

# **Maritime and Other Legislation Amendment Bill 2006**

## **Explanatory Notes**

### **General Outline**

The Bill makes a number of amendments to transport legislation. The following acts are amended:

- *Maritime Safety Queensland Act 2002* (MSQ Act);
- *Transport Operations (Marine Pollution) Act 1995* (TOMPA);
- *Transport Operations (Marine Safety) Act 1994* (TOMSA);
- *Transport Infrastructure Act 1994* (TIA);
- *Transport Operations (Passenger Transport) Act 1994* (TOPTA); and
- *Transport Operations (Road Use Management) Act 1995* (TORUM)

Additionally, minor amendments are made to the *Off-shore Facilities Act 1986* and *Transport Planning and Coordination Act 1994*.

### **Short Title**

The short title of the Bill is the Maritime and Other Legislation Amendment Bill 2006.

### **Policy Objectives of the Legislation**

To amend the MSQ Act to:

- provide for Maritime Safety Queensland (MSQ) to deal with abandoned and wrecked ships;
- allow MSQ to approve entities to conduct training and examinations of candidates for commercial or recreational marine licences; and
- provide the general manager with the power to approve the sub-delegation of his/her powers.

To amend TOMPA to:

- narrow the scope of defences for discharges occurring during transfer operations;
- streamline existing provisions about the reporting of night transfer operations;
- broaden compulsory insurance;
- clarify the roles of MSQ and port authorities for pollution response in ports;
- allow cost recovery for discharge expenses;
- provide for courts to impose a range of civil penalties and order compliance with TOMPA;
- provide 'whistleblower' protection for reporting illegal pollutant discharges; and
- allow the general manager to establish a schedule of fees by gazette notice for pollution cleanup to provide certainty of costs and facilitate faster payment.

To amend TOMSA to:

- clarify the application of TOMSA in extra-territorial waters;
- enhance the Marine Board's role in the preparation of standards;
- require ships to be registered according to their intended usage and type;
- provide for the general manager of MSQ or chief executive to approve entities to provide training;
- extend the powers of harbour masters and shipping inspectors in giving directions to ships;
- clarify existing provisions about reporting marine incidents and changing the date for submitting annual marine incidents report;
- provide appropriate protection for staff working for a Board of Inquiry;
- provide for power to condemn, dispose of or destroy wrecked or abandoned ships;
- provide for courts to suspend marine licences and order compliance with the TOMSA;

- provide 'whistleblower' protection for persons reporting unseaworthy ships;
- amend the appeal process to provide consistency with other transport legislation;
- clarify that pilotage fees are a 'user pays' regime;
- broaden the head of power for aquatic events;
- provide immunity to the State against litigation arising from buoy moorings and in relation to privately held aquatic events;
- establish that the general manager can set by gazette notice various matters about the safe operation of ships in Queensland waters;
- phase out instructions of the former Marine Board for exemptions for fishing ships;
- allow an internet search to verify that a person holds a marine licence; and
- update and provide new definitions where relevant.

To amend TIA to:

- clarify that the Port of Brisbane Corporation (PBC) has the power to undertake a master planning program and preliminary works for non-port related purposes on strategic port land;
- clarify the State's declaration process for Local Government Tollways and to provide more flexibility for the State and Local Government in how and when the declaration process is carried out;
- provide further flexibility and certainty for Local Government should they decide to construct and operate tollways;
- ensure that the state's objectives are met by the Local Government; and
- clarify what is required of a local government for the State to declare a Local Government Tollway and local government tollway corridor land.

To amend TOPTA to:

- restrict the use of stretched passenger cars to provide public passenger services (other than community transport services or courtesy transport services) to vehicles that are operated under a limousine service licence;

- expedite the processes for declaring a vehicle to be a luxury motor vehicle (which may be used under a limousine service licence) or a forward-control passenger vehicle (which may be used to provide prescribed services); and
- clarify that offences against TOPTA are disqualifying offences under TOPTA.

To amend TORUM to introduce:

- disqualification and licence suspensions for high-risk drink drivers to apply from the time the person is charged by police until that person is dealt with by a court or the charge is withdrawn or otherwise discontinued; and
- blood/breath alcohol concentration limits for people who are supervising a learner driver, equivalent to the limits that would apply to the supervisor if they were driving the vehicle.

## **Reasons for the Bill**

### **MSQ Act**

The amendments to the MSQ Act are necessary to:

establish heads of power for MSQ to effectively carry out its functions, in particular in relation to dealing with abandoned and wrecked ships and approving entities to conduct training for marine licences.

### **TOMPA**

The amendments to TOMPA are necessary to protect Queensland's coastal waters from ship sourced pollution. This is to be achieved by:

- narrowing of defences available for spills during transfer operations;
- requiring ships over 15 metres in length to hold insurance for pollution cleanup and wreck removal;
- providing courts with a power to order compliance with the Act and setting a range of penalties available for breaches of the Act; and
- providing whistleblower protection for reports of illegal discharges.

There are also several administrative amendments, including some to finalise the removal of the devolution of responsibility for pollution response from port authorities.

## **TOMSA**

The amendments to TOMSA are necessary to enhance marine safety and prevent marine incidents and in particular manage unseaworthy, abandoned and derelict ships in Queensland waters. This is to be achieved by:

- clarifying and extending some existing powers, such as the jurisdiction of harbour masters and shipping inspectors;
- providing for courts to order compliance with the Act and power to suspend or cancel marine licences;
- providing the power to condemn or destroy wrecked or abandoned ships;
- providing ‘whistleblower’ protection for persons reporting unsafe operation of ships; and
- phasing out exemptions of the former Marine Board applying to fishing ships;

There are also several amendments of an administrative nature, including creating immunity for the State in relation to the holding of aquatic events and the integrity of buoy moorings.

The Bill also introduces a head of power to allow a marine licence internet verification service for recreational licences to be introduced in subordinate legislation. This will assist customers and businesses, such as boat and personal watercraft (for example jet skis) hire companies to easily verify that marine licences are held.

## **TIA**

The PBC owns and operates port facilities at Hamilton/Eagle Farm and Fisherman Islands. All PBC commercial port operations are expected to relocate from Hamilton/Eagle Farm to Fisherman Islands over the next 20 years. As part of a relocation strategy the PBC will undertake a master planning process to ensure that the staged redevelopment does not interfere with the relocation of port operations. Once the port activity has been relocated, the PBC intends to progressively dispose of its land holdings at Hamilton/Eagle Farm. At a stage to be determined the land will cease to be strategic port land and planning approval will transfer to Brisbane City Council under the *Integrated Planning Act 1997*.

In addition to this proposed work the PBC is undertaking a master planning exercise for a small area at Fisherman Islands to service and support businesses that may be affected by the Hamilton/Eagle Farm relocation, and other service providers that will require office accommodation on

Fisherman Islands. It is also proposed to develop some local non port-related community facilities such as child care, recreational amenities and retail outlets for the benefit of the geographically isolated Fisherman Islands port community.

The amendments to TIA are necessary to clarify the PBC has the power to undertake a master planning program for non-port-related purposes and to carry out preliminary works. These amendments will be specific to the PBC.

The current declaration process for a Local Government Tollway under the *Transport Infrastructure Act 1994* is firstly, that the project be declared as a tollway project by the Minister (section 105C). Secondly, that the land be declared as tollway corridor land by the Minister (section 105H). Finally the tollway corridor land required for the project is declared to be a local government tollway by the Minister (section 105ZB).

The scheme requires amendment to allow for:

- flexibility in the timing for the State to declare a Local Government Tollway (section 105G) and to allow the state to set conditions when the declaration is made as required;
- the Local Government to have the ability to request changes to the conditions set by the Minister as part of the declaration process; and
- a compliance and enforcement framework to ensure local government compliance with conditions.

## **TOPTA**

The amendments to TOPTA are necessary to:

- restrict the use of stretched passenger cars that have a seating capacity of more than nine persons (including the driver) from providing services in competition with licensed limousines. These stretched passenger cars are currently deemed to be buses under TOPTA, enabling some operators to use these vehicles to provide limousine-like services without having to hold a limousine service licence for the vehicle;
- enable the chief executive to declare by gazette notice that a vehicle is a forward-control passenger vehicle or a luxury motor vehicle. A declaration by the chief executive will expire six months after it is issued. The six month period will allow time for a regulation to be made to declare the vehicle to be a forward-control passenger vehicle or a luxury motor vehicle; and

- clarify that offences against TOPTA are a disqualifying offence under TOPTA. The status of offences against TOPTA as disqualifying offences is currently provided for under the *Transport Operations (Passenger Regulation) 2005*, section 156, which expires on 16 December 2006.

## **TORUM**

From a public safety perspective, it is undesirable to allow high level and repeat drink drivers to continue driving on Queensland roads pending the hearing by a court of their drink driving charge. The level of crash risk rises exponentially with increased blood/breath alcohol concentration (BAC). Research shows that at 0.10 BAC, the crash risk is increased by almost six times that of driving with a zero BAC, rising to a more than 20-fold increased risk at 0.15 BAC.

Queensland legislation does not currently impose BAC restrictions on a person who is supervising a learner driver while they are learning to drive a motor vehicle, except for accredited driver trainers. Research has shown that during the learner period, learner drivers are at their safest because of the responsible supervision of a fully licensed driver. It is important that this licensed driver is able to provide effective instruction including assistance in decision-making and learning. Alcohol impairs the ability to make safe decisions and, as a consequence, impairs the ability to effectively and safely supervise learner drivers.

These amendments to TORUM are necessary to enhance public safety.

## **Administrative Costs**

The administrative costs associated with the introduction of the amendments to the MSQ Act, TOMPA, TOMSA and TOPTA and the clarifications to the scheme for project approval and tolled road projects in TIA will be absorbed within existing budget allocations except for the Marine Licence Internet Verification Service. The fee charged for this service is intended to recover both the investment (over a long period) and recover ongoing costs as outlined in Information Standard 33.

There will not be any administrative costs associated with the POB amendments to TIA. Any costs involved will be part of the PBC's budget to relocate commercial port operations to Fisherman Islands.

There will be additional administrative costs for Queensland Transport and the Queensland Police Service as a result of the drink driving amendments to TORUM.

## **Achieving the Objectives**

### **MSQ Act**

The Bill will ensure that MSQ has a clear power to deal with derelict ships, by amending the functions of MSQ to establish that the agency can deal with abandoned, wrecked, sunk or unseaworthy ships.

The Bill will also ensure that the powers and functions of the general manager can, where appropriate, be sub-delegated to provide for operational efficiency and delivery of MSQ's services throughout the State.

The Bill will also extend the purpose of the MSQ Act to include the ability for the agency to manage ship-sourced pollution 'and related matters'.

### **TOMPA**

The Bill will ensure that Queensland waters are protected from ship sourced pollutants to the greatest extent practicable.

### **TOMSA**

The Bill will ensure that, *inter alia*, MSQ is able to deal effectively with unseaworthy and derelict ships and carry out its functions under the MSQ Act and will provide amendments to TOMSA to allow a search of marine licence records by marine licence holders or other interested parties who have the permission of the marine licence holder.

### **TIA**

The amendment will add provisions in s.275 and s.285 to allow the PBC to provide for or arrange the preparation and use of its strategic port land at Hamilton for residential development, community infrastructure and ancillary services and to provide local commercial activities for the benefit of the Fisherman Islands port community.

The Bill amends chapter 6, part 8 of the *Transport Infrastructure Act 1994* including in particular sections 105G, 105H and 105ZB. The proposed amendments will provide for the tollway project approval given as per current legislation (s105C), amended tollway project approval given as per current legislation (s105E) and ability to provide a local government tollway declaration (s105GA) prior to the declaration of Local Government Tollway corridor land (s105H). The State's interests will be protected by a new provision to allow the Minister to place conditions on the Local Government Tollway declaration (s105GA) and the introduction of an enforcement regime (s105GD to s105GG).

The Bill also makes consequential amendments to the *Transport Infrastructure Act 1994* to accommodate the objectives.

The Bill also clarifies (by amendments) matters concerning usage of touch tags, the definition of the "deferred toll amount", and user administration charges.

The Bill makes amendments to the Act to allow a declaration of common area where franchised road crosses rail corridor land.

### **TOPTA**

The amendments to TOPTA will clarify the licencing requirements for persons providing limousine and limousine-like services. The Bill will bring a level playing field back to the limousine market by extending limousine service licence requirements to cover operators using stretched passenger cars that seat more than nine persons (including the driver).

The amendment enabling the chief executive to declare, by gazette notice, vehicles to be luxury motor vehicles or forward-control passenger vehicles will expedite processes to allow for new vehicles to be used, respectively, as limousines or for other prescribed services.

The Bill will also clarify in TOPTA that offences against TOPTA are disqualifying offences. This amendment to TOPTA will carry on from a transitional provision expiring on 16 December 2006 in the *Transport Operations (Passenger Regulation) 2005* which provides that offences against the Act are disqualifying offences.

### **TORUM**

The *Transport Operations (Road Use Management) Act 1995* (TORUM) will be amended to provide for:

- the immediate suspension of the driver licence of a person charged with:
  - driving a motor vehicle while under the influence of liquor (section 79(1) of TORUM) and an analysis certificate indicates the person is over the high alcohol limit;
  - failing to provide a specimen of blood or breath for analysis (section 80(11) of TORUM);
  - a drink driving offence under section 79(2), (2A), (2B) or (2J) of TORUM while an earlier such charge is still pending; or
  - dangerous operation of a motor vehicle with a circumstance of aggravation that the person was adversely affected by an intoxicating substance that is alcohol and the person was over the high alcohol limit (section 328A of the Criminal Code);

- the immediate suspension of a person's authority to drive on Queensland roads when, at the time of being charged in the circumstances outlined above, the person held a non-Queensland driver licence;
- the immediate disqualification from holding or obtaining a driver licence of a person charged in the above circumstances at a time when the person did not hold a driver licence;
- these immediate suspensions and disqualifications to apply from the time the person is charged until they are dealt with by a court or the charge is withdrawn or otherwise discontinued;
- a regulation to be made allowing a person whose Queensland driver licence is immediately suspended to apply, in certain circumstances, to the court for an order allowing them to continue driving subject to conditions imposed by the court;
- a mandatory disqualification from holding or obtaining a Queensland driver licence for between 2 and 5 years for a person convicted of driving while subject to an immediate licence suspension or disqualification as introduced by this Bill; and
- the introduction of blood/breath alcohol concentration limits for people who are supervising a learner driver, equivalent to the limits that would apply to the supervisor if they were driving the vehicle.

