure vessels and prescribed vessels, including the **qualifications** of crew and masters.

Subparagraph (k) regarding **lights and signals** has been renumbered (j) and amended so it applies to prescribed vessels as well as pleasure vessels.

New subparagraphs (k) and (l) will allow regulations to be made for matters relating to **licensing and safe navigation, including emergency and safety management procedures**, for both pleasure and prescribed vessels.

New subparagraphs (m) and (n) will allow regulations to be made for prescribed vessels regarding their **inspection, survey, certificates and hiring**. Most of these regulation making powers are currently in Part II of the Act for hire and drive vessels (section 54) which will be deleted under clause 42. Regulations made under (n) may specify, for instance, where hired vessels may be used so as not to unduly conflict with other water users. The regulations may require the operator of a fleet of vessels for hire, for example houseboats, to apply for approval of their proposed area of operation so they don't operate in an area unless it has been approved for that purpose.

New subsection (2) will allow the CEO to determine that a class of pleasure or prescribed **vessel cannot be navigated safely** and give notice of their determination via the *Gazette* (related to subparagraph (1)(c) above).

70

## **Part VII replaced**

Clause 70 repeals current "Part VII Investigation and Inquiries" and inserts new, unrelated "**Part 7 – Seaplanes**", dealing with the regulation of seaplanes.

Current Part VII provides for investigations and inquiries into casualties, misconduct or incompetence on commercial vessels. The ability of the chief executive officer in section 101(1) to direct a person to conduct a preliminary inquiry only relates to casualties or incompetence or misconduct connected with a commercial vessel. Similarly, the role of the Court of Marine Inquiry as detailed in Part VII is limited to formal investigations relating to commercial vessel casualties and charges of incompetence or misconduct of the crew of commercial vessels.

The Court of Marine Inquiry is obsolete and has not been convened in many years. The State Coroner may investigate if an accident involves a death at sea. Additionally, the National Regulator now has jurisdiction for breaches of most aspects of commercial vessel operations, including the certificates of competency that crew are required to hold. Casualties involving commercial vessels are investigated by the National Regulator even if an incident involves a suspected breach of a state law (such as the ***Preventions of Collisions at***

**Sea Regulations 1983** or a speed limit), as it would also indicate a potential breach of the general safety duties imposed on vessel owners, masters or crew under the National Law.

A matter for which the chief executive officer could depute a person to report to them under section 101(2) is not limited to a matter related to commercial vessels. However, the powers provided for in section 102 are adequately covered by the powers introduced in new Part 2 of the Act.

New section 100 is inserted to put beyond doubt that certain provisions do apply to seaplanes, as they cannot comply with all provisions of the Act. Seaplanes will need to comply with the provisions listed in subsection (2) whilst in State waters, whether or not they are operating. The provisions will apply to both commercial and recreational seaplanes, as commercial seaplanes are covered under the term 'pleasure vessel', thanks to the mantle of section 100(2).

The provisions listed as those for which a reference to a 'vessel' or 'pleasure vessel' includes a reference to a seaplane have been identified as matters which should apply to the operation of a seaplane on the water.

Section 100(2)(a) captures section 3A(1)(a) which relates to the application of the Act to a vessel in State waters.

Section 100(2)(b) captures sections 58A, 59, 60, 64, 64A, 64B, 64C, 65, 66, 67 and 68 which respectively deal with compensation in respect of false distress signals; safe navigation; penalty for unlawfully assuming control without consent of owner or master; marine incident terms, duties, reporting and preserving evidence; mooring licences; closure of waters; speed limits and speed measuring equipment.

Section 100(2)(c) captures section 79 which relates to regulations giving effect to the Prevention of Collisions Convention.

Section 100(2)(d) captures section 99(1)(b), (i) and (j) which relate to the making of regulations which respectively deal with registration requirements; crewing and qualification requirements; and lights and signal requirements.

Section 100(2)(e) captures sections 114(1A)(a), (c), (d), (e), (h) and (i) and (1D) and 115A which relate to making regulations which respectively deal with the regulation of noise, fumes and smoke; the use of State waters; provision for safety in relation to navigation, mooring and berthing; towing; traffic management plans; dealing with things that are, or are likely to become, hazards or obstructions; requirements of the CEO relating to the removal of such hazards and obstructions; and related exemptions and equivalents.

Section 100(2)(f) captures the provision of regulations made under or for the purposes of a provision listed in paragraphs (a) and (e).

Section 100(2)(g) captures a provision of this Act or the regulations that apply or have effect for the purposes of paragraphs (a) and (f) to the extent necessary.

Commonwealth laws related to civil aviation may also cover some of the matters covered by the Act's provisions listed in section 100(2)(b). If there is any inconsistency with matters provided for in a civil aviation law and this list as the provisions will apply in relation to seaplanes, then the former law would prevail, as provided for by section 109 of the Commonwealth Constitution.

## 71 **Part VIII heading amended**

The heading of Part VIII – ' has been changed to '**Part 8 – '.**

## 72 **Part VIII Division 1 inserted**

New '**Division 1 — Information protection, disclosure and exchange**' is inserted, along with sections 107 – 113.

Division 1 introduces an information sharing framework which is currently absent from the Act. Information sharing is currently managed in accordance with the Australian Privacy Principles (APP). Inserting an information regime will provide greater clarity for sharing information under this Act and other marine Acts, which are all silent on the protection and disclosure of information. It will enable the chief executive officer to better perform their functions. The proposed information sharing regime will set out which types of information the chief executive officer may lawfully use and disclose to authorised persons for authorised purposes.

Having authorised persons and authorised purposes will restrict use and disclosure of information but will enable them to occur where it is appropriate or necessary for performance of functions under written law.

An offence for unauthorised use or disclosure of information will be introduced to ensure that an appropriate penalty is in place for unauthorised use, recording or disclosure of information. Once the information sharing regime has commenced, information sharing under the APP will no longer be authorised.

The proposed information sharing framework is modelled on the *Road Traffic Administration Act 2008* and *Transport (Road Passenger Services) Act 2018*, also administered by the Department of Transport. It will enable disclosure and use of information between agencies for the purposes of performing functions under marine Acts and under other written law, where appropriate.

The proposed new sections will expressly set out those persons or entities to whom the chief executive officer may or must disclose information to, and what categories of information the chief executive officer may or must disclose to those persons or entities.

## Section 107 **Terms used**

This section introduces definitions necessary for interpreting the sections under Division 1. It provides the terms for the different categories of information the chief executive officer must or may disclose:

**incident information** is defined in section 112 and includes details of any evidence, statement, report or other information obtained as a result of any investigation made into a marine incident, and a copy of a statement or report resulting from any investigation. **Marine incident** is defined in section 64.

The Department of Transport and the Australian Marine Safety Authority (AMSA) both have responsibility for investigating incidents which occur in State waters if both a recreational and a commercial vessel have been involved. The Department of Transport, as the State regulator, also has responsibility for enforcing waterways management rules for recreational and commercial vessels, subject to the National Law. These may include speed limits, closed waters areas and other navigation rules under this Act and the *Navigable Waters Regulations 1958*. In some cases, investigation of non-compliance reports is required.

**infringement notice information** means information about infringement notices under this Act, including information about:

- giving an infringement notice to a person;
- payment of money in accordance with an infringement notice;
- withdrawal of an infringement notice;
- a matter relating to an infringement notice coming before a court for determination;
- registration of an infringement notice under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* Part 3; and
- any withdrawal of proceedings under the *Fines, Penalties and Infringement Notices Enforcement Act 1994*.

**marine qualification information** means information which includes details of:

- persons who have made applications for marine qualifications;
- persons who hold or have held marine qualifications;

- suspensions and cancellations of marine qualifications; and
- any conditions or restrictions on a particular qualification.

**mooring information** means information about mooring authorisations and the use of moorings, including details of:

- holders of mooring authorisations;
- vessels and moorings to which mooring authorisations relate;
- registered owners of vessels to which mooring authorisations relate, including past owners;
- registration of mooring authorisations, including their transfer; and
- information about the use of moorings, including unauthorised use.

**5. offence information** means

- any offence under this Act or a marine Act which a person has been charged with or convicted;
- any penalty, suspension, cancellation or disqualification arising from any such conviction; and
- the quashing or setting aside of any such conviction;

**6. vessel information** means

- information about registration of vessels, including their transfer;
- details of the registered owners of vessels, including past owners;
- hull identification numbers of vessels;
- details of makes and models of vessels;
- details of certificates of survey and operation; and
- information of a class prescribed for the purposes of this definition.

Several other terms used in this Division are also defined:

**Commonwealth or interstate authority** means a person or body with functions of a public nature under a law of another Australian jurisdiction.

**Details**, of a person, includes (as relevant) the person's:

- name;
- Australian Company Number;
- residential address;
- business address;

- email address;
- telephone number;
- date of birth.