## **Fundamental Legislative Principles**

A number of potential breaches of the fundamental legislative principles under the *Legislative Standards Act 1992* have been identified:

### **MSQ Act**

1. Clause 7 – *Powers or functions of general manager to be sub delegated* - *Legislative Standards Act 1992* s.4(3)(c)—allow the delegation of administrative power only in appropriate cases and to appropriate persons.

TOMSA and TOMPA vest extensive powers in the chief executive and the general manager as strategic and operational heads of MSQ.

Section 37 of the *Transport Planning and Coordination Act 1994* and s.27A (12) of the *Acts Interpretation Act 1954* enable powers or functions of the chief executive that have been delegated to be sub delegated. This provision was in place before MSQ and the position of general manager were created in 2002.

While the existing provision of the MSQ Act allows the general manager to delegate to appropriate persons it does not allow for the sub delegation of powers and functions.

The proposed amendment is justified because it will allow delegates to sub delegate but only to an appropriate person to whom the general manager could also have issued a delegation. The intention is that senior officers in MSQ such as harbour masters who have the day to day management of MSQ business in Queensland regions and are best placed to select and oversee persons to whom a sub delegation is given, should be able to sub delegate powers. Sub delegation will only be allowed when the original delegation from the general manager permits it so that the general manager will ultimately be able to control the extent of any permitted sub delegation. The practice of the agency will be for the instrument of delegation by the general manager to specify those positions (if any) that are appropriate for sub delegation of each power, so that the general manager can satisfy himself/herself that the positions are appropriate to exercise the powers.

## **TOMPA**

2. Clause 11 - *Defences to discharge offences - Legislative Standards Act 1992* s.4(3)(d) does not reverse the onus of proof in criminal proceedings without adequate justification.

Under the existing s.62(b) of TOMPA, it is a complete defence to a discharge offence occurring during a transfer operation if the discharge happened because of a fault in transfer apparatus not operated at the master's direction, provided all reasonable precautions to prevent or minimise the discharge were taken after the discharge actually happened. The proposed amendment narrows the defence to those situations in which the ship's owner, master, or a member of the crew whose act caused the discharge did not know, or could not reasonably know, about the existence of the damage to the transfer apparatus and took all reasonable steps to find out whether it was in good working order.

The justification for narrowing the defence is that previously a fault in the transfer apparatus was a complete defence regardless of how the fault had occurred or if it was apparent (i.e. whether through a technical problem or through a lack of preventative maintenance). The change is necessary to ensure that when a relevant person knew, or reasonably ought to have known, that the equipment was faulty, there should be liability. If the damage occurred through a lack of

maintenance which is something that the relevant person ought to have known, then the defence would not be available. There is no breach of a FLP by this amendment because narrowing the defence is not reversing the onus of proof. The changes to the defence retain the existing onus of proof that the offence must be proven by the prosecution and the defence must be proven by the person accused of the offence.

At a practical level, this amendment will not not require more of the master than the implementation of good working practice.

3. Clause 13 - *Allow a regulation to make exemptions to the insurance requirement in the Act - Legislative Standards Act 1992 s.4(4)(a) and s.4(4)(c)*—legislative power only to be delegated in appropriate cases and to appropriate persons, and authorises the amendment of an Act only by another Act.

In recognition that there may be circumstances in which it is impossible or prohibitively expensive for a ship's owner to obtain the prescribed insurance, the amendment proposes that the Minister may recommend the making of a regulation to exempt a particular type of ship from the requirements of the Act, on stated conditions. A ship's owner may not be able to obtain insurance because their ship is considered uninsurable because of the type of material from which the ship is made, for instance, ferro-cement ships are generally unable to obtain insurance.

Such exemptions will be limited to being granted only on a case by case basis, and with conditions such as a limitation on how much pollutant an exempted ship can carry.

The exemption provision is necessary to protect those people who through no fault of their own are unable to comply with the requirement for insurance. It is justified given the complexity and variability of the insurance market and the range of ships to which the Act applies. Setting guidelines in the Act for exemptions may lead to hardship for some ship owners who may be suitable for exemption but may not fit neatly within the guidelines. Therefore it is not practicable to specify such exemptions in the Act itself and the exemption by regulation is seen as a more satisfactory way of dealing with the issues as and when they arise. The Governor in Council has the power to make a regulation exempting a ship from compliance with the new requirements as the appropriate person in appropriate cases. The Minister can recommend that the regulation be made.

Managing the amendment to TOMPA by the use of exemption facilitates the effective application of this innovative amendment to maritime legislation to be in place to protect Queensland's marine environment, while taking into account the commercial realities of the insurance market.

The relevant clause of the Bill has a delayed commencement and also a 12 month transitional period to allow those subject to the new requirements sufficient time to comply.

4. Clauses 26, 35, 81, 86, 92 and 93 – *Amendments in relation to false and misleading information and documents – Legislative Standards Act 1992 s.4(3)(g)*—not adversely affect rights or liberties of individuals. Alternatively that abrogation of common law rights must be justified.

The relevant sections of the TOMPA and TOMSA in relation to false and misleading statements and documents are redrafted to address concerns raised by the Scrutiny of Legislation Committee on the grounds that a person's right to silence may have been abrogated. Instigated by the OQPC, the amendments bring the Acts into line with current drafting practice in relation to providing false information or documents. The new provisions aim to overcome concerns about the abrogation of the common law right to silence that exist in the legislation before the introduction of this Bill. They are now consistent with other Queensland statutes.

5. Clause 29 - *Allow for gazettal of a schedule of fees for discharge expenses - Legislative Standards Act 1992 s.4(4)(a)*—allow the delegation of legislative power only in appropriate cases and to appropriate persons.

The existing provisions of the Act define discharge expenses, make them recoverable as a debt to the State, and limit them to the reasonable costs and expenses incurred by the State.

The purpose of this new section is that, within these constraints, it is proposed to allow the general manager of MSQ to gazette a scale of fees for discharge expenses to give marine insurers and Protection & Indemnity Clubs planning certainty and to facilitate the settlement of claims after a pollution response. These will not be new fees, they are fees that can currently be charged. The effect of the amendment is to ensure the timely promulgation of these fees so that ships' owners and insurers are aware of them and can plan on that basis. Fees are not to be set on an incident by incident basis, but for a set period of time.

The origin of this amendment was a request by ships' insurers to expedite claims by making transparent and certain any expected costs related to a response. This mirrors a practice by the Commonwealth which has proven successful in expediting payment of discharge expenses by insurers.

Some of the costs that are to be established are prescribed by the National Plan (which is a cooperative arrangement between the Commonwealth and the States to manage responses to pollution incidents). The National Plan sets fees for both personnel (that is, the people who will be involved in the response) and equipment (for example, ships, absorbent booms, dispersal aircraft). These are examples of the fees that will be set in the gazette schedule.

The new fees set in the National Plan can be charged from the moment they are set. It is essential that the Queensland Government is able to notify ship owners and insurers of the new fees as quickly as possible after they become operative. If there were significant delays in the notification of the new fees there would be a lack of certainty and an argument available to insurers that they should be required to pay fees which had since been superseded. This could result in costly legal argument and delays in recovery of costs for the State. From the insurers' point of view, any significant delays mean a lack of certainty and limited ability to budget and plan.

Having a scale of fees set by gazette notice will add transparency and certainty to the existing provisions and reduce the time and cost for all parties associated with processing claims after a discharge occurs and gives them statutory force.

The general manager is the most appropriate person to have this function because under the Act the general manager is the marine pollution controller and is directly involved in pollution response and has knowledge of pollution response strategies, equipment and personnel, and therefore knows what costs are involved. The scope of the proposed amendment is limited to a power to quantify discharge expenses which are already recoverable under the Act.

The proposed amendment is similar to the power conferred on the chief executive officer of the Australian Maritime Safety Authority under the *Australian Maritime Safety Authority Act 1990* (Cwlth) to set fees by determination.

6. Clause 32 - *Secure compliance with the Act through undertakings and enforcement orders - Legislative Standards Act 1992 s.4(2)(a)*—  
ufficient regard to the rights and liberties of individuals.

The intention of the proposed compliance scheme is preventative and it creates a new regime, striking a balance between prosecuting offenders and providing an opportunity to work with people to find positive outcomes. The scheme is based on similar provisions in the *Environmental Protection Act 1994*.

The potential breach of an FLP is that there is a capacity to effect future acts of persons. (s.117F). However this is justified because the powers can only be enlivened when the threshold in s.117C(1) is satisfied.

MSQ seeks to protect Queensland's marine and coastal environment from potentially irreparable harm by working with the marine industry to prevent breaches of the Act before they occur. The scheme empowers the general manager to seek an undertaking from a person if there are reasonable grounds for believing the person has breached or will breach the Act. These powers will as a matter of policy only be used for potentially serious matters.

The scheme also identifies certain existing powers under which a person may be directed or required to do something (notice offences and intervention directions). An application may be made to the District Court for an enforcement order to secure compliance with an undertaking, or in relation to a notice offence or intervention direction. The court may only issue an order if it is satisfied there has been non-compliance, or will be unless the order is made. Breaching an enforcement order made by the court is a new offence against the Act.

The amendment and powers are justified because it is MSQ's experience that persons who own unseaworthy ships are highly likely to ignore directions and the ships they own have the potential to cause major environmental harm or serious marine incidents. For example, the owner of the *Ji Chong Lee*, which capsized in the Fitzroy River, Rockhampton ignored directions from MSQ to remove pollutants and salvage the ship. The only option was to prosecute for non-compliance with directions and this took several months. Meanwhile, the derelict ship had to be dealt with by the State at a cost of over \$300 000.

With the extra weight that a court order gives, and a potentially higher penalty of 1000 penalty units (currently \$75 000) or one year's imprisonment, the likelihood of compliance with the Act and directions is greater.

7. Clause 35 - *Expand the court's power to make orders after a conviction - Legislative Standards Act 1992 s.4(3)(g)*—sufficient regard to the rights and liberties of individuals.

It is proposed to expand the range of orders a court may make under s.127 following a conviction for an offence. The existing section already allows an order to be made requiring the defendant to take stated action to rehabilitate Queensland's marine environment, but limits the power to circumstances in which a discharge actually occurred. The amendment will also allow the payment of response expenses to be ordered following a conviction for an offence against TOMSA, for example in relation to the grounding of a ship, where prompt action has prevented a discharge.

In addition, it is proposed that for convictions against TOMPA the court be given power to make an order, on the application of the prosecution, that the defendant undertake certain prescribed matters. This power would be in addition to any other penalty or order under the Act or the *Penalties and Sentences Act 1992*. The range of matters that could be made the subject of an order includes conducting advertising or education campaigns, making apologies, and other issues about owning, operating, and repairing ships.

The potential to affect the rights and liberties of individuals who have been convicted of an offence is justified by the increased flexibility that will be given to the court to make orders that are appropriate to the circumstances of the offence, and tailored to achieve the objectives of the Act more effectively than a fine or term of imprisonment. The amendment is consistent with the governing principles set out in part 2 of the *Penalties and Sentences Act 1992*.

8. Clause 36 - *Provide protection from liability for disclosures about breaches (whistleblower's protection) - Legislative Standards Act 1992 s.4(3)(h)*—confer immunity from proceeding or prosecution only with adequate justification.

To encourage persons to come forward to report offences against the Act, it is proposed to provide protection from civil or criminal liability for making a disclosure about an offence to an official of MSQ. The part also confers a civil right of action on a person who makes a

disclosure in respect of a reprisal taken against them for the disclosure. The proposal is modeled on, and works in conjunction with, the *Whistleblowers Protection Act 1994*.

The amendment is justified because it is a proven tool (as used in the aviation industry) that acts as an incentive to encourage persons within the maritime industry, who are best placed to observe breaches, to come forward without fear of recriminations or reprisal. Even a small spill of a pollutant in an environmentally sensitive area has the potential to cause substantial harm, and the purpose of TOMPA is clearly to minimise deliberate and negligent discharges of ship-sourced pollutants into coastal waters. Persons disclosing information are not provided with immunity for their own illegal acts. Immunity is only in relation to the disclosure. There is sufficient public interest in protecting the marine environment and this provides adequate justification for the limited immunity provided to the whistleblower.

## **TOMSA**

9. Clause 60 - *Provide for a regulation to be made about training and examinations - Legislative Standards Act 1992 s.4(4)(a)*—legislative power only to be delegated in appropriate cases and to appropriate persons.

The amendment is merely a clarification which does not have any impact upon the operation of the Act other than making it clear that MSQ has the capacity to approve an entity to conduct training and examinations for marine licences and the operation of ships. There is no change to the persons delegated these functions, namely the chief executive and the general manager. It is appropriate for this power to be delegated to the chief executive and the general manager of MSQ because it creates consistency with the general policy underlying the provisions of TOMSA and the function cannot be practically administered otherwise.

10. Clauses 66 to 76 - *Extend harbour masters' powers to give directions to ensure safety - Legislative Standards Act 1992 s.4(3)(a)*—administrative power sufficiently defined and subject to review.

A harbour master's powers to give directions under part 7 division 2 of the Act may only be exercised if the harbour master considers it necessary to ensure safety, having regard to the effectiveness and efficiency of the Queensland maritime industry. The amendments to the division continue to be subject to these limits.

The proposed s.87B will enable a harbour master to give a direction to a ship to which the Act applies (refer TOMSA s 11) and in particular if the harbour master believes a marine incident has happened or is likely to happen. Amendments to ss.89, 92, & 93 will also extend the harbour master's powers under those sections, which are currently limited to pilotage areas, to areas in which the harbour master believes a marine incident has happened or is likely to happen.

It is appropriate that a harbour master should be able to give a direction to a ship to which the Act applies, and which is therefore subject to safety obligations, whether or not it is within a pilotage area, if the giving of the direction may prevent a marine incident occurring and potentially save lives and prevent harm to the marine environment. Harbour masters are master mariners appointed by MSQ because of their experience with a wide range of ships and environments, including local experience of the conditions in the waters of which they are in charge. Harbour masters have access to ship movement information and about current hazards to navigation. A harbour master is therefore the best person to give overall direction to shipping to ensure safety and protection of the marine environment.

It is not possible for the legislation to set out the criteria for the making of decisions by harbour masters in relation to marine safety because the myriad of circumstances, weather conditions and maritime experience cannot be easily defined in legislation. Harbour masters are best placed to make these decisions and give directions on a case-by-case basis due to their status as experts in their field with the appropriate technical knowledge and experience.

All decisions made by a harbour master are subject to review. If no specific review provision is set, then part 16 s.203 (Appeals) under TOMSA applies.

11. Clause 75 – *Harbour master may carry out direction - Legislative Standards Act 1992 s.4(2)(a)*—sufficient regard to the rights and liberties of individuals

S.93(4) may be considered a breach as it may affect the rights and liberties of a person whose ship is damaged as a result of an act of a harbour master and their right to be compensated. The wording of the subsection is the same as is currently in the Act, and it continues to keep the State liable for damage or injury, in addition to the owner or master of the other ship attached to it, and does not prevent recovery of damages.

The capacity for the State to recover expenses of carrying out a direction remains, but is updated to apply to the amended sections.

All decisions made by a harbour master are subject to review. If no specific review provision is set, then part 16 s.203 (Appeals) under TOMSA applies.

12. Clause 77 – *Marine incidents must be reported - Legislative Standards Act 1992 s.4(3)(h)*—confer immunity from proceeding or prosecution only with adequate justification.

The amendment merely provides an example of what may be a reasonable excuse for a person not reporting a marine incident within the stipulated timeframe and is an appropriate defence to liability. The amendment does not confer immunity but allows for a genuine reason to be taken into account when it is impossible to comply strictly with the legislation.

13. Clause 79 - *Provide protection from liability for persons providing services to a Board of Inquiry - Legislative Standards Act 1992 s.4 (3) (h)*—confer immunity from proceeding or prosecution only with adequate justification.

In accordance with a recommendation by a previous Board of Inquiry (BOI), it is proposed that persons providing services to a BOI, whether or not they are public servants, should be protected from civil liability for acts or omissions done honestly and without negligence. The liability would in such circumstances attach to the State.

The benefit of ensuring that BOIs may conduct inquiries into marine incidents fully and fairly justifies the provision of the protection to all persons involved in the conduct of an inquiry. All staff working for a BOI should be able to execute their duties fearlessly without concern for loss of personal assets if sued. The overriding condition for the immunity of acting honestly and without negligence is lower than the existing provisions for other persons appearing before or working for a BOI, such as BOI members because their positions are akin to judges and therefore would be entitled to greater immunity. It is also in accordance with general principles of vicarious liability by which an employer is responsible for the acts of their employees.

14. Clause 82 - *Extend shipping inspectors' power to give directions when life may be endangered - Legislative Standards Act 1992 s.4(3)(a)*—administrative power to be sufficiently defined and subject to review.

S.171 empowers a shipping inspector to give certain directions if the shipping inspector believes on reasonable grounds that life may be endangered because a ship is not safe, or cannot be operated safely. Shipping inspectors are appropriate persons to give directions on a case-by-case basis due to their status as experts in their field with the appropriate technical knowledge and experience. The proposed amendment extends the power in two ways. A direction will be able to be given to the owner, the master, or a person who appears to be the ship's master, rather than only to the master. This will ensure that a valid direction may be given to, for example, the owner of an unsafe ship that is at a berth and un-crewed. A direction will also be able to be given to require a ship to remain at a place, rather than only at an anchorage, berth or mooring. This will enable a valid direction to be given to keep an unsafe ship on a slipway or hardstand.

The amendment is justified because of its potential to prevent costly marine incidents occurring and potentially save lives and prevent harm to the marine environment. Additionally, a person whose interests are affected by such a direction has a right to a review of the decision as part 16 s.203 (Appeals) of TOMSA applies.

15. Clause 83 - *Extend shipping inspectors' power to give directions that a ship be surveyed - Legislative Standards Act 1992 s.4(3)(a)*—administrative power sufficiently defined and subject to review.

The amendment to s.172, which empowers a shipping inspector to direct that a ship be surveyed and order repairs, extends the operation of the section to allow a direction to be given to the owner as well as the master. It does not change the types of directions that can be given or give shipping inspectors additional powers.

It is appropriate in the interests of marine safety that a direction involving the expenditure of money should be able to be given to the owner of the property. It is also justified because often there is no "master" of a ship, for instance if a ship has been on-sold, or if it is not being used. Under the current s.172 this direction can be given only to the master of a ship.

Additionally, a person whose interests are affected by such a direction has a right to a review of the decision as part 16 s.203 (Appeals) of TOMSA would apply.

16. Clause 84 - *Provide shipping inspectors with a power to give directions in relation to an unseaworthy ship - Legislative Standards*

*Act 1992 s.4(3)(a)*—administrative power to be sufficiently defined and subject to review.

The intention of the proposed new section is to empower shipping inspectors to attach a written notice to a ship declaring it unseaworthy and directing that it not be operated except in an approved way. Shipping inspectors are appropriate persons to assess seaworthiness on a case-by-case basis due to their status as experts in their field with the appropriate technical knowledge and experience. Shipping inspectors under the existing legislation already exercise similar powers. It is not possible to define criteria for determining seaworthiness in the legislation because it must be assessed on a case-by case basis.

A copy of a written notice declaring a ship to be unseaworthy must be given to the owner or master, if known, who may be directed to remove the ship from Queensland waters. If the owner or master is not known, the ship may be dealt with under s.175A (removing abandoned property).

It would be a breach of the safety obligation for the owner or master of such a ship to operate the ship.

The amendment is justified as the new section is to enable MSQ to take preventative action to address the safety issues associated with the large number of unseaworthy and derelict ships in Queensland waters. The amendment will work to prevent marine incidents from occurring and potentially save lives and prevent harm to the marine environment.

All decisions made by a shipping inspector are subject to review. If no specific provision is set, then part 16 s.203 (Appeals) of TOMSA would apply.

17. Clause 85 - *Extend shipping inspectors' power to seize and remove abandoned property to lost, abandoned or stranded ships - Legislative Standards Act 1992 s.4(3)(b)*—is consistent with natural justice.

It is proposed to extend the existing power to seize and remove abandoned property in Queensland waters to lost, abandoned or stranded ships in or on land adjacent to Queensland waters. Under the existing provisions, a seizure notice must be attached to the ship and published for 28 days. Under the amendment, the 28 day period may be waived if the shipping inspector is satisfied on reasonable grounds that the property or ship is or may become a hazard to ships or navigation, or may cause damage to the environment. The section

provides that the balance of the proceeds of sale after a public auction, and after payment of expenses, is payable to the owner.

The amendment is justified because in situations where a ship has become, or is likely to become a danger to life, a navigation hazard or threat to the marine environment, the owner has clearly not taken seriously their responsibilities to the marine environment and safety, and in such cases, past experience has shown that it is likely that the owner will not take action to remedy the situation. The marine environment could be put at severe risk without this power. In these cases, such as with the MV *Karma* which grounded in November 2003, the State has to step in and take responsibility to minimise danger and damage.

In such cases, the potential immediate damage to the marine environment and the need to take swift action outweighs the need to inform the owner of the proposed action. To minimise the effects on the owner of a ship, the shipping inspector is required to publish a notice in a newspaper about seized property. The owner can claim the abandoned property within 28 days of the notice. The decision of a shipping inspector is also subject to the appeal provisions in part 16 (appeals) of TOMSA.

18. Clause 87 - *Secure compliance with the Act through undertakings and enforcement orders - Legislative Standards Act 1992* s.4(2)(a)—sufficient regard to the rights and liberties of individuals.

The intention of the proposed compliance scheme is preventative and it creates a new regime, striking a balance between prosecuting offenders and providing an opportunity to work with people to find positive outcomes. MSQ seeks to ensure marine safety by working with the marine industry to prevent breaches of the Act before they occur. The scheme empowers the general manager to seek an undertaking from a person if there are reasonable grounds for believing the person has breached or will breach the Act. The scheme is based on similar provisions in the *Environmental Protection Act 1994*.

The potential breach of an FLP is that there is a capacity to effect future acts of persons. (s.183F). However this is justified because the powers can only be enlivened when the threshold in s.183C (1) is satisfied.

The scheme also identifies certain existing powers under which a person may be directed or required to do something (notice offences).

An application may be made to the District Court for an enforcement order to secure compliance with an undertaking, or in relation to a notice offence. The court may only issue an order if it is satisfied there has been non-compliance, or that there will be non-compliance unless the order is made. Breaching an enforcement order made by the court is a new offence against the Act.

The amendment and powers are justified because it is MSQ's experience that persons who own unseaworthy ships are highly likely to ignore directions and that the ships they own have the potential to cause major environmental harm or serious marine incidents. For example, the owner of the MV *Karma*, which grounded off Agnes Water in November 2003, ignored directions from MSQ to remove the ship. The only option was to prosecute for non-compliance with directions, which took several months. Meanwhile, the derelict ship had to be dealt with by the State at a cost of over \$300 000.

With the extra weight that a court order gives, and a potentially high penalty of 500 penalty units (currently \$37 500) or one year's imprisonment, the likelihood of compliance with directions is greater.

19. Clause 91 – *Licence disqualification, cancellations and suspensions - Legislative Standards Act 1992 s.4(2)(a)*—sufficient regard to the rights and liberties of individuals.

These proposed new provisions are a modified version of the *Transport Operations (Road Use Management) Act 1995*. The potential breach of an FLP is that it takes away a person's right to drive a ship, which may have an impact on their employment or recreation. The provisions are justified because they provide a similar scheme to that which applies to motor vehicle licences and provides a court with the discretion to disqualify, cancel or suspend a marine licence in appropriate cases in the interests of marine safety. This is a judicial power, not an administrative one. The principles that apply are consistent with natural justice because they allow a person to present their case on its merits. In appropriate cases a restricted licence can be issued. There is an accompanying regulation making power.

In appropriate cases, as set out in the division, a person can at the time of the conviction apply for a restricted licence to operate a ship. There is also a capacity to apply to a court for a variation of a restricted licence, which could be utilized for instance if a person's hours of employment change.

Additionally, the proposed new s.204 of the Act provides a specific right to appeal against a disqualification.

These provisions will commence by proclamation after a period of notice and education presented to the courts and the maritime community about their implications.

20. Clause 92 - *Provide protection from liability for disclosures about breaches (whistleblower's protection) - Legislative Standards Act 1992 s.4(3)(h)*—confer immunity from proceeding or prosecution only with adequate justification.

To encourage persons to come forward to report offences against the Act, it is proposed to provide protection from civil or criminal liability for making a disclosure about an offence to an official of MSQ. The part also confers a civil right of action on a person in respect of a reprisal taken against them for the disclosure. The proposal is modeled on the *Whistleblowers Protection Act 1994*.

The amendment is justified because it is a proven means of providing an incentive (as used in the aviation industry) to encourage persons within the industry, who are best placed to observe breaches, to come forward without fear of recriminations or reprisal. Even a minor breach of safe practices has the potential to cause substantial harm, injury or loss of life and the purpose of TOMSA is clearly to regulate the marine industry to ensure safety. Persons disclosing information are not provided with immunity for their own illegal acts. Immunity is only in relation to the disclosure. There is a significant public interest in ensuring marine safety for the whole boating community and this provides adequate justification for the limited immunity to the whistleblower.

21. Clause 92 - *Review of and appeals against particular decisions - Legislative Standards Act 1992 s.4(3)(a)*—administrative power sufficiently defined and subject to review.

It may be perceived that the amendments proposed limit a person's right to appeal against a decision made under the Act by which they are affected. However, the proposed amendment provides comprehensively for appeals to be made against decisions made under the Act, subject to a few exemptions contained in s.203D of the amendment. These exemptions are identical to those contained in the current Act at s.203(3). The amendment brings the appeal provisions for decisions made under the TOMSA in line with

other transport legislation. It provides for staged review and appeals consistent with the *Transport Planning and Coordination Act 1994*.

22. Clause 96 – *Pilotage fees, conservancy dues and related matters – Legislative Standards Act 1992 s.4(3)(k)* — is unambiguous and drafted in a sufficiently clear and precise way.

The proposed amendment relates to conservancy dues. The amendment makes it clear that conservancy dues may not always relate to a service provided and are levied on all relevant ships, and that they are not an excise, which would be beyond the legislative competence of the Queensland parliament.

23. Clause 97 - *Limit MSQ's liability in relation to issuing of consents for the holding of aquatic events - Legislative Standards Act 1992 s.4(3)(h)*—confer immunity from proceeding or prosecution only with adequate justification.

The section clarifies MSQ's role in relation to granting consents to hold aquatic events. MSQ is responsible for granting a permit and imposing reasonable and relevant conditions in the interests of marine safety. Permits may not authorise non-compliance with the regulation or the Act.

Permits are granted on a range of conditions which include that the event organisers must hold public liability insurance.

MSQ is not responsible for supervising the holding of the event or activity. The amended section will provide that the State and any person who grants a permit for an aquatic event is not liable in relation to the holding or conduct of the event or activity other than in relation to the granting of the consent.

The amendment is justified because the State will continue to be liable if it is negligent in granting a permit for an aquatic event and harm or damage is caused, but as the State has no role in the conduct or holding of the event, it is inappropriate for liability to attach to the State for something over which it has no control. The risk for the actual event should be borne by the organisers or the insurers to whom a premium has been paid.

24. Clause 98 - *Limit MSQ's liability in relation to approving the establishment of a buoy mooring - Legislative Standards Act 1992 s.4(3)(h) and s.4(3)(g)*—confer immunity from proceeding or prosecution only with adequate justification and does not impose obligations retrospectively.

The section clarifies MSQ's role in relation to granting approvals for buoy moorings. MSQ is responsible for granting an approval for establishing a buoy mooring at a location and other matters relating to the identification and use of the buoy mooring. The approval may be granted subject to reasonable and relevant conditions.

MSQ is not responsible for approving the structural integrity of the buoy mooring, or for other matters in relation to the buoy mooring's establishment or maintenance. The amended section will provide that MSQ is not liable in relation to a buoy mooring's establishment or maintenance other than in relation to the approval of the location of the buoy mooring.

The amendment is justified because MSQ's only role is to ascertain the safe placement of the buoy in consideration of navigational safety. The adequacy of the structure and its maintenance are solely the responsibility of the buoy mooring holder. It is therefore unreasonable to expect the State to act as an "insurer" for any negligence of buoy mooring holders.

Although the retrospective application of this provision is not beneficial to people, there is no legitimate expectation that the State is responsible for anything other than approving the location of buoy moorings. There can be no suggestion that individuals have relied on legislation as providing for the structural integrity, standard of workmanship or maintenance of buoy moorings. The amendment removes any uncertainty that the State has a role in anything other than approving the location of the buoy mooring.

25. Clauses 101 and 104 - *Remove transitional provisions in particular about standard practice instructions and speed boat licences - Legislative Standards Act 1992 s.4(3)(g)*—not adversely affect rights or liberties or impose obligations retrospectively.

Standard Practice Instructions issued by the former Marine Board may no longer be relied upon by new ships with respect to registration, certificates of survey or safety equipment requirements.