**Marine Acts** mean the *Harbours and Jetties Act 1928*, *Jetties Act 1926*, *Lights (Navigation Protection) Act 1938*, *Marine and Harbours Act 1981*, *Marine Navigational Aids Act 1973*, *Shipping and Pilotage Act 1967*, *Transport Coordination Act 1966*, *Sea-Carriage of Goods Act 1909* and the *Pollution of Waters by Oil and Noxious Substances Act 1987*.

**Marine qualification** means a qualification issued under this Act in relation to navigating or operating a vessel, which includes Recreational Skipper's Tickets provided for in the *Navigable Waters Regulations 1958*. The definition also includes corresponding qualifications issued under the law of another Australian or overseas jurisdiction.

**Mooring authorisation** means an authorisation to use a mooring under this Act. It includes a mooring licence and authorisation to use a shared use mooring site or a courtesy or emergency mooring, for example.

**Overseas authority** means a person or body with functions of a public nature under a law of an overseas jurisdiction.

**Registered owner** of a vessel registered under regulations made under section 99(1)(b) means the person specified as the owner in the register.

## Section 108 **Protection of information**

Under the Act, the chief executive officer is responsible for the registration of vessels, administration of a marine qualification regime, issuing and recognising marine qualifications, enforcing waterways safety rules and setting and enforcing safety requirements for vessels.

While performing their functions under the Act, the chief executive officer obtains and holds information, for example, in a vessel registration register, marine qualifications register and infringement management system, to enable the ongoing performance of their functions.

This section will apply to any person who is or has been engaged in the performance of functions under this Act, whether as an employee, agent or contractor of the chief executive officer, or in any other capacity in which that person was engaged in the performance of functions under the Act. These people have, or may have, access to information obtained and held by the chief executive officer, which is necessary to enable those persons to perform their functions.



Subsection (1) provides an offence for such a person to directly or indirectly record, disclose or use that information unless such an action is done for the reasons listed in subsection (2):

- for the purpose of performing a function that the person has under this Act or a marine Act; or
- as required or allowed under this Act or another written law; or
- under the order of a court or person or body acting judicially; or
- for the purposes of the investigation of a suspected offence or disciplinary matter or the conduct of proceedings against a person for an offence or disciplinary matter; or
- if the information is personal information — with the consent of the person to whom it relates; or
- in circumstances prescribed for the purposes of this subsection.

In recognition of the seriousness of the offence, the penalty will be a maximum fine of \$12,000 or a term of imprisonment of up to 12 months. This aligns with a similar offence in section 143A of the *Road Traffic (Administration) Act 2008*.

Subsection (3) provides that the offence does not apply to de-identified information. This will allow the chief executive officer to record, disclose or use statistical or other information if it could not reasonably be expected to lead to identification of a person.

Subsection (4) enables de-identified information to be shared when requested and will also support marine safety research. Examples of de-identified information are the number of:

- boating fatalities per year;
- vessels registered in the State; or
- people holding a particular marine qualification.

Subsection (5) allows the charging of a fee if it does not exceed the cost to the Department of preparing or collating the information.

### **Section 109 Exchange of information between chief executive officer and Commissioner of Police**

Subsection (1) will require the chief executive officer and the Commissioner of Police to disclose particular information to one another. The exchange of this information is necessary to enable them to perform their functions under marine Acts and, in the case of the Commissioner of Police, to also perform their functions under any other Act.

The chief executive officer must disclose marine qualification information, mooring information, incident information, offence information, infringement notice information and vessel information. These terms are defined in section 107 of this Act.

Subsection (1)(g) provides that the chief executive officer must also disclose information prescribed in regulations for the purpose of this subsection.

Subsection (2) restricts the use of information disclosed by the chief executive officer to the Commissioner of Police to performance of the Commissioner's functions under a written law or otherwise, and not for any other purpose. The Commissioner of Police may then disclose information provided under subsection (1) to an officer, department or instrumentality of this State, another Australian jurisdiction or another overseas jurisdiction for use in the performance of their law enforcement functions of that officer, but not for any other purpose.

This will enable the Commissioner of Police to use the information disclosed to enforce the laws for which they are responsible, for example vessels used in trafficking of drugs or which are purchased with proceeds of crime.

Water Police Officers are authorised under section 117 to enforce certain provisions of this Act. In some cases, an investigation that is being coordinated by land police may involve a vessel or a matter which has occurred on a vessel. In these instances, a strengthened information sharing power is required to enable the chief executive officer to provide the Commissioner of Police with information to undertake investigation.

Subsection (3) requires that the Commissioner of Police must disclose incident information, general offence information, infringement notice information and information prescribed for the purposes of this subsection to the chief executive officer.

Subsection (4) provides that in subsection (3)(b), **general offence information** is defined as the offence information defined in section 107, as if that definition were not limited to offences under this Act or a marine Act.

Subsection (5) restricts the use of information disclosed to the chief executive officer to performance of the CEO's functions under this Act or a marine Act and not for any other purpose.

Department of Transport compliance officers and Water Police Officers are responsible for investigating marine incidents in State waters and for enforcing waterways rules and regulations. In incidents which result in a fatality or serious injury, Water Police lead an investigation, however Department of Transport compliance officers may be the first to arrive on-scene. In some cases these incidents result from a person's dangerous behaviour and

Department of Transport compliance officers have no power to use force or to make arrest. Without the ability to request information about a person's prior convictions, officers currently interact with an alleged offender without any prior warning of their character or previous criminal history. This section will allow compliance officers to request this information from the Commissioner of Police and then take charge of the incident (until Water Police arrive) with an understanding of the risk posed to them and to members of the public.

### Section 110 **Exchange of information between chief executive officer and other authorities**

Section 110 will enable the chief executive officer to share information with other authorities that issue marine qualifications or have functions under law which correspond or substantially correspond to the functions of the chief executive officer under this Act or are prescribed for the purposes of this section. The chief executive officer may disclose this information but will be able to use their discretion whether to do so.

Subsection (1) defines **relevant authorities** as including:

- a Commonwealth, interstate or overseas authority with the function of granting marine qualifications.
- a Commonwealth or interstate authority with functions that substantially correspond to functions of the chief executive officer under this Act.
- a person prescribed or of a class prescribed for the purposes of this definition.

Subsection (2) provides that the chief executive officer may disclose marine qualification information, mooring information, infringement notice information, offence information and information prescribed for the purposes of this subsection. This will enable other regulatory bodies to access certain information held by the chief executive officer to enable them to perform their functions.

Subsection (3) provides that if any of the information disclosed includes information about an offence for which a person has been convicted or has been given an infringement notice, the chief executive officer will be required to disclose to the authority any information about:

- quashing of the conviction;
- withdrawal of the infringement notice;
- the matter for which an infringement notice was issued coming before a court for determination;

- registration of the infringement notice under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* Part 3;
- withdrawal of proceedings under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* Part 3; and
- anything else concerning the offence which is likely to be favourable to that person.

This information is to be provided at the time or subsequently when the information becomes known to the chief executive officer. This ensures that information disclosed about a person will not be used to their disadvantage if the matter has since been resolved.

Subsections (4) and (5) provide that the chief executive officer may also seek and use the same types of information from those authorities for the purposes of performing their functions under this Act or a marine Act. If someone moved to Western Australia from interstate or overseas and wanted to use a commercial or recreational marine qualification to obtain a Recreational Skipper's Ticket (RST), they must either pass an RST assessment or provide proof of an accepted equivalent or higher qualification. The chief executive officer may be required to verify the validity of the qualification and whether it is subject to operating restrictions in deciding whether to grant a Western Australia marine qualification. Subsection (2) also enable an interstate authority to seek information to make a similar consideration.

### Section 111 **Disclosure of information to prescribed persons for authorised purposes**

Section 111 will enable the chief executive officer to disclose marine qualification information, mooring qualification information, vessel information and information prescribed for the purpose of this subsection, to prescribed persons for an authorised purpose.

Subsection (1) defines **authorised purpose** as including:

- performing a function under written law or a law of another jurisdiction;
- one related to the administration or enforcement of a written law or a law of another jurisdiction; or
- one prescribed for the purpose of this subsection.

**Prescribed person** will include a person prescribed, or of a class prescribed, for the purposes of this definition.

There are circumstances where a person may require access to information held by the chief executive officer in order to perform their functions under a written law or for a purpose related to the administration or enforcement of a

written law. The chief executive officer may disclose this information and will be able to use their discretion whether to do so.

For example, although local governments are responsible for management of shorelines and beaches across the State, sometimes derelict vessels are left on the shore and the vessel's registration information is needed in order to contact the owner and arrange recovery of any removal costs. Without access to this information, a local government may not have any other way of contacting the vessel's owner.