The transitional provision in s.224 is therefore no longer required. The ability to reference the Standard Practice Instructions by certain ships to which they once applied is preserved by ss. 65, 70, 227, and 228 of the regulation. The omission of s.224 of the Act will not have a retrospective effect and therefore there is no breach of this FLP.

The recognition of speedboat licences issued under the former Act and recreational ship master's licences issued under this Act, as if they

were recreational marine driver's licences with an unlimited term will be continued by a new s.244 which will replace part of the omitted s.224.

## **TORUM**

These amendments are expected to enhance road safety for the benefit of the entire community. While the immediate suspension provisions will restrict the charged person's ability to drive on Queensland roads, this restriction is justified in the circumstances set out in the amendments – that is, where the person has been charged with a high alcohol limit drink driving offence, with failing to provide a specimen for analysis, with repeated drink driving offences or with dangerous operation of a motor vehicle with a circumstances of aggravation that the person was adversely affected by alcohol and the person was over the high alcohol limit.

## **TOPTA**

These amendments do not breach fundamental legislative principles.

## **TIA**

Section 4(3)(b) of the *Legislative Standards Act 1992* provides that the legislation must be consistent with the principles of natural justice. The amendments proposed to the *Transport Infrastructure Act 1994* provide for additional flexibility about the timing of a local government tollway declaration. This means that a local government tollway declaration may be given in respect of a range of land tenures including some land required for a local government tollway which has not, at that time, been acquired by a local government. In this case, the existing review mechanisms under the *Acquisition of Land Act 1967* and *Judicial Review Act 1991* will apply if there is any doubt about the resumption process managed by the constructing authority (local government). The proposed amendments do not remove this right.

The proposed compliance and enforcement framework also provides certainty about the consequences of a breach of conditions. The regime provides a staged process and appeal rights. It ensures that the principles of natural justice are maintained and sets out a clear process which is fair and reasonable.

The amendments do not breach the fundamental legislative principles.

## **Consultation**

### **MSQ Act, TOMPA and TOMSA.**

Complete inter-departmental consultation has occurred on the proposed Bill. There has also been consultation with relevant stakeholders on specific provisions in the Bill. These include consultation with all registered owners of ships greater than 15 metres in length, maritime industry organisations such as the Queensland Boating Industry Association and port authorities throughout the State. There has also been consultation with relevant local councils and interstate maritime authorities.

The Marine Licence Internet Verification Service aligns with a number of other Queensland Transport and Government transactions that are available on the Internet- e.g. Change of Address and replacement vehicle and ship registration labels and certificates. On that basis broad consultation is not required.

Additionally broad consultation has been undertaken by MSQ recently regarding the introduction of a personal watercraft licence (PWCL) with industry and the public.

### **TIA**

For the Port of Brisbane amendments consultation has occurred with Queensland Treasury, Department of Natural Resources, Mines and Water, Department of Local Government, Planning, Sport and Recreation, Brisbane City Council and Port of Brisbane Corporation.

For clarification and amendment of the tolling legislation, consultation has been undertaken with Queensland Treasury, Office of the Coordinator General, Department of Local Government Planning Sport and Recreation, Queensland Office of Parliamentary Council, Department of Justice and Attorney-General, Department of Natural Resources Mines and Water, the Department of the Premier and Cabinet, Queensland Motorways Limited, and Brisbane City Council.

### **TOPTA**

Consultation has been held with the Limousine Association of Queensland and the Department of Tourism, Fair Trading and Wine Industry Development.

### **TORUM**

Issues relating to alcohol and young driver safety were discussed at a Road Safety Summit held on 21 and 22 February 2006. There was a wide range

of community and industry representation at the summit and there was broad-ranging support for measures to reduce the incidence of drink driving, particularly by repeat offenders.

As the major advocacy body for motorists in Queensland, the Royal Automobile Club of Queensland (RACQ) has been consulted on these specific changes and is supportive of them.

### **All Provisions**

In addition Queensland Treasury, the Department of the Premier and Cabinet, and the Department of Justice and Attorney General have been consulted on all provisions of the Bill.

## **Notes on Provisions**

### **Part 1                      Preliminary**

#### **Short Title**

**Clause 1** states that the short title of the Bill is the *Maritime and Other Legislation Amendment Act 2006*.

#### **Commencement**

**Clause 2** provides that sections 13, 44, 91, 92, 95, 105 and Part 5 division 3 of the Bill will commence on a date to be fixed by proclamation.

### **Part 2                      Amendment of MSQ Act 2002**

**Clause 3** states that the Act amended in this part is the MSQ Act 2002.

**Clause 4** amends section 4 (Purpose of Act) by removing the words 'ship-sourced pollution' and inserting the words 'ship-sourced pollution and related matters'. This amendment establishes that the purpose of MSQ is, *inter alia*, to undertake particular functions in relation to ship-sourced pollution and related matters. This means that MSQ can take action not

only in relation to ship-sourced pollution, but also to broader related matters, such as taking action to deal with abandoned and wrecked ships.

**Clause 5** amends section 8 (Functions and powers of MSQ) by inserting an additional power at sub section 8(1)(a)(iv) to provide that MSQ can approve entities to conduct training **and examinations** for issuing licences under the Act. Previously this power was limited to approving entities to conduct training programs. This amendment provides clarity that part of a training program could include an examination.

Clause 5 also inserts a new sub-section (x) which provides that it is a function of MSQ to monitor and manage abandoned, stranded, sunk or wrecked ships, and unseaworthy ships. This amendment at sub-section (x) is associated with the amendment at clause 4, and an amendment to TOMSA.

**Clause 6** omits the existing section 11(5) (Functions and powers of general manager) from the Act. This removes the sub-section dealing with the power of the general manager to delegate his/her powers under this or another Act. This amendment allows for the insertion of a new section 11A.

**Clause 7** inserts a new section 11A – (Delegation of powers of general manager). This amendment details that the general manager may delegate a function or power of the general manager under this or another Act to an appropriate person. The section then goes on to permit delegations to be sub delegated. In considering the original delegation, the general manager can determine which functions and powers are suitable for sub delegation thereby ensuring continued judicious exercise of these functions and powers.

This amendment was made to enable persons to whom a function or power was delegated, to then sub-delegate that function or power to an appropriate person. Appropriate persons are persons such as employees of MSQ, authorised officers under TOMPA or shipping inspectors under TOMSA. This amendment will enable the more efficient and effective delivery of the statutory functions of MSQ. MSQ is a highly regionalised organisation and it is necessary for effective business operations, to enable appropriately experienced or qualified persons to undertake certain functions of the general manager, such as conducting examinations for commercial marine qualifications.

## **Part 3**                      **Amendment of *Transport Operations (Marine Pollution) Act 1995***

**Clause 8** states that the Act amended in Part 3 is the *Transport Operations (Marine Pollution) Act 1995* (TOMPA).

**Clause 9** is an administrative amendment that inserts a reference to section 46 (Words and expressions used in Annex IV to MARPOL and this part) of the Act into section 5(2)(b) (Words and expressions used in MARPOL and this Act) to make it clear that the Act's sewage provisions are to be interpreted in accordance with MARPOL except to the extent provided for in section 46.

**Clause 10** is an administrative amendment that amends section 61 (Discharge of pollutant into coastal waters) by correcting a grammatical error to provide consistency with the rest of the Act which uses the expression 'coastal waters'.

**Clause 11** amends section 62 (Defences to discharge offence). This clause omits the current section 62(b) and replaces it with a new section 62(1)(b) that narrows the existing defence for discharges that occur because of a fault in the transfer apparatus. The new section 62(1)(b) provides a defence for a pollutant discharge during a transfer operation only if the owner, master or crew member charged with committing the offence did not, or could not reasonably have known, that the transfer apparatus causing the discharge was faulty.

This amendment narrows the current defence and stems from incidents where defensible discharges occurred during transfers where the transfer apparatus was not maintained or serviced. This amendment would preclude the availability of the defence when negligence or failure to maintain transfer apparatus is within the knowledge of the master, owner or crew member, for instance it may be apparent from a cursory visual examination that a transfer apparatus is damaged.

Clause 11 also inserts a new section 62(2) which provides that the owner or master must prove that they took all reasonable precautions to find out from all members of the ship's crew whether the transfer equipment was faulty.

A new section 62(3) provides a definition of 'fault' (this relates to transfer apparatus only) to specify that the defence does not apply if the transfer

apparatus was defective because of an event or lack of maintenance while the transfer apparatus was under the direction of the master of the ship.

**Clause 12** amends the heading of section 63 (Restrictions on transfer operations at night) to be (Restrictions on transfer operations for particular ships at night). The current section requires all ships, irrespective of length, to obtain written permission from an authorised officer to transfer a pollutant between sunset and sunrise. Technically this means that even a person filling a 20 litre jerry can between sunset and sunrise should obtain written permission from an authorised officer. This is onerous on boat owners and authorised officers and was not the desired outcome when this provision was first introduced. The amendment sees the requirement changed to apply only to ships over 15 metres in length overall. Ships of this size and over present a much greater potential pollution risk.

Sub section 63(2) to (4) are renumbered as a result of this amendment.

**Clause 13** amends section 67A (Ship's owner to have insurance) by omitting the existing section 67A (1) which requires compulsory insurance over 35m and inserts a new section 67A (1) which reduces this threshold to all ships more than 15m in length overall.

This amendment is designed to address the growing number of larger abandoned ships that cost the State substantial amounts for the clean up of pollutant discharges and the cost of removal of such ships in difficult salvage situations.

While some ships may be seaworthy, they cannot obtain insurance because of their construction materials, for example ferro cement ships. The amendment therefore provides a capacity to make a regulation that grants an exemption from the requirement to have insurance for certain ships, but only on a case by case basis.

Exemptions will only be made when insurance cannot reasonably be obtained or kept in force. The exemption will be limited by imposing such conditions as are reasonable for the granting of the exemption, for example, limiting the amount of pollutant that can be carried on board or making the exemption contingent upon the implementation of a risk management plan for the ship.

There is also a transitional provision which provides 12 months for owners of ships over 15m to obtain suitable insurance. There will be a consequential amendment to follow to the *Transport Operations (Marine Pollution) Regulation 1995* to provide for such exemptions.

**Clauses 14–28, 30–31, 33-34**

The following amendments drafted in clauses 14 – 28 (except clause 26) all relate to changes necessary due to removal of the devolution of oil spill response in ports.

Prior to the commencement of MSQ in October 2002, port authorities had responsibility for responding to oil spills within their port limits. With the creation of MSQ, it was agreed with port authorities that this responsibility would become MSQ's. This made a number of minor changes necessary to TOMPA to remove references to port authorities.

**Clause 14** omits the current section 69 (Authorised officers subject to directions from general manager) which provides that an authorised officer is subject to direction by the general manager or the chief executive of a port authority, depending on who has appointed the authorised officer and inserts a new section 69 to remove references to the chief executive of a port authority. This reflects the new arrangements whereby all appointments of authorised officers are to be made by the general manager.

**Clause 15** amends section 70 (Powers of authorised officers). Sections 70(2) and (3) are omitted to remove references to port authorities in relation to the devolution of oil spill response in ports. Port authorities will no longer be responsible for this response and therefore this reference is no longer valid.

**Clause 16** amends section 71 (Limitation on powers of authorised officer). The existing section 71(1) (c) is being omitted and replaced with a new section 71(1) (c) which enables the general manager of MSQ to limit, by notice, the powers of an authorised officer. This amendment removes the reference to port authorities and reflects the present arrangement for limiting the powers of authorised officers.

**Clause 17** amends section 72 (Appointment of authorised officers). This amendment removes references to port authorities' capacity to appoint authorised officers under the Act. As a consequence port authorities will no longer appoint authorised officers. All authorised officers will be appointed by the general manager of MSQ, who may still appoint employees of port authorities or other persons who may be prescribed in the regulation, such as agents of, or contractors to port authorities, as authorised officers.

**Clause 18** amends section 73 (Authorised officer's appointment conditions). This amendment omits the reference to 'administering executive', which is currently defined to mean the chief executive of the relevant port authority for matters devolved under the Act and replaces it with 'general manager', being the general manager of MSQ.

**Clause 19** amends section 74 (Authorised officer's identity card). Sections 74(1) and (5) are amended to replace 'administering executive' with 'general manager'. Sections 74(3) and (4) are being omitted and sections 74(5) and (6) renumbered. There is a related transitional provision at clause 44.

**Clause 20** amends section 76 (Protection from liability). The amendment removes the reference to liability attaching to a port authority. The amendment does not change the criteria for when the protection from civil liability is available, which is only in circumstances when the authorised officer acts honestly and without negligence. In such circumstances the liability attaches instead to the State. This is appropriate because the authorised officer will have been appointed by the State following the commencement of these amendments. There is a related transitional provision at clause 44 for this section which continues liability of a port authority for acts or omissions done before the commencement of this amendment.

**Clause 21** amends section 82 (Power to seize evidence from places). Section 82(5) is amended to replace references to 'administering executive' with 'general manager'.

**Clause 22** amends section 83 (Power to seize after boarding ship). Section 83(3) is amended to replace references to 'administering executive' with 'general manager'.

**Clause 23** amends section 92 (Purpose of division) Division 6 (Response action to discharge and authorised officer's emergency powers) to remove reference to a port authority.

**Clause 24** amends section 93 (State has prime responsibility for directing emergency response). The amendment clarifies that the State may enter into an agreement with a port authority about discharge responses in port limits, whereupon the port authority has responsibility for 'first strike' response to oil spill response within port limits on behalf of the State. All port authorities have entered into such agreements. 'First strike' response means an initial response for larger spills, but for smaller spills it may be all that is required to clean up the oil or prevent harm to the environment.

**Clause 25** amends section 94 (Emergency declaration may overrule local law) to remove a reference to a port authority. The amendment does not affect the Minister's ability to override a local law if that local law is inconsistent with, or hinders the State's response to a serious discharge of pollutants into coastal waters.

**Clause 26** omits the existing sections 105 (False, misleading or incomplete documents) and 106 (False or misleading information) and replaces them with new sections 105 (False or misleading statements) and 106 (False or misleading documents). The revised sections have been inserted to overcome the Scrutiny of Legislation Committee's objections to similar provisions in other legislation on the ground that they abrogate a person's right to silence.

**Clause 27** amends section 110 (Compensation) to remove reference to a port authority and insert the words 'from the State' after 'compensation'. The amendment makes the State responsible for compensation to persons who incur loss or expense because of the exercise or purported exercise of a power under the Act. There is a related transitional provision at clause 44 which preserves claims until the commencement of this amendment against the party responsible for the loss or expense.

**Clause 28** amends section 111 (Definitions for part). This section provides definitions for Part 13 of TOMSA (Discharge expenses). This amendment renumbers subsections following previous amendment and clarifies that after the removal of the devolution to port authorities, compensation under section 110 is payable by the State and not a port authority, subject to the transitional provision referred to in clause 27 above.