Subsection (3) creates an offence for a person to whom information is disclosed, or who is employed or engaged by a person to whom information is disclosed, to use the information for a purpose other than the authorised purpose for which it was disclosed. The penalty is imprisonment for 12 months or a fine of \$12,000. This penalty aligns with the one in section 108 and reflects the seriousness of the offence.

## Section 112 **Disclosure of incident information**

Subsection (1) defines:

***de-identified incident information*** as statistical or other information derived from incident information which could not reasonably be expected to lead to identification of a person to whom it relates. It could include the number of boating fatalities per year or the number of incidents which occurred where passengers were not wearing lifejackets;

***incident information*** as including details of any evidence, statement, report or other information obtained as a result of any investigation of a marine incident and a copy of a statement or a report resulting from any investigation;

***marine incident*** as defined in section 64; and

***marine safety education purpose*** as research directed to the promotion of marine safety or distributing information about marine safety.

Subsection (2) provides that the chief executive officer and the Commissioner of Police may disclose incident information in relation to a marine incident to a person who was involved in the incident. The chief executive officer will be able to use their discretion whether to disclose the information.

Subsection (3) provides that a person was involved in the incident if they were:

- onboard a vessel involved in the incident
- the owner of a vessel involved in the incident
- injured or suffered loss as a result of the incident
- otherwise involved (other than indirectly) in the incident.

Subsection (4) provides that the chief executive officer may also provide de-identified incident information to a person for a marine safety education purpose.

Subsection (5) allows the charging of a fee if it does not exceed the cost to the Department of preparing or collating the information.

### Section 113 **Disclosure by means of automated system**

Subsection (1) provides that information that the chief executive officer or the Commissioner of Police is authorised or required to make by this Division may be made by means of an automated system, subject to regulations.

Subsection (2) requires that an automated system must comply with any requirements set out in the regulations.

Subsection (3) provides that relevant people may be allowed to, subject to regulations, retrieve data from an automated system and be provided with an alert when information has been modified or added to the system.

This amendment will enable the chief executive officer and the Commissioner of Police to share information stored in various registers and databases electronically where appropriate and authorised by the regulations.

## 73 **Part VIII Division 2 heading inserted**

Clause 73 inserts a new heading in Part 8 '**Division 2 – Regulations**'.

## 74 **Section 114 amended**

Section 114 'Powers in relation to regulations' is amended. It is the primary regulation making power in the Act and provides that the Governor may make regulations regarding matters necessary or convenient to give effect to the Act's purpose, including those which apply to all types of vessel and craft, to people, and to water related activities even if they don't involve vessels or craft.

Subclause (1)(a) amends subsection (1)(a) to introduce limits on the number and types of people who have functions under the Act.

Subclause (1)(b) amends subsection (1)(c) to allow the chief executive officer, rather than the Minister, to prescribe the form or content of licences, certificates, orders and so on, as it seems an unnecessarily administrative burden for the Minister.

Subclause (2) inserts new subsections (1A) to (1F). Subsection (1A) lists specific head powers in subparagraphs (a) to (j).

Subparagraph (1A)(a) will provide the power to make regulations regarding the emission of **noise, fumes and smoke** arising from operating vessels. This power is currently only applicable to pleasure vessels but has been moved from section 99(1)(f) so that it applies to all vessels. Western Australia is permitted to broaden its application thanks to section 6(2)(b)(ii) of the ***Marine Safety (Domestic Commercial Vessel) National Law Act 2012***.

Subparagraph (1A)(b) moves the power currently in section 99(1)(ha) to section 114 so that its application is not limited to pleasure vessels. It will enable regulations to be made to regulate or prohibit **water related activities**, including those involving craft which are not vessels as well as those associated with commercial, prescribed or pleasure vessels (which will include things to be specified by the regulations to be vessels, such as surfskis, sailboards and kitesurfs). It will also enable regulation of activities which don't necessarily involve craft, such as swimming or diving if they impact on waterways safety, including by limiting or not allowing certain activities that are assessed as being unsafe. An example of an unsafe activity involves a type of aquatic toy sometimes referred to as a manta tube kite. These are highly dangerous and have caused fatalities overseas. The State is currently able to limit their use because they are towed behind a vessel, but it's likely that a new dangerous thing or water activity will emerge which is not associated with vessel use. Subparagraph (1A)(b) clarifies that regulations may be made to cover any activity which may impact the safety of people using Western Australia waterways. It could be used to make regulations for **safety equipment requirements**, limit operating areas and so on for novel craft which emerge in the future, or for things which are outside the definition of 'vessel' and are not yet specified to be a vessel by the regulations.

Subparagraph (1A)(c) will provide the power to make regulations to regulate or prohibit the **use of all waters or specified State waters** by all or by specified vessels or for specified purposes. This will ensure that regulations can be made to respond to the differing nature of waterways and the way different groups of people use them as it provides a degree of flexibility to ensure safety outcomes continue to be met. For example, it would enable regulation of the use of all waters by certain classes of vessels such as mini submarines or other high risk craft; or prohibition of the use of specified waters by certain classes of vessels, such as prohibiting motorised vessels from an area of the river frequented by non-motorised paddle craft or swimmers. Regulations could also prohibit vessels from anchoring in channels or other areas where they may obstruct other vessels, for instance. Regulations prohibiting a class of vessel from using all waters are unlikely to be made, unless in exceptional circumstances where they pose a high safety risk. This power is currently in section 99(1)(i) and is only applicable to pleasure vessels but has been moved

so that it applies to all vessels. Western Australia is permitted to broaden its application thanks to section 6(2)(b)(vi) of the Commonwealth Act.

Subparagraph (1A)(d) will enable the making of regulations in respect of **vessel navigation, mooring and berthing**, including by prohibiting or regulating the navigation of **vessels which cannot be safely navigated**, as determined by an inspector. A vessel which cannot be safely navigated may not be an 'unsafe vessel' (as defined in section 58) in itself – rather, it could be due to environmental factors such as the weather, or the vessel's size and location. A small vessel in perfect condition setting out into a cyclone would be an example of unsafe navigation. This power has been derived from section 99(1)(j) and added to section 114 so that it applies to all vessels. The difference between this power and the one in proposed section 99(1)(c) is that in the latter, the CEO may determine that a class of pleasure or prescribed vessel cannot be navigated safely and prohibit their navigation in Western Australia waters. In this power, an inspector may determine that an individual vessel cannot be navigated safely and prohibit its navigation, or place conditions or restrictions on its navigation. The CEO may order this prohibition or regulation by publication if it's not dealt with adequately in the regulations and the matter is urgent and temporary, via new subsections (1B) and (1C) respectively. Western Australia is permitted to broaden the application of these matters thanks to section 6(2)(a) and (2)(b)(i) and (viii) of the Commonwealth Act; and by regulation 5 Item 13 of the ***Marine Safety (Domestic Commercial Vessel) National Law Regulation 2013***, made under section 6(2)(b)(xxiii) of the National Law.

Subparagraph (1A)(e) will allow regulations to be made regarding **towing** vessels and other objects, and for issuing towage permits. This power exists in section 25(d) of the Act in relation to commercial vessels but will be removed by clause 42 of the Bill. Towing vessels can be dangerous, and as the National Law does not regulate it, it's important that Western Australia can continue to do so (permitted by section 6(2)(b)(viii) of the Commonwealth Act).

Subparagraph (1A)(f) will enable the making of regulations concerning the **conduct of passengers**. The Act's current passenger management provisions in sections 72 to 75 will be repealed by clause 53 as they are out of date and duplicate powers in the *Criminal Code Act Compilation Act 1913*. However, as additional powers may be required in WA's marine environment in the future to maintain safety outcomes, the provisions are being moved to section 114 so they will apply to passengers on all vessels. Western Australia is permitted to broaden the application of this matter thanks to section 6(2)(b)(xii) of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*.



Subparagraph (1A)(g) will provide the power to make regulations to **designate waters**, including by referring to the vessels which are, or are not, permitted to operate in those waters. This power has been derived from section 7 which is being deleted. It is being moved to section 114 so that it applies to all vessels. Section 6(2)(b)(v) of the Commonwealth Act permits the continued operation of State laws dealing with designation of waters.

Subparagraph (1A)(h) will enable regulations to be made providing for **traffic management plans** that regulate the movement of vessels, people or other things in specified State waters, and for the enforcement of those plans. It is anticipated that regulations will specify that certain traffic management plans made by the chief executive officer will be published in the *Gazette*. The plans may address situations such as congested waterways where it may be unsafe for some vessel types to operate at the same time. Prior to an event expected to involve high vessel traffic such as the former Skyworks, or during temporary works which may impact navigation such as bridge construction, published notices could require vessels to take certain routes. Western Australia is permitted to regulate this matter under section 6(2)(b)(viii) of the Commonwealth Act.

Subparagraph (1A)(i) would enable regulations to be made to deal with things, including vessels, that are, or are likely to become, **hazards or obstructions** in the opinion of the CEO. This power has been derived from section 71 which will be deleted by clause 54 as it's currently limited to dealing only with removal and sale of vessels, only if they are in navigable waters, and only to recover the costs of their removal, rather than of storage, disposal, legal fees and so on. This has led to many owners abandoning badly maintained vessels of low saleable value which then become hazards or obstructions. If the owner cannot be located or lacks financial capacity, the State currently bears the cost of removal and storage and faces a lengthy legal process under ***the Disposal of Uncollected Goods Act 1970*** to dispose of the vessel via sale or landfill, due to the insufficiency of section 71. This power would ensure that the State has effective powers to remove such vessels and other things from waters and from the shore; to store, destroy, sell or otherwise dispose of them as appropriate; to apply the proceeds of any sale; and to recover all relevant costs.

Subparagraph (1A)(i)(v) would allow that costs include, but are not limited to:

- those incurred in servicing or altering the thing in order to minimise safety risks or to reduce the removal costs, such as pumping water out of the hull prior to removal;
- valuation costs to determine how much a thing can be sold for or if it's more cost effective to destroy it; and

- legal fees associated with entering into agreements or contracts with third parties involved in the removal, sale or disposal.

Regulations made under subparagraph (1A)(i)(ii) could permit a removed obstruction to be dealt via a combination of actions such as sale, storage, destruction and disposal, as it may be necessary to dispose of certain damaged parts of a vessel, while selling other more intact or valuable parts such as the motor, for example. If the thing is a vessel, restrictions on these powers are proposed in subsection (1D). Western Australia is permitted to continue to regulate this matter under section 6(2)(b)(ix) of the ***Marine Safety (Domestic Commercial Vessel) National Law Act 2012***.

Paragraph (1A)(j) will enable regulations to be made to require a hirer of a **'hire and drive vessel'** that is a domestic commercial vessel to have certain **qualifications**, as permitted by regulation 5 Item 19 of the ***Marine Safety (Domestic Commercial Vessel) National Law Regulation 2013***, made under section 6(2)(b)(xxiii) of the ***Marine Safety (Domestic Commercial Vessel) National Law Act 2012***.

New subsection (1B) will allow for regulations to authorise the CEO to deal with matters regarding the regulation or prohibition of the use of waters (subparagraph (1A)(c)) and navigation, mooring and berthing (subparagraph (1A)(d)) via order published in the *Gazette* or on the WA legislation website.

New subsection (1C) will limit the exercise of the authorisation under subsection (1B) to situations where the CEO is satisfied that the regulations do not deal with, or adequately deal with, the matter, where the matter is urgent, and where the order is temporary.

New subsection (1D) will limit regulations made under paragraph (1A)(i) by stipulating how they must be used in relation to **removal of vessels**, because vessels can be of significantly greater value than other things which become hazards. Subsection (1D) will ensure that:

(a) If a thing to be removed is a vessel, it cannot be removed without at least 7 days' notice being given to the owner, unless the CEO considers that it's an immediate risk to safety or to the environment. This is to ensure that the owner has time to remove the vessel themselves, as in current section 71(1).

(b) If a vessel that is an immediate risk is removed without notice, the CEO must give notice of the removal to the owner. Department of Transport compliance officers need to be able to move, destroy or dispose of a vessel, if it poses an immediate risk to safety or to the environment. Such a risk may not be able to be mitigated without destroying or disposing of the vessel, such as occurred in 2013 when the Department of Transport had to cut up a large

wrecked vessel which posed a navigational and environmental risk as it was not possible to tow in its damaged state.

Examples of when it may be necessary to remove a vessel which is a hazard or obstruction without notice are if it:

- poses an imminent risk to the environment because it's likely to sink and is carrying oil;
- contains dangerous chemicals and is in a busy area;
- is abandoned in a busy channel or in waters being used for an approved event; or
- is on a boat ramp and is preventing other vessels from leaving the water.

(c) The regulations may provide specific details about how notice is to be given if the owner is unknown or cannot be located.

New subsection (1E) ensures that the term '**hire and drive vessel**' has the same meaning as given in the National Law – “any vessel which is let for hire or reward or for any other consideration, including vessels provided in conjunction with holiday establishments or hotels for the use of guests or tenants”; and that ‘hirer’ means “a person who hires the vessel; or a person, other than the owner of the vessel or a person acting on the owner’s behalf, who operates the vessel while it is under hire.”

New subsection (1F) provides that a reference in subsection (1D) to an owner of a vessel means the person specified to be the owner in the most recent application for vessel registration or for the transfer of vessel registration. This means that the last person specified on the register of vessel registration is the owner, even if the vessel is no longer registered or if it has been sold to another person but has not been transferred in accordance with the regulations.

Subclause (3)(a) replaces current subsection (2)(a) with subsections (2)(a) and (2)(aa). New subsection (2)(a) provides that the maximum fine for breaches of regulations is \$15,000 for an individual (up from \$1000), and \$75,000 for a body corporate. It also provides that if an offence under the regulations is a continuing offence, then the maximum fine is \$200 for each day or part day the offence continues after notice of the offence (up from \$50). New subsection (2)(aa) is similar to current (2)(a)(ii) but adds the word “direction” from section 77(1) which is to be deleted. It also increases the maximum fine for breaching a condition under the Act or regulations from \$1000 to \$3,000 for an individual, or \$15,000 for a body corporate. It also provides that if the offence is a continuing offence, then the maximum fine is \$100 for each day or part day the offence continues after notice of the offence

(up from \$50). Like all penalties in the Act, the penalties in section 114(2) have not been increased in over 40 years and are now very much out of alignment with other Western Australian legislation.

Subclause (3)(b) amends subsection (2)(b) to provide that the amount of modified penalties is now dealt with under new subsection (3). Subclause (3)(c) amends subsection (2)(f) to provide that persons or things can be exempted from the same instruments referred to in new subsection (2)(aa).

Subclause (4) deletes existing subsection (3) and inserts new subsection (3) which provides that, instead of specifying a maximum amount, the amount of a modified penalty for an offence under the Act must not be more than 20% of the specified fine for the offence.

75

### **Section 115 amended**

Section 115 'Regulations may adopt codes etc' has been amended to remove or update references to obsolete committees, standards and codes.

Subclause (1)(a) amends subsection (1)(a) so that it now provides that regulations made under this Act may adopt any subsidiary legislation or other instrument made under any Act of the State, other Australian jurisdiction or the UK.

Subclause (1)(b) also amends subsection (1)(a) to add that the standards, rules, codes or specifications of the International Organization for Standardization and Australian Maritime Safety Authority (AMSA) can also be adopted wholly, in part, or with modifications. AMSA is the National Regulator for domestic commercial vessels and the International Organization for Standardization sets standards for various forms of marine equipment such as lifejackets. This subclause also removes the reference to the Association of Australian Port and Marine Authorities, now called Ports Australia, as it is no longer involved in the development of commercial vessel standards.

Subclause (1)(c) also amends subsection (1)(a) to remove the term 'rules' as regulations would specify any like bodies, not rules.

Subclause (1)(d) amends subsection (1)(b) to add a reference to the National Standard for Commercial Vessels. This is necessary as parts of the National Standard for Commercial Vessels has progressively replaced parts of the Uniform Shipping Laws Code (USL) as they are created, but this process is not yet complete. This subclause also removes the reference to the USL being adopted by the Marine and Ports Council of Australia as that organisation no longer exists.

Subclause (1)(e) amends subsection (1)(c) to reflect gender neutral language by changing 'he' to 'the chief executive officer'.

Subclause (2) deletes subsection (2) which provides that the production of a printed document purporting to be a copy of or extract from the *Commonwealth of Australia Gazette* containing the Uniform Shipping Laws Code shall be evidence that the document is a copy of the Uniform Shipping Laws Code as adopted by the Marine and Ports Council of Australia. Previously, *Commonwealth Gazette* notices published parts of the Uniform Shipping Laws Code declaring that those provisions were in force, pursuant to section 427 of the ***Navigation Act 1912***. No equivalent requirement has been included in the ***Navigation Act 2012*** or the ***Marine Safety (Domestic Commercial Vessel National Law) Act 2012***.

76 **Part VIII Division 3 heading inserted**

A new heading '**Division 3 — Exemptions and equivalents**' is inserted.

77 **Section 115A amended**

Subclause (1) replaces subsection (1) with new subsections (1), (1A), (1B) and (1C). It expands section 115A to include persons, clarify its intent, and adds a penalty for failure to comply with a condition of an exemption or allowance.

New subsection (1) provides that the chief executive officer may exempt persons or vessels, or classes of person or vessel, from the application of specified provisions of the Act or regulations if satisfied that compliance would be unreasonable or impractical.