**Clause 29** (General manager to set amounts for costs and expenses relating to definition of discharge expenses). This new section provides that the general manager of MSQ may, by gazette notice, set costs relating to expenses incurred by the State in a pollution response. The scope of the costs to be gazetted is limited to quantifying those costs which are already recoverable under the Act as discharge expenses, and will reduce the time for all parties associated with processing claims after a discharge incident. Fees are not to be set on an incident by incident basis, but for a set period of time, and will be regularly updated to reflect current actual costs.

**Clause 30** amends section 115 (Recovery of discharge expenses). This amendment replaces references to 'administering authority' with 'general manager'. This means that while the expenses incurred by the State or a port authority in responding to a marine pollution event can be recovered, only the general manager may make a demand for payment of such expenses. The amendment continues the regime when port authorities incur discharge expenses on their own behalf or on behalf of the State; those costs will be recoverable from the polluter as 'discharge expenses'.

**Clause 31** amends section 116 (Appeals). The amendment replaces a reference to 'administering authority' with 'general manager' and does not

change the existing jurisdictional arrangements for appeals for persons affected by the recovery of discharge expenses.

**Clause 32** inserts a new Part 13A (Securing compliance with Act). The establishment of this new part is considered necessary to ensure a high level of compliance with the significant provisions of TOMPA. MSQ has on several occasions issued directions to persons under the Act which have not been complied with and which have led to a ship becoming involved in a marine incident or causing pollution of the marine environment. This amendment comprises several sections and sets up a regime whereby a prescribed applicant (being the chief executive, the general manager or the marine pollution controller) can require a person to enter into a voluntary undertaking, or apply to the District Court for an undertaking to be entered into, or for an enforcement order requiring compliance with a direction given under the Act that has not been carried out. In the absence of the powers provided by this new part, the only recourse is for a prosecution against the non-complying person, which may take several months to commence and would in any event leave the direction not complied with, in which case the State may have to carry it out at great expense. Examples of such an undertaking could be for a person to agree to move a ship to a slipway for repairs, or to remove pollutants that are onboard the ship or to not operate a ship that may pose a risk to the marine environment. If a person failed to comply with the undertaking, or if the general manager believes that the person will not comply with the undertaking, MSQ could apply to a court for an enforcement order. The capacity to apply to a court for an enforcement order for non compliance would add weight to the original direction given by MSQ and be an incentive for compliance.

Specific new sections include:

#### Division 2 Enforcement orders and interim enforcement orders

117A outlines that the purpose of this part is to provide for alternative ways of ensuring compliance with the Act including enforcement orders and undertakings.

117B provides the power to bring a request for an enforcement order or a request for the cancellation of an enforcement order before the District Court.

117C outlines the grounds on which the District Court may make an enforcement order.

117D outlines that if the District Court is undecided on a request for an enforcement order that the District Court may, by application from the State or on its own accord, issue an interim enforcement order.

117E outlines the matters about which an enforcement order can direct a person to do or not do in order to prevent or stop a contravention of a notice offence of the legislation from occurring. This section states that the District Court may direct a person to give a security bond to the State regarding a matter mentioned in an enforcement order and if a person does not comply with the order, part or all of this security bond may be forfeited to the State. This section establishes an offence for contravening an enforcement order or an interim enforcement order and sets the maximum penalty at 1000 penalty units or one year's imprisonment. This penalty is consistent with the penalties for other serious offences under the Act that may result in substantial damage to the Queensland marine or coastal environment.

117F outlines the powers of the District Court in making enforcement orders or interim enforcement orders and includes the power to cancel or amend an enforcement order or interim enforcement order.

117G makes it clear that a person who is affected by an enforcement order or an interim enforcement order may not claim costs or damages against the State in relation to the order.

### Division 3 Undertakings

117H establishes that where the general manager believes, on reasonable grounds, that a person has or will contravene the Act, that the general manager may by notice, request a person to give a written undertaking that the person will cease to or not commit the offence.

117I sets out other matters about which an undertaking can be sought.

117J establishes the grounds on which a person who has entered into an undertaking or the general manager may vary or withdraw such undertaking. This section also outlines the process that must be followed for the variation or withdrawal of an undertaking.

117K establishes that if the general manager reasonably believes a person has or will contravene an undertaking, that the general manager may make application to the District Court for an enforcement order.

117L requires the general manager to keep a register of each undertaking given and to make this register available free of charge for public inspection.

**Clause 33** amends section 118 (Evidentiary provisions). This amendment replaces references to 'administering authority' with 'general manager' where appropriate to reflect the removal of the devolution of oil spill response in ports.

**Clause 34** amends section 122 (How discharge expenses may be recovered). This amendment supports the amendment made at clause 30 where 'administering authority' is replaced with 'general manager' and allows for discharge expenses to be secured by making a demand against a security granted under section 115(3). This is a consequence of the removal of the devolution of oil spill response in ports.

**Clause 35** omits section 127 and inserts a new section 126A (Allegations of false or misleading statements or documents) and replaces section 127 (Court may make orders about rehabilitation, etc). The new section 126A has been inserted to overcome the Scrutiny of Legislation Committee's objections to similar provisions in other legislation on the ground that they abrogate a person's right to silence. This amendment is complementary to clause 26.

The new section 127 (Court may make orders about rehabilitation etc) includes provision for courts to apply a range of civil penalties in addition to pecuniary penalties. For example, in cases where a breach of TOMPA is proven, on application by the prosecution, a court may order the defendant to undertake a range of actions. Such actions could include conducting an advertising or education campaign to promote compliance with the Act, or to publish an apology, or put in place a system or modifying a ship to ensure compliance with the Act. Additional options available to a court include being able to direct that an activity in relation to a ship be started or stopped, or to direct that a person must not own or operate a ship without the consent of the general manager of MSQ.

The new section also establishes that discharge expenses, whether they were incurred in preventing a discharge, or in responding to an actual discharge, can be recovered if a person is convicted of an offence against the TOMPA or the TOMSA. An example of when this may be applicable is with a large ship, grounded on a reef, when a preventative response has been entirely successful and substantial costs have been incurred, but no offence against the TOMPA has been committed, but breaches of the TOMSA have occurred. In the absence of this new section, the discharge expenses would have to be recovered in separate civil proceedings. The amendment will allow them to be recovered in the same proceeding as any prosecution. The new section is subject to limitation of liability provisions under the law of the State or the Commonwealth.

The amendment is intended to allow for options other than pecuniary penalties to apply to breaches of TOMPA and to strengthen compliance with the Act by preventing pollutant spills and by the deterrent effect of the penalties under the Act. The application of such penalties is in addition to

the range of penalties available to a court under the *Penalties and Sentences Act 1992*.

**Clause 36** inserts a new Part 14A (Protection for whistleblowers). This new section outlines the way in which whistleblower protection will apply to persons reporting breaches of the TOMPA. The amendment is complementary to the *Whistleblowers Protection Act 1994* (WPA) and does not limit the application of that Act. The WPA does already allow for public interest disclosures in relation to TOMPA offences however the threshold for such a disclosure to be afforded the protections is 'a substantial and specific danger to the environment'. This high threshold could not always be met and it is important for all pollution discharges to be prevented or responded to. A small discharge of a pollutant such as diesel fuel in a sensitive environment can cause substantial harm. Similar provisions for public interest disclosures also exist in the *Biodiscovery Act 2004*, the *Guardianship and Administration Act 2000* and the *Commission for Children and Young People and Child Guardian Act 2000*.

Specific new sections include:

128A provides definitions of the terms 'disclosing person', 'official' and 'reprisal' as used throughout this part.

128B establishes that this part applies to a person other than a person who makes a disclosure under the *Whistleblowers Protection Act 1994*.

128C provides that a person is not civilly or criminally liable for information disclosed if the person honestly believes on reasonable grounds there is or was a contravention of the Act.

128D provides that the liability of a person disclosing information under this part is not affected because of the disclosure. This section does not limit the *Penalties and Sentences Act 1992*.

128E establishes that a person must not make a reprisal against another person who has disclosed information under this part.

128F establishes that a reprisal is a tort and that a person responsible for a reprisal may be liable for damages.

128G establishes that it is an offence for a person to make a false or misleading statement under this part and sets the maximum penalty at 200 penalty units. This penalty is consistent with similar penalties for providing false or misleading statements contained in the Act.

128H establishes that it is an offence for a person to provide a false or misleading document under this part and sets the maximum penalty at 200

penalty units. This penalty is consistent with similar penalties for providing false or misleading documents contained in the Act.

**Clause 37** omits Part 15, Division 1 (Administration – devolutions) which devolved powers under the Act to port authorities and is consequential to the removal of devolution of oil spill response in ports.

**Clause 38** omits part 15, division 2 heading (Delegations) and is a consequence of the removal of the devolution of oil spill response in ports.

**Clause 39** amends section 130 (Delegations by chief executive) and extends the meaning of 'powers' that may be delegated to include 'functions'. This amendment is administrative in nature and is complementary to an amendment to the *Acts Interpretation Act 1954*.

**Clause 40** omits sections 131 (Delegation by port authority's chief executive officer) and 132 (Delegation by general manager). These sections allowed delegations by the chief executive officer of a port authority and the general manager of powers under the Act. Delegations by the chief executive are no longer required and delegations by the general manager are covered by section 11A of the *Maritime Safety Queensland Act 2002*.

**Clause 41** amends section 133 (Regulation-making power) by replacing the reference to 'administering authority' with 'general manager' and is consequential to the removal of devolution of oil spill response in ports.

**Clause 42** amends Part 17 heading (Transitional provisions for Maritime Safety Queensland Act 2002). The heading requires amendment as the transitional provisions are no longer solely for the MSQ Act, but will also have to include transitional provisions as part of the *Maritime and Other Legislation Amendment Act 2006*.

**Clause 43** amends section 136 (Definitions for pt 20) to reflect changed numbering.

**Clause 44** inserts a new Part 17, Division 2. This new part and division allow for transitional provisions that will be necessary to implement the *Maritime and Other Legislation Amendment Act 2006*.

Specific transitional sections are:

143 creates a transitional provision that will ensure defences available up until the commencement of the new section 62 (Defences to discharge offences) for transfer operations continue to be available for offences alleged to have been committed before the commencement of the amended section 62.

144 establishes a 12 month transitional provision for the owners of ships between 15 and 35 metres to acquire the necessary insurance required under section 67A by not making it an offence not to have this insurance until one year after the commencement of section 67A. This transitional amendment will allow ship owners time to make suitable arrangements for insurance for their ships to ensure compliance with the Act.

145 establishes that on commencement of section 74 (see clause 19), a person who was appointed as an authorised officer by the chief executive of a port authority will stop being an authorised officer and will require their identity card to be forwarded to the general manager of MSQ. The general manager may reappoint the person as an authorised officer if necessary.

A maximum penalty of 40 penalty units (\$3 000) applies for failure to forward the identity card unless the person has a reasonable excuse. Examples of a reasonable excuse are set out in the section. This penalty is consistent with the existing penalty for not returning an identity card when a person ceases to be an authorised officer, such as if they were to leave the employ of MSQ. The section also states that a person's employment relationship with the port authority is not affected by the person not being an authorised officer appointed by the port authority.

146 provides protection from liability for port authorised officers and others and continuing liability for port authorities for any act or omission of the port authority before the commencement of section 76 (see clause 20).

147 provides that an order made under the existing section 127 continues to apply to an offence committed entirely before the commencement of the new section 127. It also provides that an enforcement order or an interim enforcement order cannot be made in relation to an offence committed entirely before the commencement of the new section 127.

148 continues delegations made by the general manager under section 132 (see clause 40) for 1 year from the commencement of section 132.

149 provides that the powers of a port authority appointed authorised officer exercised before the commencement of the section remain valid subject to a requirement that a subsequent component of the exercise of the power must be completed and written notice of the exercise of the power given to the general manager.

150 provides that port authorities continue to have prime responsibility for discharges that occurred immediately before the commencement of the amendments, unless the State has by signed notice assumed such responsibility (see clause 24).

151 provides that port authorities continue to have liability for valid claims for compensation arising before the commencement of the new section 111 (see clause 28).

152 provides that if a port authority has commenced the recovery of discharge expenses and the claim was not completed before the commencement of the new section 115 (see clause 30), the port authority may continue to recover the discharge expenses and any consequential appeal may be made against the port authority.

153 maintains the operation of section 118 (Evidentiary provisions) (see clause 33) to matters affected by the *Maritime and Other Legislation Amendment Act 2006*.

**Clause 45** amends the schedule (Dictionary) to include a number of new definitions for terms used throughout the act, including

- Convicted
- Disclosing person
- Division 3 undertaking
- Enforcement order
- Interim enforcement order
- Intervention direction
- Marine pollution controller
- Notice offence
- Official
- Port authorised officer
- Prescribed applicant
- Reprisal
- Territorial sea

These new definitions relate to the new provisions such as those relating to enforcement orders, undertakings and a number of clarifying definitions consequential to the *Maritime and Other Legislation Amendment Act 2006*.

## **Part 4**                      **Amendment of *Transport Operations (Marine Safety) Act 1994***

**Clause 46** states that the Act amended in this part is the *Transport Operations (Marine Safety) Act 1994* (TOMSA) ('the Act').

**Clause 47** omits section 4 (Definitions) and replaces it with a new section 4 that states that definitions are contained in a schedule to the Act.

**Clause 48** makes a minor clarifying amendment to section 5 (Meaning of certificate of compliance) which makes it clear that when 'builder' is referred to it means a 'ship builder'.

**Clause 49** amends section 10 (Meaning of ship) to support and provide clarity to amendments relating to abandoned and wrecked ships (see clause 5) and shipping inspectors' directions (see clause 82) being given in relation to a ship when it is not in the water. The new definition clarifies that the Act applies to all ships whether or not they are on water or on land, for instance on a slipway or a hardstand.

**Clause 50** inserts a new section 10A (Meaning of commercial ship, fishing ship and recreational ship and related provision) as these terms are now specifically referred to in the Act, whereas currently they are only referenced in the *Transport Operations (Marine Safety) Regulation 2004* (TOMPR). 'Commercial ship', 'fishing ship' and 'recreational ship' are defined as they are in the TOMPR. A new subsection provides for a regulation to be made in relation to deciding if a ship is used only for private recreation. The capacity to make such a regulation will assist MSQ to prevent the registration of ships inappropriately and may also assist boat owners in determining the appropriate registration for their ships.