New subsection (1A) provides that if the chief executive officer is satisfied that appropriate measures will be taken to ensure the safety of competitors, spectators and members of the public, they can exempt persons or vessels engaged in an aquatic event or activity. This new subsection is the equivalent of current section 99(3) - it has been moved as exemptions relating to aquatic events are no longer limited to pleasure vessels. Moving this power will streamline the Act's exemptions powers in one provision and will simplify the exemptions process.

New subsection (1B) provides that the chief executive officer must ensure that written notice of an exemption is given to the person, or to the master or owner of the vessel, to which the exemption applies, or is made publicly available. Notice requirements will depend on the circumstances of the exemption. If the exemption is made under subsection (1A), notice will be given to the event organiser. This is because at the time an exemption is applied for by the event organiser, they may not yet know who the individual participants will be. It will not usually be necessary to issue each participant in an event with a notice of the exemption, and the conditions are often publicised in the application to participate in the event.

New subsection (1C) provides that a failure to comply with (1B) does not invalidate an exemption to ensure that an administrative error will not result in a potentially large group of people breaching the Act without their knowledge or intent.

Subclause (2) adds subsection (1A) in addition to current subsection (1), in relation to the CEO's powers.

Subclause (3) amends subsection (3) so the chief executive officer can allow a different fitting, material etc, than is required under the Act to be carried or fitted by a class of vessels, rather than just by individual vessels.

Subclause (4) inserts new subsection (3A) which provides that subsections (1B) and (1C) apply to an allowance under subsection (3) in the same way they apply to exemptions, with the necessary modifications.

Subclause (5) amends subsection (4) reflect gender neutral language by changing 'he' to 'the chief executive officer'.

Subclause (6) inserts new subsection (5) to provide an offence for failing to comply with a condition of an exemption or allowance. The maximum court-imposed penalty for an individual is \$5,000.

## 78 **Part VIII Division 4 heading inserted**

A new heading '**Division 4 - Inspectors and authorised persons**' is inserted.

## 79 **Sections 116 to 118 replaced**

Clause 79 deletes sections 116 to 118 and inserts new sections 117, 118, 118A and 118B.

Current section 116 dealing with delegations is repealed as delegations will be dealt with under new sections 124 and 124A.

New section 117 provides for the chief executive officer to appoint inspectors and to designate authorised persons. Both of these actions are required to be in writing to ensure transparency and to reflect current record keeping expectations.

The reference to the appointment of surveyors is removed, as surveyors currently only deal with commercial vessels which are now dealt with almost solely by the National Law. Surveyor functions may be provided for in regulations if required, for example in relation to prescribed vessels, under proposed section 99(1)(f).

Section 117 will also enable inspectors to be appointed with some or all of the powers under the Act, similar to section 91(2) of the National Law.

New section 118 will require the chief executive officer to issue identity cards to inspectors and authorised persons rather than certificates of appointment as required under current section 118.

Subsection 118(1) requires the chief executive officer to issue an identity card to an inspector or authorised person.

Subsection 118(2) requires an identity card to be in an approved form rather than a prescribed form to reduce the administrative burden of updating the form to meet legal or community requirements. An identity card is required to include a photograph of the person and state the provisions of the Act under which they may exercise powers.

Subsection 118(3) provides a requirement to, and a penalty of \$1000 for failure of, a person who ceases to be an inspector or authorised person to return their identity card as soon as is practicable. This is similar to the requirement for marine safety inspectors under the National Law.

Subsection 118(4) provides that this requirement and penalty does not apply if the card is lost or destroyed.

Subsection 118(5) provides that an identity card is sufficient evidence of the authority of an inspector or authorised person.

New section 118A requires an inspector, authorised person or police officer to provide proof of their authority if requested to do so.

Subsection 118A(1) requires an inspector or authorised person (other than a police officer) to produce their identity card if requested to do so by a person that the inspector or authorised person has exercised, or is about to exercise, a power in regards to.

Subsection 118A(2) requires a police officer who is not in uniform to produce evidence that they are a police officer if requested to do so by a person that the police officer has exercised, or is about to exercise, a power in regards to.

New section 118B provides for an inspector to be assisted by other persons when exercising their powers.

Subsection 118B(1) allows an inspector or authorised person to authorise other persons as necessary to assist. This will enable people with the relevant expertise to assist inspectors in performing their compliance and enforcement powers, such as a marine surveyor who can identify structural defects with a vessel that would make it unsafe, or a person experienced in

operating electronic equipment on a vessel which may contain data relevant to an investigation.

Subsection 118B(2) provides that anything done lawfully by an assisting person is taken to have been done by the inspector or authorised person.

Subsection 118B(3) requires the assisting person to comply with any reasonable direction of the inspector or authorised person, with a penalty of \$2000 for failure to do so.

An equivalent power to section 118B exists in section 114 of the National Law. During the development of the National Law, the National Regulator advised that a person assisting a marine safety inspector could do so without the inspector necessarily needing to accompany them. For example, if there was an incident in a regional or remote area and no marine safety inspectors were available, the National Regulator advised that an inspector could ask the relevant local Department officer (or some other appropriate person) to exercise specific powers or functions as they direct. This ability is also necessary in this Act, given the extent of Western Australia's coastline and potential limitations on resources.

80 **Part VIII Division 5 heading inserted**

A new heading '**Division 5 — Certain offences**' is inserted.

81 **Section 119 amended**

Section 119 provides an offence for obstructing a person performing or endeavouring to perform a power or duty conferred on the person by or under this Act.

Subclause (a) inserts "(the official)" after "a person" so that "the official" may be used throughout section 119 to reflect current drafting practice and allow for non-gendered language.

Subclause (b) replaces the term "him" with "the official" to reflect non-gendered language.

Subclause (c) increases the maximum court-imposed penalty for obstruction from \$2000 to \$5000 to reflect the seriousness of this offence.

Subclause (d) replaces the term "that person" with "the official" to reflect current drafting practice.

Subclauses (e) and (f) replace the term "his" with "the official" and "their" respectively to reflect non-gendered language.



82

### **Section 120 amended**

Section 120 provides an existing offence for false declarations, statements or representations and for giving false information under oath.

Clause 82 increases the maximum court-imposed penalty of \$2000 to \$5000 for an individual and introduces a fine of \$10,000 for a body corporate.

83

### **Section 120A replaced**

Clause 83 will delete existing section 120A which requires a person to give an inspector their name and address and insert new section 120A which will additionally require a person to give their date of birth and evidence of their identity. It also increases the maximum court-imposed penalty.

Subsection (1) will empower an inspector to request a person's details where they reasonably believe the person has committed an offence against the Act. This is necessary to provide for sufficient identification of suspected offenders and to align inspectors' powers under this Act with marine safety inspector's powers under section 99 of the National Law. This power may be exercised whether the person who is reasonably believed to have committed an offence is on board a vessel or not.

The maximum penalty imposed for a failure to comply with this provision is increased from \$200 to \$5000, to reflect the importance of being able to accurately identify suspected offenders for enforcement of the Act. The amount aligns with the new offences in section 10.

84

### **Section 121 amended**

Section 121 provides for offences in connection with certificates and licences, providing that a person shall not knowingly make a false representation, forge, or fraudulently alter or use any of the documents specified.

Clause 84 makes minor amendments to reflect current drafting practices and to increase the maximum court-imposed penalty for these offences.

Subclause (1)(a) replaces the term "himself" in subsection (1)(a) with "themselves" to reflect non-gendered language.

Subclause (1)(b) replaces the term "he" with "the person" in subsection (1)(c) to reflect non-gendered language.

Subclause (2) increases the maximum court-imposed penalty fine of \$2000 to \$3000 for an individual and introduces a fine of \$10,000 for a body corporate.

85

## **Sections 122 to 124 deleted**

Clause 86 deletes sections 122 to 124.

86

## **Part VIII Divisions 6 to 8 inserted**

Clause 86 inserts new Divisions 6 to 8 and inserts new sections 122 – 124F. The new Division headings **Liability, Administration** and **Miscellaneous** allow the grouping of relevant provisions to improve clarity.

### **Section 122 Liability of chief executive officer and owner for costs and compensation in relation to detained vessels**

Current section 122 relates to liability of the chief executive officer for costs and compensation in relation to provisional and final detention under current Part III. It has been redrafted to align with the new vessel detention provisions in new Part 3.

Subsection (1) provides that if a vessel is detained under section 61 and subsection (3) does not apply, the owner of the vessel is liable to pay the reasonable costs of detention and inspection of the vessel. These costs are recoverable by the chief executive officer in a court of competent jurisdiction.

Subsection (2) provides that these costs include the costs of any proceeding before the State Administrative Tribunal under section 63C and the remuneration of any person designated under section 63(2) to inspect the vessel and provide a report.