**Clause 51** amends section 11 (General application of Act to ships) to extend the general application of the Act to all ships connected with Queensland wherever they may be, including outside of Queensland waters, and to all ships on Queensland intrastate voyages including while they are outside of Queensland waters. The effect of this amendment is to provide certainty that the Act is intended to have extraterritorial operation to relevant ships connected with Queensland. Queensland waters are three nautical miles seaward from the baseline (the coast) and internal waters. This amendment extends the application of the Act beyond that limit and puts it beyond doubt that the State has power to regulate relevant ships connected with Queensland which are operating at considerable distances

from the Queensland coast, such as Queensland registered long line tuna fishing ships, which may operate more than 200 nautical miles from the Queensland coast.

**Clause 52** inserts a definition into section 19 (Development of marine safety strategies) to make it clear that the term 'coordination plan' means a plan developed under the *Transport Planning and Coordination Act 1994*. The amendment does not alter the meaning of the section.

**Clause 53** is a minor clarifying amendment to section 34 (What mechanisms ensure safety) to provide clarity that the term 'builders' means 'ship builders'.

**Clause 54** amends section 40 (General safety obligation of ship designers and builders and marine surveyors about condition of ships) to clarify that the terms 'builders' means 'ship builders', and replaces the word 'person' in section 40(2) and inserts the words 'accredited ship designer, ship builder or marine surveyor'. This amendment corrects a drafting ambiguity and makes it clear that section 40(2)(a) and (b) apply to accredited ship designers, ship builders or marine surveyors and not a person injured in a marine incident.

**Clause 55** amends section 42 (Relationship between regulatory provisions and general safety obligations about the condition of ships). The amendment inserts the word 'general' before 'safety provision' in section 42(2)(a). This amendment corrects a drafting ambiguity and provides consistency with references to 'general safety obligations' throughout the rest of the Act.

**Clause 56** amends section 47 (Notice of proposal to prepare draft standard) to provide that the Marine Board be advised of proposals to prepare draft standards. Currently the provision only requires the Marine Board to be advised of the draft standard once it is actually prepared which effectively limits the advisory role of the Marine Board. The amendment will ensure that the Marine Board is engaged at the earliest stages of the development of marine standards.

**Clause 57** amends section 56 to insert the words 'as a commercial ship, fishing ship or recreational ship' after the words 'the ship'. The amendment is intended to clarify that registration must suit the type of ship and its intended use. For example, a recreationally registered ship cannot be used for commercial purposes.

**Clause 58** replaces section 57(2) and inserts new subsections (3) and (4) to complement the amendment of section 56. It clarifies that the owner or master of a ship must not operate that ship in contravention of its

registration type or in contravention of its registration conditions. For example, a recreational ship cannot be used as a commercial ship. The current maximum penalty of 200 penalty units (currently \$15 000) continues to apply for a master or owner who operates a ship in contravention of its registration type and this penalty applies to a breach of each subsection.

**Clause 59** inserts a clarifying definition into section 60 (Regulation may require licences) to put it beyond doubt that a licence includes a certificate of competency, service or recognition and a permit.

**Clause 60** amends section 62 (Grant, amendment and renewal of licences) to provide for the chief executive or general manager to approve an entity to conduct examinations and to conduct training programs. It had previously been considered that the power to approve an entity to conduct training also conferred the power to conduct examinations as part of that training. The amendment puts this beyond doubt.

**Clause 61** inserts a note into section 63 (Cancellation, suspension and amendment of licences) which flags the new powers of a court to disqualify or cancel a marine licence which are contained in clause 91 of this Bill.

**Clause 62** amends section 64 (Objects of division) to make it clear that when 'builders' is referred to it means 'ship builders'.

**Clause 63** amends section 65 (Regulation may provide for accreditation) to make it clear that when 'builder' is referred to it means a 'ship builder'.

**Clause 64** amends section 79 (Delegation by harbour master) to make it clear that delegated powers are intended to include functions of the delegator. This is an administrative amendment and is complementary to an amendment to the *Acts Interpretation Act 1954*.

**Clause 65** amends section 80 (Identity cards) to make it clear that delegated powers are intended to include functions of the delegator. This is an administrative amendment and is complementary to an amendment to the *Acts Interpretation Act 1954*.

**Clause 66** amends section 86 (General limitation on harbour master's power to give directions under subdivision) to set the threshold for when a harbour master can give a direction (to ensure safety) and to whom a direction may be given. The amendment inserts the word 'reasonably' (considers it necessary) as a criteria for enlivening the harbour master's power to give a direction. The amendment also removes the references to directions and notices given to a crew member being deemed to have been

given to the master, as the equivalent of subsections (3) and (4) are to be inserted into the new section 86A (see clause 67).

**Clause 67** inserts a new section 86A (Direction may be general or particular). This new section specifies that a harbour master's directions may be general (applying to all ships or types of ships, masters or owners or other persons) or particular (applying to a specific master, owner or ship, or other person). Currently a harbour master must give a direction to each master of each individual ship within a pilotage area. This can be onerous on a harbour master if a direction is to affect a large number of ships. This can delay safety advice being given to all ships, for example, in the event of a marine incident within a pilotage area that requires all other ships to keep clear, or a direction to navigate with particular care because a navigation beacon is not operating. This amendment is in conjunction with the new section 87B (clause 69) which will allow harbour master's to give general or specific directions for all of Queensland waters, rather than just in or near pilotage areas. The new section provides that a direction may be given orally, in writing or in another way, examples of which are given and include by means of phone, radio, fax, email, publication in a newspaper or another means suitable in the marine environment such as by notices to mariners, flags or lights.

**Clause 68** amends section 87 (Power of minister to require directions) by removing what would be a confusing reference to 'particular direction' in view of the new section 86A, and changes it to a mere 'direction'. Additionally, because of the proposed removal of section 86 (3) and (4) the section is amended to reflect this.

**Clause 69** inserts a new section 87B (Direction to master about operation of ship in relation to a marine incident area). This amendment will allow harbour masters to give directions to ensure safety of ships, in particular within a relevant area, being an area in which the harbour master reasonably believes a marine incident has happened or is likely to happen. 'Marine incident area' is a new definition to be inserted as a part of this Bill into the dictionary of TOMSA. Currently the harbour master can only give directions to ships in or near a pilotage area. The amendment has the effect of extending this power to all of Queensland waters (3 nautical miles from the baseline and internal waters) if it is necessary to ensure marine safety. The purpose of this amendment is to address situations where ships are outside of pilotage areas and it is necessary to give a direction to the master/s of the ship/s to operate the ship in a specified way to ensure safety. A number of examples of the meaning of a 'specific way' are given. A maximum penalty of 200 penalty units (currently \$15 000) applies to a person who fails to comply with a direction of the harbour master, unless

that person has a reasonable excuse for not complying. This penalty is consistent with the existing penalty for non compliance with a harbour master's direction in or near a pilotage area.

**Clause 70** amends section 88 (Direction to master about operation of ship). The amendment inserts a reference to a pilotage area into section 88. This supports and is complementary to the new section 87B by making it clear that the harbour master's powers continue to operate in relation to a pilotage area. The maximum penalty prescribed for the current section, 200 penalty units (currently \$15 000) remains unchanged. The penalty provision only applies to persons given a specific direction, and doesn't apply if the person has a reasonable excuse for not complying.

**Clause 71** amends section 89 (Direction to a person in charge of a place). The amendment inserts reference to a 'marine incident area', being an area in which the harbour master reasonably believes a marine incident has happened or is likely to happen, into section 89. This supports the new section 87B which extends a harbour master's jurisdiction over which directions can be given to all of Queensland waters, rather than merely in or near pilotage areas. The maximum penalty prescribed for the current section, 200 penalty units (currently \$15 000) remains unchanged. The penalty provision only applies to persons given a specific direction, and doesn't apply if the person has a reasonable excuse for not complying.

**Clause 72** amends section 90 (Direction to person carrying out works) The amendment inserts a reference to a 'marine incident area', being an area in which the harbour master reasonably believes a marine incident has happened or is likely to happen. This supports the new section 87B which extends a harbour master's jurisdiction over which directions can be given to all of Queensland waters, rather than merely in or near pilotage areas. The maximum penalty prescribed for the current section, 200 penalty units (currently \$15 000) remains unchanged. The penalty provision only applies to persons given a specific direction, and doesn't apply if the person has a reasonable excuse for not complying.

**Clause 73** amends section 91 (Direction to person about obstruction). The current section refers to a buoy, mooring or something else obstructing navigation. This is replaced with the wider term 'something'. This will allow a harbour master to take action over a wider range of items that may be considered to be obstructing navigation. The amendment also removes the words 'in or near a pilotage area'. This allows a harbour master to take action about something that is or may obstruct navigation anywhere in Queensland waters (3 nautical miles from the baseline and internal waters) and is complementary to the new section 87B. The maximum penalty

prescribed for the current section, 200 penalty units (currently \$15 000) remains unchanged. The penalty provision only applies to persons given a specific direction, and doesn't apply if the person has a reasonable excuse for not complying.

**Clause 74** amends section 92 (Direction to person to put out certain lights etc.). The amendment restructures the section and removes the reference 'in or near a pilotage area'. Additionally it changes 'believes, on reasonable grounds' to reasonably believes in subsection 2(b) in accord with current drafting style. This amendment allows a harbour master to give directions about lights and other interferences anywhere that may be an impediment to the safe navigation of ships and is complementary to the new section 87B. The maximum penalty prescribed for the current section, 200 penalty units (currently \$15 000) remains unchanged. The penalty provision only applies to persons given a specific direction, and doesn't apply if the person has a reasonable excuse for not complying.

**Clause 75** amends section 93 (Harbour master may carry out direction). The amendment to section 93 is complementary to the new section 87B and allows a harbour master to carry out a direction that has not been complied with given under sections 87, 87A, 87B, 88, 89, 90, 91 or 92, about a ship or thing. The amendment to section 93(4)(d) allows a harbour master to give a direction about any 'thing' that is or may be an obstruction to navigation. Subsection 4 makes it clear that if a person suffers loss as a result of the harbour master attaching the ship, the subject of the direction, to another ship, buoy, wharf or pile, there is no impediment on recovering damages from the directed ship. Additionally, there is no exclusion on the harbour master or the State remaining liable for any loss.

**Clause 76** amends section 94 (Recovery by State of expenses of carrying out direction). This amendment restructures the existing section and complements the previous sections and allows the cost of the State carrying out a direction, instead of the directed person, to be recovered only in circumstances when the person has received a particular direction in relation to sections 87, 87B, 88, 89, 90, 91 or 92. This is to ensure fairness, on the basis that a person must be aware, by means of having received a direction, rather than a general direction, that the direction applies to them.

**Clause 77** amends section 125 (Marine incidents must be reported). The amendment provides an example of what a 'reasonable excuse' would be, namely, not having a way to report a marine incident. The intention of this amendment is to provide guidance as to how a reasonable excuse can be applied to a failure to report a marine incident within the specified time.

**Clause 78** amends section 127 (Regular reports of marine incidents to Minister). This amendment extends the time frame for the submission of the annual report about marine incidents from 4 months to 6 months after the year to which the report relates. This amendment has become necessary due to increased complexity of data and analysis demanded in the report. The Minister has a legislative obligation to table the report and the extended time frame will ensure that the report can be compiled and produced to meet this legislative requirement more efficiently.

**Clause 79** amends section 139 (Protection of members, legal representatives and witnesses). This amendment extends the protection already in place for members of a Board of Inquiry, barristers, solicitors or other persons appearing before a Board of Inquiry and persons summoned to attend or appearing before the Board as a witness. For example, this extends protection to persons providing administrative support or consultants and experts to the Board who are not members of the panel, legal professionals or witnesses. The protection provided is the same as that given to harbour masters and shipping inspectors who act honestly and without negligence. Liability will attach to the State instead of the person. This amendment was recommended by the Board of Inquiry into the collision between the *Sun Paradise* and the *Pride of Airlie*.

**Clause 80** amends section 142 (Board's powers on inquiry). This amendment corrects a typographical error in the Act, where section 142(1)(c) appears twice. The second instance of this is to be corrected to be section 142(1)(e). This amendment does not affect the application of the Act in any way. Additionally, the section is amended to refer to the *Legal Profession Act 2004* to make it clear that a Board may not authorise someone who would not otherwise be authorised to engage in legal practice contrary to the *Legal Profession Act 2004*. This later point of clarification was recommended by OQPC.

**Clause 81** amends sections 148 (False or misleading statements) and 149 (False or misleading documents). OQPC suggested these technical amendments to the existing provisions of TOMSA to overcome the Scrutiny of Legislation Committee's objections to similar provisions in other legislation on the ground that they abrogate a person's right to silence. These changes are similar to those in TOMPA referred to above.

**Clause 82** amends section 171 (Shipping inspector may direct that ship stays at, or goes to, safe anchorage). The amendment is intended to clarify that a shipping inspector can give a written direction to a range of persons such as the owner or person in charge of the ship and that a direction can be given in relation to a ship while it is out of the water. The section only

applies if the shipping inspector reasonably believes that life may be endangered because a ship is being used, or is intended to be used, and it cannot be operated safely. The need for this amendment to provide a range of persons to whom a direction can be given arises from situations such as when a ship is sold or there is no apparent master. Additionally, it was unclear under the current section whether or not a direction could be given to a ship when it is, for instance, on a slipway. It is important to have a capacity to prevent a ship from being placed in the water if it is unsafe, and also for a direction to be given to remove a ship from the water so that it can be properly inspected. The amendment to section 10 is integral to the operation of this amendment. As in the current section, a maximum penalty of 200 penalty units (currently \$15 000) applies for non-compliance with the direction.

**Clause 83** amends section 172 (Shipping inspector may direct ship is surveyed and order repairs). This amendment allows for a shipping inspector's directions given under section 171 to be given to an owner as well as a master of a ship. This will cover situations where there is no apparent master, such as when a ship has been sold. The restriction to the master and owner, and not another person in control of the ship is appropriate as only a master or owner would be in a position to expend money on a survey or specified works. The current penalty of up to 500 penalty units (currently \$37 500) or 1 year's imprisonment remains unchanged.

**Clause 84** inserts a new section 172AA (Shipping inspector may declare that ship is unseaworthy and must not to be operated). The amendment provides that if a shipping inspector reasonably believes a ship is unseaworthy, they may by written notice declare the ship to be unseaworthy and direct that it not be operated except in a way approved by the shipping inspector. If the identity of the master or owner of the ship is known, the shipping inspector must give them a copy of the declaration and direction, and they may be further directed to remove the ship from Queensland waters in a way approved by the shipping inspector. For instance under the supervision of a harbour master this new power would, for instance, provide a shipping inspector with a power to prevent a ship like the *MV Karma* putting to sea. The *MV Karma* grounded on the beach at Agnes Water in 2003 and in responding to the grounding the State incurred costs of nearly \$400 000. A maximum penalty of 200 penalty units (currently \$15 000) applies for non-compliance with the direction. This amount of maximum penalty is consistent with other penalties in the Act for non-compliance with a direction. If the identity of the master or owner of the

ship is not known, the ship may be treated as abandoned property under section 175A (clause 85) and sold by public auction or destroyed.

**Clause 85** amends section 175A (Removing abandoned property). The amendment fortifies the current section by deeming abandoned, or wrecked ships in or near Queensland waters, such as ships on the foreshore, and other abandoned property that is or may become a hazard to ships or navigation or that may cause damage to the environment, as property that can be immediately seized and removed in an abridged timeframe by a shipping inspector, rather than in 28 days as in the current section. A seizure notice issued under the amended section must include a statement about the place to where the property has been removed. The amendment also inserts an expanded definition of 'abandoned property' to make it clear that ships and other property above the high water mark but near to Queensland waters may be dealt with under this section. This would make it clear that a ship, such as the MV *Karma*, or a derelict ship stranded on a beach could be treated as abandoned property. The amendment also includes provision for the costs of removal of the property to be recoverable jointly and severally from the master and owner of the ship.

**Clause 86** amends sections 176 (False or misleading statements) and 177 (False or misleading documents). OQPC suggested these technical amendments to the existing provisions of TOMSA to overcome the Scrutiny of Legislation Committee's objections to similar provisions in other legislation on the ground that they abrogate a person's right to silence. These changes are similar to those in TOMPA referred to above.

**Clause 87** inserts a new Part 13A (Securing compliance with Act). MSQ has on several occasions issued directions to persons under the Act, such as the owner of the MV *Karma*, which have not been complied with and which have led to a ship becoming involved in a marine incident or causing pollution of the marine environment. This amendment sets up a regime whereby a prescribed applicant (being the chief executive, the general manager or a harbour master) can require a person to enter into a voluntary undertaking, or apply to the District Court for an undertaking to be entered into, or for an enforcement order requiring compliance with a direction given under the Act which has not been carried out. Examples of such an undertaking could be for a person to agree to move a ship to a slipway for repairs, or install safety equipment or to not operate a ship that may pose a risk to other ships or the marine environment. If a person fails to comply with the undertaking, or if the general manager believes that the person will not comply with the undertaking, MSQ could apply to a court for an enforcement order. The capacity to apply to a court for an enforcement order for non-compliance would add weight to the original direction given

by MSQ and be an incentive for compliance. Failure to comply with an undertaking or an enforcement order may result in a maximum penalty of 500 penalty units (currently \$37 500) or one year's imprisonment. This penalty is equivalent to other penalties in the Act for breaches or safety obligations, and is at an appropriate level to deter from non-compliance with an order, particularly one given by a court. The general manager of MSQ must keep a register of all undertakings, whether entered into voluntarily or court ordered. These provisions are based on similar powers in the *Environmental Protection Act 1994*, the *Property Agents and Motor Dealers Act 2000* and the *Fair Trading Act 1989*.

**Clause 88** inserts a new Part 15, Division 1 heading (General). The amendment creates divisions under Part 15 to allow for the insertion of a new Division 2 (see below). The amendment creates the heading 'Division 1 – General', to allow existing provisions to be maintained.

**Clause 89** inserts a new section 200A (Allegations of false or misleading statements or documents). OQPC suggested this and other technical amendments to the existing provisions of TOMSA to overcome the Scrutiny of Legislation Committee's objections to similar provisions in other legislation on the ground that they abrogate a person's right to silence. These changes are similar to those in TOMPA referred to above.

**Clause 90** amends section 201(4)(e) (Evidentiary provisions) to remove the reference to 'order' to complement the new provisions relating to a harbour master's powers to give general and particular directions under Part 6 Division 2 of the Act.

**Clause 91** inserts new Part 15 Divisions 2 to 4 (Licence disqualifications, cancellations and suspensions). This amendment inserts a new power for courts to cancel or suspend marine licences. MSQ has the discretion to cancel or suspend a marine related licence or authority through a 28 day 'show cause' process. In cases where a defendant is successfully prosecuted for a breach of maritime safety or pollution legislation, this allows the person to continue operating until the show cause process is concluded, unless there has been a marine incident.

These new sections will, in cases where particular circumstances may warrant, such as for a serious breach of maritime safety legislation resulting in a marine incident or injury or for repeat offences, provide for courts to have the power to suspend, disqualify or cancel the licence immediately at the time of a prosecution for an offence against TOMSA.

This will see a marine licence or authority able to be cancelled or suspended or a person disqualified from applying for or holding a marine

licence for contravening sections 41 (General safety obligation about condition of ships), 43 (General safety obligation to operate a ship safely), 44 (General safety obligation about safety equipment), 57 (Contravention of registration obligations), 61 (Operation without a licence), 186 (Unlawful interference with a ship) and 211 (Breach of collision regulations). In addition, a breach of *Transport Operations (Road Use Management) Act 1995* (TORUM) in relation to operating a ship while under the influence of alcohol or drugs or a breach of the Criminal Code section 328A in relation to dangerous operation of a ship may also result in a suspension or cancellation.

In considering whether to suspend or cancel a marine licence or authority, a court is to have regard to the nature of the offence, circumstances of the offence, real or potential danger to other persons and whether the person has been convicted of a similar offence within the last five years. The sections are modeled on similar provisions in the TORUM relating to vehicle driver licences. As with under the TORUM the courts have a discretion to grant a restricted licence if an application is made at the time of conviction if a refusal would cause extreme hardship to the applicant or the applicant's family by depriving him/her of a means of earning a livelihood. There is also a capacity for an application to be made to vary the conditions of a restricted licence and for the removal of a disqualification.

**Clause 92** inserts new Part 15A (Protection for whistleblowers). This new section outlines the way in which whistleblower protection will apply to persons reporting breaches against the TOMSA and is similar to the new section proposed to be inserted into the TOMPA (clause 36). The amendment is complementary to the *Whistleblowers Protection Act 1994* (WPA), and does not limit the application of that Act. The amendment does not provide immunity for whistleblowers in relation to their own acts in contravention of the TOMSA, other than to the extent that the court may have regard to, if the person is acting on instructions from the master of the ship or someone authorised by the master to give such instructions. The amendment restates the existing provisions of the Act that it is an offence to provide false or misleading information or statements, and it protects whistleblowers against reprisals by stating that a person must not cause detriment to a whistleblower for making a disclosure, such reprisal being actionable as a tort for which damages may be payable. Similar provisions for such disclosures also exist in the *Biodiscovery Act 2004*, the *Guardianship and Administration Act 2000* and the *Commission for Children and Young People and Child Guardian Act 2000*. The amendment protects a whistleblower by making them not civilly or criminally liable for

disclosing information actionable as defamation or breaching confidentiality.

Clause 92 also amends Part 16 section 203 (Appeals). The amendment sets out how the *Transport Planning and Coordination Act 1995*, Part 5 applies to particular reviews and appeals for persons affected by decisions made under TOMSA. This amendment provides consistency with transport legislation in relation to appeals processes. The amendment at the new section 204 (Appeals in relation to disqualification under section 202A) also sets out the appeal rights process for persons disqualified from holding or maintaining a marine licence.

**Clause 93** amends section 205 (False or misleading documents). OQPC suggested these technical amendments to the existing provisions of TOMSA to overcome the Scrutiny of Legislation Committee's objections to similar provisions in other legislation on the ground that they abrogate a person's right to silence. These changes are similar to those in TOMPA referred to above.

**Clause 94** amends section 205A (Inquiries about person's suitability to conduct examinations or conduct training programs) to enable criminal history reports to be given to the general manager of MSQ as well as the chief executive. The amendment has no other effect on the section.

**Clause 95** inserts section 205B to provide a head of power to allow marine licence holders or other interested parties who have the permission of the marine licence holder to search via the internet to verify that the person has a marine licence. This new section will provide the licence holder with the capacity to easily prove that they have the authority under the maritime legislation to operate a ship. The verification system would advise in a Yes/No response that the person holds a recreational marine driver licence and/or personal watercraft licence. A single search would provide information about both types of licences.

**Clause 96** amends section 206 (Signals of distress). The amendment does not affect the current operation of the section, but makes it consistent with the meaning of 'convicted' (of an offence), as used elsewhere in the Act and Regulation and now defined in the Act's dictionary. 'Convicted' is defined as found guilty of an offence whether or not a conviction is recorded.

**Clause 97** replaces section 215 (Pilotage fees and conservancy dues). The current section 215 is replaced by a new section 215, which is reformatted. The amendment establishes that a regulation may be made about fees, such as for pilotage and other related services, and that they are payable on a 'user pays' basis. This amendment was recommended by, and has the

support of, Crown Law to put it beyond doubt that such fees are within the constitutional power of the State, and that they are not an excise. The amendment also more correctly states that conservancy dues are used generally in relation to ships and not merely for the provision and maintenance of aids to navigation.

**Clause 98** amends section 217 (Regulations about aquatic events and activities). The amendment establishes that the State is not liable in relation to the granting of a permit for the holding of an aquatic event and is a clarification of the applicable law to ensure that the State is not to be joined as a party in expensive litigation if someone is injured or property damaged during the conduct of an aquatic event. Examples of what constitutes an aquatic event are given in the current section and include such things as boat races, water ski displays and fireworks displays. Liability is to be limited to the decision made by the State to permit the event to go ahead. The State has no role in the holding or the conduct of an aquatic event, which is a risk that should be borne by insurers for aquatic events. It is currently a condition of the issue of an aquatic event permit that public liability insurance is obtained.

**Clause 99** amends section 218 (Other matters for regulations). The amendment establishes that the State's liability in relation to buoy moorings is limited and that the State is not liable for establishing or maintaining a buoy mooring, nor is the State liable for the ongoing maintenance of an established buoy mooring. The amendment is a clarification of the applicable law to ensure that the State is not to be joined as a party in expensive litigation if someone is injured or property damaged because of the negligence of a buoy mooring holder. Matters relating to the integrity of the buoy mooring are the responsibility of the buoy mooring holder. The State's liability is to be limited to the decision made as to the placement of the buoy mooring in terms of navigational safety.

**Clause 100** inserts a new section 219 (General manager's power to fix other matters by gazette notice). The general manager can set a range of matters by gazette notice, such as defining areas of Queensland waters as category areas for buoy moorings, or stating waters where the presence of anchored ships may cause a danger to navigation. The amendment provides a clear head of power to the general manager to set such matters by gazette notice.

**Clause 101** inserts a new Part 19, Division 1 heading (Provisions for Act No. 14 of 1994). This amendment will insert a new heading immediately before section 220 of the TOMSA. The heading establishes the transitional

provisions for Act No. 14 of 1994 being the *Transport Operations (Marine Safety) Act 1994*.

**Clause 102** omits section 224 (Existing approvals, consents, licences, permits etc). This amendment will remove the existing section 224. This section provided for Standard Practice Instructions (SPIs) of the former Marine Board under the former Act, in relation to safety equipment and ship build to be continued under the new TOMSA. These exemptions are to be phased out after having been in place for 11 years to allow industry time to comply with the current Act, and therefore the transitional provision allowing them must be removed. The ability to reference the former SPIs for certain ships to which they once applied is preserved by sections 65, 70, 227, and 228 of the regulation. These provisions are unaffected by the proposed amendment to section 224 of the Act. Design documentation accepted under the 1987 regulation may still be used for registration or certificate of survey purposes; ships built and operating before 1996 and complying with a former SPI with regard to safety equipment are deemed to satisfy the prescribed safety equipment requirements; and ships built and operating before 1996 and complying with a former SPI with regard to design and construction are taken to comply with a standard about ship design and construction. These grandfathering provisions will in part be progressively phased out by amendment to the relevant sections of the regulation. There will be no immediate cost impact as a result to the proposed amendment to section 224 of the Act.

**Clause 103** replaces Part 20 heading (Transitional provisions for the Maritime Safety Queensland Act 2002). The re-heading of Part 19 to include a Division 1 allows for Part 20 to be re-numbered as Division 2. The new division applies transitional provisions for the MSQ Act 2002.

**Clause 104** amends section 225 (Definitions for pt 20). This amendment is complementary to clause 103 and renames the part as a division.

**Clause 105** inserts a new Part 19, Division 3 and schedule (Provisions for the *Maritime and Other Legislation Amendment Act 2006*). This amendment inserts a new division 3 to provide for transitional changes necessary as a result of the Bill.

Specific new sections include:

236 preserves the meaning of words as defined in the current section 4 to the extent that they can be consistent with words as they are now defined in the schedule.

237 continues the effect of harbour masters' directions given before the commencement of the Bill.

238 applies the examples of a reasonable excuse in the amendment to the requirement to report a marine incident before the commencement of the Bill.

239 preserves the effect of directions and notices given by a shipping inspector before the commencement of the Bill.

240 applies section 175A as it was prior to commencement of the Bill to property seized.

241 provides that enforcement orders and interim enforcement orders cannot be made in relation to offences committed before the commencement.

242 provides that the new sections in relation to disqualification, cancellation and suspension of a marine licence cannot be applied to an offence committed before the commencement.

243 provides that appeals against pre-commencement decisions which have not been commenced must be taken under the amended sections in relation to appeals.

244 provides for existing licences to drive speedboats. The amendment allows for a person who held a speedboat driver's licence immediately prior to the commencement to be a person who holds a recreational marine driver's licence. The speedboat licences issued under the former Act and recreational ship master's licences issued under this Act are recognised as if they were recreational marine driver's licences with an unlimited term and will be continued by the new section 244 which will replace part of the omitted section 224.

Schedule – this amendment also inserts a schedule into the Act which defines words used in the Act. Currently these definitions are in section 4 of the Act. It also inserts various key definitions previously contained in the *Transport Operations (Marine Safety) Regulation 2004*, such as 'tender' and 'convicted' because the expressions will now be referred to in the Act. Additional new definitions are also inserted in the schedule, and in particular defining a 'buoy mooring', and other definitions relating to the new Part 13A (securing compliance with the Act).

## **Part 5**                      **Amendment of other legislation**

### **Division 1**                **Amendment of *Transport Infrastructure Act 1994***

**Clause 106** states that this Division amends the *Transport Infrastructure Act 1994*.

**Clause 107** provides that a 'relevant person' now replaces the words 'chief executive' in sections 84B(4)(a) and (5). As there may be a declared common area involving a franchised road, in addition to Local Government Tollway and state toll road corridor land, the definition of relevant person for the purposes of these sections also now includes a person to whom State toll road corridor land has been leased.