Subsection (3) provides that if there was no reasonable cause for detaining a vessel under section 61 as an unsafe vessel, the chief executive officer is liable to pay the owner of the vessel the owner's costs of, and incidental to, the detention and inspection of the vessel, and also compensation for any loss or damage sustained by the owner from the detention or inspection.

### **Section 123 No liability for certain acts and omissions**

Section 123 replaces current section 124 which provides immunity for the Minister, chief executive officer and other officials of the Department.

Subsection (1) provides that an action under a common law tort does not lie against a person for anything that the person has done in good faith in the performance, or purported performance, of a function under this Act.

Subsection (2) provides that this protection applies even though the thing done may have been capable of being done whether or not this Act had been enacted.

Subsection (3) provides that despite subsection (1), the Crown is not relieved of any liability that it might have for another person having done anything as described in that subsection.

Clause 86 inserts the heading **Division 7 — Administration** before section 124.

Two new delegation provisions are inserted to replace section 116 - section 124 regarding the Minister, and section 124A regarding the chief executive officer.

#### **Section 124 Delegation by Minister**

Subsection (1) allows the Minister to delegate any of their powers or duties under this Act, other than the power of delegation.

Subsection (2) requires the delegation to be in writing and signed by the Minister.

Subsection (3) allows a power or duty that is delegated to the chief executive officer to be expressly sub-delegable.

Subsection (4) provides that a delegate exercising their power or duty is taken to do so in accordance with the terms of the delegation unless the contrary is shown.

Subsection (5) states that nothing in this section limits the ability of the Minister to perform a function through an officer or agent.

#### **Section 124A Delegation by chief executive officer**

Subsection (1) allows the chief executive officer to delegate any of their powers or duties under this Act, other than this power of delegation.

Subsection (2) requires the delegation to be in writing and signed.

Subsection (3) provides that a delegate exercising their power or duty is taken to do so in accordance with the terms of the delegation unless the contrary is shown.

Subsection (4) states that nothing in this section limits the ability of the chief executive officer to perform a function through an officer or agent.

#### **Section 124B Agreement for performance of chief executive officer's functions**

Subsection (1) allows the chief executive officer to enter into an agreement providing for their functions under this Act that are described in the agreement to be performed on behalf of the chief executive officer. This

would allow, for example, the chief executive officer to enter into an agreement with a company for the manufacture of cards indicating that the owner is in possession of a Recreational Skipper's Ticket authorising them to drive a pleasure vessel.

Subsection (2) provides that the agreement may be with the Commissioner of Police, a local government, or any other person or body, whether or not the person or body has itself functions of a public nature.

Subsection (3) provides that a function described in the agreement may be performed in accordance with the agreement and on, and subject to, the terms and conditions in the agreement.

Subsection (4) specifies that if the performance of a function is dependent upon the opinion, belief, or state of mind of the chief executive officer it may be performed under the agreement upon the opinion, belief, or state of mind of the person with whom the agreement is made or another person provided for in the agreement.

Subsection (5) provides that the chief executive officer may disclose marine qualification information, mooring information, and vessel information to the person with whom the agreement is made if the chief executive officer considers that the disclosure is required for the purposes of the performance of a function under the agreement. These terms are defined in section 107 of the amended WA Marine Act. This would allow confidential information such as a person's name and address to be shared with a company contracted to create Recreational Skipper's Ticket cards, for example.

Subsection (6) provides that for the purposes of this Act or any other written law, an act or thing done by, to, by reference to, or in relation to, a person in connection with the performance by that person under the agreement of a function of the chief executive officer is as effectual as if it had been done by, to, by reference to or in relation to, the chief executive officer.

Clause 86 then inserts the heading **Division 8 — Miscellaneous** before section 124C.

#### **Section 124C Giving notices, orders, directions and other documents**

Section 124C has been inserted to allow for regulations to be made to apply to the giving of notices, orders and directions under the Act. This modernises the Act by allowing for documents to be given electronically and allows the Act to keep up to date with technology by allowing regulations to make provision for the service of documents.

Subsection (1) defines **electronic means** to include an electronic database or document system and any other means by which a document can be accessed electronically.

Subsection (2) allows for regulations to be made to make provision for the giving of a direction, order, notice or other document required or permitted under this Act (including giving by electronic means). It also allows for regulations to make provision for the time at which the direction, notice or document is taken to have been given, and the means of satisfying a requirement under this Act in relation to a document in writing (for example, a requirement that the original of a document be given or that a document be signed) if the document is given by electronic means.

Subsection (3) states that this section applies to a requirement or permission to give a document whether the expression “give”, “send” or “serve”, or any other word or expression, is used. The terms ‘giving’ and ‘given’ include giving a verbal direction, posting a notice or other document by mail, and handing it to the person.

#### **Section 124D Fixing notices, orders, directions and other documents on or near vessels**

Section 124D has been inserted to give inspectors necessary options in relation to various circumstances in which they may be required to give a document to the master, owner or person who had possession or control of a vessel, to ensure the document has the best chance of being seen by the relevant person.

Subsection (1) provides that if a person is required or permitted under this Act to give a direction, order, notice, or other document to the master or owner of a vessel or a person who had possession or control of a vessel, but that cannot be conveniently done, the document may be given to the owner of the vessel or fixed in a prominent place on or near the vessel.

Subsection (2) specifies that this applies to a requirement or permission to give a document whether the expression “give”, “send” or “serve”, or any other word or expression, is used.

#### **Section 124E Making certain things publicly available**

This section specifies that a requirement under this Act to make a notice or other thing publicly available may be satisfied by it being published on the Department’s website. This is often the most convenient and accessible way for the public to be notified of relevant information.

## Section 124F **Application of *Criminal and Found Property Disposal Act 2006***

This section specifies that the Department of Transport is a prescribed agency for the purposes of the *Criminal and Found Property Disposal Act 2006*. That Act applies to the disposal of property that has been found or left in the possession of the Department, or that has been seized during a criminal investigation. The procedure under that Act involves the Department making an application to the appropriate court for an order in relation to the property.

### 87 **Part IX heading amended**

The heading 'Part IX –' has been replaced by 'Part 9 –'.

### 88 **Section 125A amended**

In section 125A the term "against" is replaced with "under" to reflect current drafting terminology.

### 89 **Section 127 amended**

Subclauses (a) and (b) amend subsection (1) to remove gendered language by replacing "his" and "he" in paragraphs (b) and (c) with "the person's" and "the person" respectively.

Subclause (c) replaces "in command or charge" with "the master" in subsection (1)(c) to clarify the provision's intent to serve any summons on the master of the vessel, or the person appearing to be the master. This reduces ambiguous terms in the Act and will reduce any confusion about who to serve the summons on. 'Master' is defined in section 3(1) as the person who has command or charge of the vessel, but does not include a pilot.

### 90 **Section 128 deleted**

Current section 128 deals with service of a document where there is no vessel master by affixing a copy to the mast of the ship. Its language is outdated and is that of commercial vessels. It has been replaced by new section 124D which uses more modern and relevant language.

New subsection 124D(1) provides that if a person is required or permitted under this Act to give a direction, order, notice, or other document to the master or owner of a vessel or a person who had possession or control of a vessel, but that cannot be conveniently done, the document may be given to the owner of the vessel or fixed in a prominent place on or near the vessel.

‘Owner’ is defined in section 3 and includes any person exercising or discharging or claiming the right or accepting the obligation to exercise or discharge, any of the powers or duties of an owner, whether on their own behalf or on behalf of another and includes a person who is the owner jointly with any other person or persons and an officer of a body corporate.

### **Section 129 replaced**

Section 129 is deleted and replaced by new section 129 which also deals with averments relating to vessels. It has been extended to provide that during a prosecution, unless there is evidence to prove otherwise, an affirmation of the following is sufficient evidence:

- subsection (a) - a person is or was at the specified time, the owner, master or operator of a specified vessel;
- subsection (b) - a specified vessel is, or was at the specified time, a domestic commercial vessel, a pleasure vessel or a prescribed vessel;
- subsection (c) - a specified vessel is, or was not at a specified time, exempt from a specified provision of this Act;
- subsection (d) - a vessel is, or was at a specified time, registered or licenced or required to be registered or licenced under an Act; and
- subsection (e) - a vessel is or was in, or used in, navigable waters.

Section 157 of the National Law contains a similar provision.

Regarding subsection (b), amendment to this section is necessary so that in a prosecution, a statement in a charge that a particular vessel is a pleasure vessel would be sufficient evidence of that fact. The definition of ‘pleasure vessel’ includes a vessel that is used wholly for the purposes of recreational or sporting activities. While registration records can in fact prove the vessel is registered as a pleasure vessel, they cannot prove that the vessel is used wholly for recreational, or further, prove that a person is the owner. This is problematic in prosecutions because a court may or may not draw an inference that just because a vessel is registered as a pleasure vessel, it is being held wholly for recreational or sporting activities.

The Department has also encountered difficulties in determining whether a vessel is required to be registered, and further, that the requirement for a vessel to be registered is not covered by the requirement to be licensed. The amendments provide that a pleasure vessel registration is a licence unless proven otherwise.

Changes to the definition of ‘pleasure vessel’ further supports the changes at subsections (b) and (d), by making it beyond doubt that a pleasure vessel does not include a domestic commercial vessel. This removes the

ability for a domestic commercial vessel owner to claim dual registration as a pleasure vessel under this Act and also as a domestic commercial vessel under the National Law.

92

### **Section 130 amended**

Section 130 is amended to provide that during a prosecution, unless there is evidence to prove otherwise, an affirmation that a person holds a qualification that meets the requirements for the vessel involved, is sufficient evidence of the fact.

‘Crewing’ replaces the term ‘manning’ which is a commercial vessel term, as this section also applies in relation to recreational vessels. The word ‘qualification’ has been added to ensure that the provision also captures Recreational Skipper’s Tickets. These have been a requirement for people seeing to drive a pleasure vessel since 2006.

Subclause (a) replaces the term ‘manning’ with ‘crewing’.

Subclause (b) inserts the words ‘or qualification’ after the phrase ‘particular certificate’.

Subclause (c) replaces the phrase ‘shall be deemed to be’ with ‘or qualification is’.

Note: The note provides that the heading of section 130 has been amended to ‘Averment relating to qualifications of crew’.

93

### **Section 132 amended**

Clause 93 amends section 132 ‘Proceedings by way of infringement notice’.

Subclause (1)(a) amends subsection (1) to broaden the scope of the section to allow authorised persons to issue infringement notices for offences which are not directly connected with a vessel. This will rectify the current limitation of only being able to be issue an infringement notice for an offence which involves a vessel. For instance, if a person does not heed a caution and swims in an area prohibited to swimming for safety reasons, such as in a channel leading to a port, an infringement may now be issued to the person even though the offence is not connected with a vessel. Issuing an infringement notice for some offences in the Act and the regulations is more appropriate in some cases than proceeding with a court prosecution.

Subclause (1)(b) makes a minor amendment to subsection (1) to clarify the term ‘notice’.



Subclause (2) makes a minor amendment to subsection (2) to clarify that it only applies if the offence is in connection with a vessel, given the changes made to subsection (1). If an authorised person cannot determine who committed the offence, it allows them to serve the infringement on the vessel owner or leave it on or near the vessel.

Subclause (3) amends subsection (8) to increase the maximum court-imposed penalty for removing an infringement notice from a vessel. As none of the Act's penalties have been increased in over 40 years, this penalty is increased from \$200 to \$2000 to align with offences in other Western Australian legislation.

Subclause (4) amends subsection (11) to delete the definition of 'authorised person' and 'infringement notice'. They are no longer needed - the former because it is now defined in section 3, and the latter as the amendment in subclause 93(1)(b) clarifies its meaning.

Subclause (5) amends subsection (11) to clarify that an authorised person in this section includes an inspector. Both terms are defined in section 3.

Subclause (6) makes a minor amendment to subsection (11) to reflect the amendment made by subclause 93(5).

94

### **Section 133 amended**

Clause 94 amends section 133 'Onus on owner to identify person in charge of vessel'.

Subclause (1)(a) amends subsection (1)(a) to reflect gender neutral language by changing 'his' to 'the owner's or other person's'.

Subclauses (1)(b) and (c) make minor amendments to subsection (1)(b) to use clearer language by changing 'any person' to 'the person' and inserting 'at the time' when an offence is committed.

Subclause (2) amends subsection (1) to increase the maximum court-imposed penalty from \$1000 to \$3000 to align with offences in other Western Australian legislation.

Subclause (3)(a) makes a minor amendment to subsection (2) to reflect a more modern drafting style by changing "offence against this Act" to "offence under this Act".

Subclause (3)(b) amends subsection (2) to reflect the changes made by subclause 93(2) to subsection 132(2).

Subclause (4) amends subsection (5) so that the definition of ‘authorised person’ in this section means the same as the new meaning in section 132(11) – that is, it includes an inspector.

95

### **Section 134 deleted**

Section 134 ‘Production of proof of identity by authorised person’ is deleted because there are near equivalent provisions in amended sections 118 and 118A.

Currently, section 134 requires the Chief Executive Officer to issue each authorised person, other than inspectors, a certificate in the prescribed form. An authorised person is required to produce that certificate (or inspector’s certificate if they are so designated), if asked, to a person that they have, or are about to, exercise powers upon. It also states that production of the certificate is conclusive evidence in court proceedings of how the person became authorised and has authority to exercise powers.

These requirements are now replicated in the following provisions:

- Section 118 requires the CEO to issue each authorised person and inspector with an identity card and provides that in the absence of any contrary evidence, the production of an identity card during a proceeding is sufficient evidence of the authorised person’s or inspector’s designation.
- Section 118A requires an inspector or authorised person to produce their identity card if requested by the person in relation to whom they have exercised, or are about to exercise, a power under the Act, or if they are a police officer not in uniform, to produce evidence they are a police officer.

96

### **Part X heading replaced**

Clause 96 replaces the Part X heading with ‘Part 10 – Repeal and transitional provisions.’

97

### **Part X Division 1 heading inserted**

Clause 97 inserts the heading ‘Division 1 — *Western Australian Marine Act 1982*’.

98

### **Section 136 deleted**

Clause 98 deletes current section 136 which has been omitted since 1984, but its section number still appears.

**Part X Division 2 inserted**

Clause 99 inserts the heading ‘Division 2 — *Marine Safety (Domestic Commercial Vessel National Law Application) Act 2023*’ and inserts new sections 136 ‘**Certain orders, notices, exemptions and certificates**’ and 137 ‘**Transitional regulations**’.

**Section 136** provides transitional provisions in relation to applying the Commonwealth National Law. Subsection (1) provides that any orders previously made under section 66(1) will remain in operation when clause 50(1) of this Bill commences. Section 66(1) allows the CEO to close state waters for reason of safety or emergency, to vessels generally, or a specific class of vessels, under such terms as is required. This transitional arrangement will allow continuity of safety measures in place and remove the potential administrative burden of having to redo each order.

Subsection (2) provides that any orders previously made under section 67(1) will remain in operation when clause 51 of this Bill commences. Section 67(1) allows the CEO to limit the speed at which vessels may be navigated in any State waters by published notice. This transitional arrangement will allow continuity of safety in locations where vessel speed limits are in place and will remove the administrative burden and cost of having to redo each order.

Subsection (3) provides that any notices previously made under current section 99(2) will remain in operation when clause 69 of this Bill commences, as if they have been granted under new section 115A(1), to the extent that they are not inconsistent with it. Current section 99(2) empowers the CEO to regulate times, places and conditions relating to unsafe navigation, specified waters, and navigation, mooring and berthing, by published notice. Transitional arrangements will allow continuity of existing notices and will remove the administrative burden and cost of having to redo each notice.

Subsection (4) provides that any exemptions previously granted under current section 99(3) will remain in operation when clause 69 of this Bill commences, as if they have been granted under new section 115A(1) or (1A). Current section 99(3) allows the CEO to exempt people and pleasure vessels involved in aquatic events from carrying safety equipment. Transitional arrangements will allow continuity of existing exemptions relating to aquatic events which have been assessed and have risk mitigation measures in place to maintain the safety of competitors, spectators and the general public.

Subsection (5) provides that any certificate previously issued under section 118 or 134 will remain in operation when clause 79 of this Bill commences.

Current sections 118 and 134 have been replaced by new section 118 which requires the CEO to issue an identity card (previously certificate of appointment), specifying that a person is an authorised person or an inspector under the Act. The holder must produce the certificate if requested by a person in respect of whom they have exercised, or are about to exercise, their powers. This transitional arrangement will allow continuity of current appointments and designations and will ensure there is no gap in enforcement of the Act.

Subsection (6) provides that any order, notice, exemption or certificate that has effect under this section, has effect subject to this Act

**Section 137** provides for transitional regulations. Subsection (1) contains the following definitions:

**commencement day** means the day on which clause 36 of this Bill comes into operation.

**publication day** means the day on which these transitional regulations are published on the WA legislation website.

**transitional regulations** to mean regulations made for the purposes of subsection (2).

Subsection (2) means that the transitional regulations will be able to deal with anything which relates to a transitional, savings or application matter connected with the enactment of Parts 9 and 10 of this Bill.

Subsection (3) ensures that the ability to make transitional regulations ceases after 2 years from the commencement of clause 36 of this Bill.

Subsection (4) states that if transitional regulations provide that something existed or did not exist on or before publication day, but not earlier than commencement day, the regulations will apply.

Subsection (5) states that if transitional regulations contain a provision as per subsection (4), it will not operate so as to prejudice the rights of a person that existed before publication day, nor will it impose a liability on a person in relation to something that was done or was not done prior to publication day.

100

### **Schedule 6 deleted**

Clause 100 deletes Schedule 6 of the Act as although it has been omitted from the Act since 1984, reference to it still appears.

## PART 10 – OTHER ACTS AMENDED OR REPEALED

This part of the Bill consequentially amends Western Australian statutes which make reference to the *Western Australian Marine Act 1982* or to the superseded *Navigation Act 1912*. It also repeals two obsolete Amendment Acts.

### Division 1 — *Constitution Acts Amendment Act 1899* amended

#### 101 Act amended

Clause 101 states Division 1 amends the ***Constitution Acts Amendment Act 1899***.

#### 102 Schedule V amended

Clause 102 will delete references to the redundant Western Australian Marine Manning Committee in the ***Constitution Acts Amendment Act 1899*** Schedule V Part 3. References to this Committee will also be removed from the *Western Australian Marine Act 1982* by the Bill because regulation of commercial vessels in regard to manning (also referred to as crewing) is now provided for by the National Law to the exclusion of state laws.

### Division 2 — *Marine and Harbours Act 1981* amended

#### 103 Act amended

Clause 103 states Division 2 amends the ***Marine and Harbours Act 1981***.

#### 104 Section 18A amended

Clause 104 amends the term 'certificate' in section 18A(13) of the ***Marine and Harbours Act 1981*** to 'identity card' to align with amendments to section 118 of the *Western Australian Marine Act 1982*.

### Division 3 — *Personal Property Securities (Commonwealth Laws) Act 2011* amended

#### 105 Act amended

Clause 105 states Division 3 amends the ***Personal Property Securities (Commonwealth Laws) Act 2011***.

#### 106 Section 17 amended

Clause 106 amends section 17(1)(i) of the ***Personal Property Securities (Commonwealth Laws) Act 2011*** to reflect that detained vessels are now dealt with under sections 61 to 63C of the *Western Australian Marine Act 1982*.

#### **Division 4 — *Pilots' Limitation of Liability Act 1962* amended**

##### **107 Act amended**

Clause 107 states Division 4 amends the ***Pilots' Limitation of Liability Act 1962***.

##### **108 Section 3 amended**

Clause 108 amends the ***Pilots' Limitation of Liability Act 1962*** to replace a reference in section 3 to the Commonwealth's repealed *Navigation Act 1912* with the *Navigation Act 2012*.

#### **Division 5 — *Pollution of Waters by Oil and Noxious Substances Act 1987* amended**

##### **109 Act amended**

Clause 109 states Division 5 amends the ***Pollution of Waters by Oil and Noxious Substances Act 1987***.

##### **110 Section 3 amended**

Clause 110 amends the ***Pollution of Waters by Oil and Noxious Substances Act 1987*** to replace and delete definitions that have become obsolete due to the commencement of the National Law.

Subclauses (1) and (2) replace the section 3 definition of 'Tonnage Measurement Convention' with 'Tonnage Convention' as defined in the *Navigation Act 2012*, and change the definition of 'trading ship' to point to the *Shipping Registration Act 1981* instead of the *Western Australian Marine Act 1982*. The definition of 'Australian fishing vessel' is deleted as it is no longer needed.

Subclause (3) deletes subsection 3(4) relating to the definitions of 'inter-state voyage', 'intra-state voyage' and 'overseas voyage' as they are no longer needed. The concept of 'inter-state voyage' has been phased out of Australian maritime law.

Subclause (4) amends subsection 3(6) to delete the word 'Measurement' as it is no longer used in the name of the Tonnage Convention.

##### **111 Section 8 amended**

Clauses 111(a), (b), (c) and (d) amend subsection 8(6) of ***Pollution of Waters by Oil and Noxious Substances Act 1987*** regarding exceptions to the offence of discharge of oil or of an oily mixture from a ship into State waters.

Paragraphs (a)(v), (b)(iv), (e)(iii) and (g)(iii) are amended to update references from the superseded *Navigation Act 1912* to the *Navigation Act 2012*.

References in these paragraphs to section 90B of the *Western Australian Marine Act 1982* will also be removed, as section 90B has not been proclaimed and will be removed by clause 120 of this Bill.

112      **Section 13 amended**

Clause 112 deletes subsection 13(1) of ***Pollution of Waters by Oil and Noxious Substances Act 1987*** to remove outdated references to ‘intra-state voyage’, ‘Australian fishing vessel’ and ‘overseas voyage’ as these terms are no longer defined in the *Navigation Act 2012*. New subsection 13(1) instead applies the provision to all ships in State waters with a gross tonnage of at least 400 and to those which are oil tankers.

113      **Section 23 amended**

Clause 113 amends subsection 23(1) to replace the phrase “proceeding on an intra-state voyage” with “in State waters” for the reasons given in clause 112.

**Division 6 — *Sentencing Act 1995* amended**

114      **Act amended**

Clause 114 states Division 6 amends the ***Sentencing Act 1995***.

115      **Section 107 amended**

Subclause (1) amends the definition of ‘vessel’ in subsection 107(5) of the ***Sentencing Act 1995*** to have the same meaning as given in the *Western Australian Marine Act 1982* (this Act), instead of as given in *The Criminal Code*. As the latter’s definition is substantially different from the new definition of ‘vessel’ in section 3 of this Act, this amendment prevents the situation where a craft which has been specified as a vessel in regulations made under this Act is not considered a vessel under the Sentencing Act.

Subclause (2) amends subsection 107(5) to remove the ‘Certificate of Competency’ reference in the definition of ‘marine qualification’ for the purposes of the disqualification of qualifications. State legislation no longer regulates commercial certificates of competency and Western Australian courts do not have jurisdiction to cancel commercial marine qualifications which are regulated by the National Law.

**Division 7 — *Supreme Court Act 1935* amended**

116      **Act amended**

Clause 116 states Division 7 amends the ***Supreme Court Act 1935***.

117      **Section 30 amended**

Clause 117 amends section 30 of the **Supreme Court Act 1935** to replace the reference to the superseded *Navigation Act 1912* with the *Navigation Act 2012*. It also amends the heading of section 30.

**Division 8 — *Waterways Conservation Act 1976* amended**

118      **Act amended**

Clause 118 states Division 8 amends the ***Waterways Conservation Act 1976***.

119      **Section 48 amended**

Clause 119 amends subsection 48(5a)(b) of the ***Waterways Conservation Act 1976*** which defines ‘ferry or charter vessel’ as authorised under the Act to carry more than 10 passengers. Although these vessels are now regulated by the National Law, that law does not authorise numbers of passengers and it is more appropriate to define these vessels as having a carrying capacity of more than 10 passengers.

**Division 9 - *Western Australian Marine Amendment Act 1987* repealed**

120      **Act repealed**

Clause 120 states that the ***Western Australian Marine Amendment Act 1987*** is repealed. Sections 4 - 6 of the 1987 Amendment Act, relating to international conventions, have never been proclaimed and the amendments are no longer required. Sections 4 - 6 were initially not proclaimed because substantial drafting of regulations was required and the Department then lacked the necessary expertise to undertake this work. Drafting of regulations was then overtaken by development of the *Maritime and Transport Legislation Amendment and Repeal Bill 1999*, which was set to repeal the 1987 Amendment Act. However, this Bill lapsed when Parliament was prorogued ahead of the 2001 election.

**Division 10 - *Western Australian Marine Amendment Act 1990* repealed**

121      **Act amended**

Clause 121 states Division 10 amends the ***Western Australian Marine Amendment Act 1990***.

122      **Section 4 amended**

Clause 122 deletes section 4(d) of the 1990 Amendment Act.



**Sections 6 to 9 and 12 deleted**

Clause 123 deletes sections 6, 7, 8, 9 and 12 of the 1990 Amendment Act as they were never proclaimed and are no longer required.

Sections 6 to 9 relate to safety manning of commercial vessels and to the Manning Committee. Provisions of the *Western Australian Marine Act 1982* which provide for a Manning Committee are to be repealed by this Bill as the National Law now regulates the manning, or crewing, of commercial vessels.

Section 12 would have repealed the power for the Minister to grant mooring licenses under section 65 of the *Western Australian Marine Act 1982* however, it has not been proclaimed. Section 65 is still used to issue mooring licences and is not proposed to be repealed.

Like the *Western Australian Marine Amendment Act 1987*, this Amendment Act was scheduled to be repealed by the *Maritime and Transport Legislation Amendment and Repeal Bill 1999* which lapsed in 2001.