**Clause 108** adds 'provisions about administration charges' to the list of examples in section 85(3) of provisions that can be included in a road franchise agreement. This is an example provided for local government franchised road (section 105Y). For consistency in the legislation, it is being included in state franchised road provisions (section 85).

**Clause 109** inserts a new section 85A that provides for the operation and management of common areas where franchised road intersects with rail corridor land. A railway manager and the franchisee may both use the common area, which may include overpasses (with footings in the common area). The State is not liable for the railway's presence or operation because of its tenure over the land. Where a toll road on a common area ceases being used the chief executive may require that the area be cleared of road infrastructure.

**Clause 110** provides that section 90 refers only to parts 1 to 5 of Chapter 6 as these are the provisions that refer to 'State-controlled Roads'. Because amendments include provisions about local government tollways the amendment to section 90 is necessary.

**Clause 111** provides that under section 92, the payment of 'user administration charge' should not apply to persons making payment by use of a touch tag. Touch tag is an existing form of payment and does not involve use of electronic toll collection lanes. The user administration charge has never been set by the Minister as it is intended to commence only when full free flow electronic tolling comes into effect at a date yet to be set.

**Clause 112** provides that under section 94, the payment of 'user administration charge' should not apply to persons making payment by use of a touch tag. Touch tag is an existing form of payment and does not involve use of electronic toll collection lanes. The user administration charge has never been set by the Minister as it is intended to commence only when full free flow electronic tolling comes into effect at a date yet to be set. Currently, there are arrangements adopted for existing tollways.

**Clause 113** provides a correction to section 96 by deleting the reference to 'section 94(3)' and replacing it with 'section 94(3A)'. This corrects a typographical error that is contained under section 96.

**Clauses 114 and 115** amend sections 97 and 98 of the *Transport Infrastructure Act 1994* to ensure that drivers using Electronic Toll Collection lanes without a valid transponder or a pre-paid or post-paid tolling product are charged no more than the administration costs involved in collecting the unpaid toll (the administration charge) together with the toll payable.

The current legislation provides for such a driver to be liable for not only the administration charge but also the user administration charge. The user administration charge is the charge paid by a driver opting to use a pre-paid or post-paid tolling product and covers the additional costs incurred by a toll operator in offering these products.

The amendment will remove the requirement for a driver, who has failed to pay the toll through an authorised method of payment, to pay a user administration charge in addition to an administration charge and the toll payable. The user administration charge and administration charge are two different charges and are applied under different circumstances in the Act.

The user administration charge has never been set by the Minister as it is intended to commence only when full free flow electronic tolling comes into effect at a date yet to be set.

**Clause 116** provides that section 105B now includes definitions for 'compliance notice', 'declaration', 'final notice', 'local government franchisee', 'local government tollway', 'matter', 'relevant notice', 'revocation notice', 'Schedule 5 step-in notice', 'Schedule 5A step-in notice', and 'suspension notice'.

**Clause 117** provides that the section 105D is omitted and the principles conveyed by section 105D are reinserted at section 105ZOA in relation to the approved tollway project and local government tollway.

**Clause 118** provides that section 105E is amended to include reference to the new section 105ZOA.

**Clause 119** provides that section 105F(b) now refers to 'section 105GA' and not 'section 105ZB' as the relevant local government tollway declaration is now included under section 105GA.

**Clause 120** provides that the existing section 105G (state not liable for loss relating to approved tollway project) is omitted but the principles are re-established by clause 128 as section 105ZOB.

The new section 105G provides that a local government can request in writing that the Minister declare a local government tollway for an approved tollway project. The written request from the local government must be accompanied by a plan that identifies the proposed local government tollway. For example, although a survey plan is not necessarily required, the plan may identify the dimensions and location of the proposed local government tollway. This might include the horizontal and vertical alignment of the tollway route, and depth below ground of a tunnel required for the tollway. The Minister can ask for further details about the approved tollway project or proposed local government tollway or ask for a revised plan. For example, the Minister may request a revised plan as the route is finalised through survey descriptions as well as prior to completion of the local government tollway. Under section 105G(4) the Minister may make a declaration about the local government tollway without receiving the further information.

Clause 120 also introduces a new section 105GA whereby the Minister, upon receiving written request from a local government with an approved tollway project, (section 105C) may declare a local government tollway.

Under section 105GA the Minister may by gazette declare part or the whole of a local government franchised road and part or the whole of Local Government Tollway corridor land to be a local government tollway.

Section 105GA says the Minister at his discretion, before making a Local Government Tollway declaration, may have regard to whether there have been any material changes to the approved tollway project, whether conditions imposed by the Minister under the project approval (for example, section 105C and section 105E) have been complied with and whether the local government has complied with all other requirements relevant to the approved tollway project under the *Transport Infrastructure Act 1994* or other Acts.

Section 105GA (3) & (4) provide that the Minister may make the declaration and impose conditions about a matter mentioned in schedules 5

and 5A that the Minister considers necessary in the circumstances. Schedule 5 matters generally relate to matters about tolling while Schedule 5A applies to other transport matters. For the purpose of Schedule 5A, a condition might include a requirement that the local government provide and maintain a free alternative public facility which offers an acceptable level of service.

Section 105GB provides the local government which has obtained a declaration of a local government tollway under section 105GA, can by notice in writing request the Minister to amend the declaration. Amendments that can be requested are refining the boundaries of a plan, including additional land in or omitting land from the declaration (a plan must accompany the application) and amending, imposing or removing a condition on the declaration about a matter in schedule 5 or 5A. The Minister may amend the declaration in the manner the Minister considers necessary or desirable.

Subdivision 2 puts in place a framework for ensuring that conditions placed on a Local Government Tollway declaration are complied with. Section 105GC provides the Minister with the ability to notify a local government if he believes a condition(s) (under section 105GA) has been contravened. The notice provided to local government may require the local government to stop the contravention and/or rectify the matter.

The compliance notice must state that the Minister believes the local government has contravened a condition of the declaration of the Local Government Tollway (including a breach by a franchisee). The compliance notice must state if the Minister requires a local government to rectify the matter, what the Minister believes is reasonably capable of being rectified, and the reasonable period (not less than 7 days after the notice has been given) in which the local government must take steps.

The compliance notice must state the action the Minister may take under sections 105GD, 105GF and 105GG if the local government fails to comply with the notice.

The local government must comply with the notice unless it has a reasonable excuse.

Sections 105GD, 105GE, 105GF and 105GG detail the options available to the Minister should a local government fail to comply with a notice issued under section 105GC or should a local government franchisee fail to stop contravening the condition or fail to rectify the matter as required by the compliance notice.

Where the breach is of a condition:

- under Schedule 5 (if the local government is the operator of the tollway); or
- Schedule 5A (if the local government is the operator of the tollway);

the Minister may issue a notice stating that no tolls are payable for a specified period (suspension notice). For serious and ongoing breaches, the Minister has the power to issue a revocation notice. The suspension notice and the revocation notice must be provided to the local government. The revocation notice must include:

- That the Minister believes the contravention has not stopped;
- How it is believed that the local government has failed to stop or rectify the contravention;
- The steps that the local government must take to stop or rectify the contravention;
- The reasonable period (not less than seven days) after the revocation notice is given in which the contravention must stop or the matter must be rectified;
- That if the contravention does not stop or the matter is not rectified after receiving the revocation notice, within the period specified in the notice, the Minister intends to revoke the declaration of the local government tollway.

Should the local government fail to stop the contravention the Minister may, by gazette notice, revoke the local government tollway declaration.

The revocation takes effect from the day of the gazettal or a later day as stated in the gazettal.

Section 105GE states that if the Minister has provided a notice stating that a toll stops being payable (a suspension notice), the notice has effect for the period stated in the notice and a person is not liable, under section 105ZC (liability for toll and user administration charge and satisfying the liability) to pay a toll for the period (section 105ZOB provides for non liability of the State).

Section 105GF states that the Minister may give a schedule 5 step-in notice if there is a contravention of a schedule 5 condition where there is a local government franchisee. If the local government fails to comply with the notice the Chief Executive may exercise the powers of the local government under the franchisee agreement to enforce the local government's rights.

Section 105GG provides where the local government has entered into a franchise agreement and the local government is contravening a condition mentioned in a compliance notice about a Schedule 5A matter, the Minister may give the local government a Schedule 5A step-in notice. The notice must state the following:

- That the Minister believes the contravention has not stopped;
- How it is believed that the local government has failed to stop or rectify the contravention;
- The steps that the local government must take to stop or rectify the contravention;
- The reasonable period (not less than seven days) after the step-in notice is given in which the contravention must stop or the matter must be rectified;
- That if the contravention does not stop or the matter is not rectified, after receiving the step-in notice, within the period specified in the notice, the Chief Executive will take steps to stop the contravention or rectify the matter.

Should the local government fail to stop the contravention, without a reasonable excuse, the Chief Executive may, take steps to stop the contravention or rectify the matter.

The Chief Executive may recover any expenses incurred as a result of actions taken under any step-in notice as a debt payable to the State by the local government.

Section 105GH provides that if a relevant notice (as defined in section 105GH(1)) is given by the Minister it must state that the local government may appeal the decision and that under the *Transport Planning and Coordination Act 1994* Part 5, the local government may ask for the decision to be stayed.

Section 105GI provides that if a local government is given a relevant notice (as defined in section 105GH(1)), the local government may appeal the notice to the Supreme Court. The *Transport Planning and Coordination Act 1994* Part 5 Division 3 applies to the appeal.

**Clause 121** provides for an amendment to section 105H of the Act to allow a declaration by the Minister of Local Government Tollway Corridor Land under section 105H to be made subsequent to a declaration of a Local Government Tollway under section 105GA.

A request for a declaration made under section 105H must be accompanied by a survey plan identifying the local government tollway corridor land. The declaration of the Local Government Tollway Corridor Land is an essential component of the local government tollway framework. When the land is declared under section 105H, the Local Government Tollway Corridor Land and the land for which a tollway declaration applies, must be consistent.

The declaration under section 105H can only be given if the Minister is satisfied that all conditions and requirements under the *Transport Infrastructure Act 1994* and other Acts and that the conditions of the approved tollway project or the declaration of a local government tollway have been met.

**Clause 122** provides for an amendment to section 105Y to remove the reference to section 105ZB and insert 'Division 2A, the Declaration of'. It also provides for the removal of section 105Y(2)(c).

**Clause 123** omits the current section 105ZA and inserts a new section 105ZA which expands upon the local government's requirement to report on the operation of Part 7 of the legislation. When reporting on this part in the annual report of the local government under the *Local Government Act 1993* or the *City of Brisbane Act 1924*, the local government must include in the report a statement of how it is complying with conditions imposed under either an approved tollway project or imposed on the declaration of a local government tollway.

**Clause 124** replaces the heading to Division 6 of the Act to be 'Tolling Matters'.

**Clause 125** omits the existing Chapter 6, Part 8, Division 6, Subdivision 1 and replaces it with 'Subdivision 1 Notice of tolling matters' and inserts a new section 105ZB.

Under section 105ZB:

- Subsection (1) provides that the local government must give notice of the matters mentioned in schedule 5 (tolling matters) before a toll is payable.
- Subsection (2) provides that the local government must advertise its notice of the matters mentioned in schedule 5 in a newspaper circulating generally in the local government's area and in adjoining local government areas.

- Subsection (3) allows different toll amounts to be set for different classes of vehicles or by reference to stated exceptions or factors such as the time of day the tolled infrastructure is being used by a motorist.
- Subsection (5) provides that an administration charge for an unpaid toll under a notice under subsection (1) must not be more than the reasonable cost of issuing a notice and collecting the unpaid toll and administration charge for the toll.
- Subsection (6) provides that a user administration charge imposed for payment of a toll must not be more than the reasonable cost of administering and collecting payment of the toll. The user administration charge has never been set by the Minister as it is intended to commence only when full free flow electronic tolling comes into effect at a date yet to be set.

**Clause 126** amends section 105ZF by omitting the amount of the user administration charge from the deferred toll amount. The amendment will remove the requirement for a driver, who has failed to pay the toll through an authorised method of payment, to pay a user administration charge in addition to an administration charge and the toll payable. The user administration charge and administration charge are two different charges and are applied under different circumstances in the Act.

**Clause 127** omits from the heading of section 105ZG and from section 105ZG (1) the words 'user administration charge' as the user administration charge is an amount already included in the calculation of the administration charge. The amendment will remove the requirement for a driver, who has failed to pay the toll through an authorised method of payment, to pay a user administration charge in addition to an administration charge and the toll payable. The user administration charge and administration charge are two different charges and are applied under different circumstances in the Act.

**Clause 128** inserts a new Division 7. Section 105ZOA imposes (both before and after the local government tollway declaration has been made) an obligation on the local government to keep the Minister informed of material changes to the project or the local government tollway as soon as practicable.

Section 105ZOB provides that the State is not liable for any loss suffered by a local government or another person in relation to a local government tollway including any approval or declaration under the Act or construction, maintenance or operation of a local government tollway. The State is also not liable for any loss suffered as a result of a declaration

under section 105H or any condition imposed on any declaration that the Minister makes under the Act.

**Clause 129** provides for an amendment to section 249 of the Act to permit the lessee of a franchised road to construct, maintain and operate on a common area with rail corridor land. The amendment ensures that a 'relevant person' is defined to include the franchisee of state franchised road and a 'relevant road' includes a franchised road. This ensures the franchisee does not have liability for the railway or its use or operation on the common area.

**Clause 130** amends section 275 (Functions of port authorities) to clarify that port authority functions include the power for the Port of Brisbane Corporation to develop and use its strategic port land at Eagle Farm and Hamilton for residential accommodation, community infrastructure and ancillary services and at Fisherman Island for local commercial activities for the direct benefit of the port community. These powers include the planning and works in relation to these developments. The existing provision allowing the Cairns Port Authority to develop and use its strategic port land for residential and tourist accommodation is reinserted.

**Clause 131** amends section 285 (Land Use Plans) in subparagraph 285(1)(c)(vi) to make the existing provision generic rather than specifically refer to the Cairns Port Authority's special functions of residential and tourist accommodation. The provision extends the types of port authority land that require land use plans. Land use plans are an integral part of the process to determine strategic port land.

**Clause 132** provides for an amendment to schedule 5 by replacing the heading with 'Tolling matters for toll road or local government tollway – sections 93, 105GA and 105GB.'

**Clause 133** inserts a new schedule 5A to the Act detailing the matters for which the Minister may make and amend a condition for a local government tollway under sections 105GA and 105GB.

**Clause 134** amends the dictionary in schedule 6 of the *Transport Infrastructure Act 1994* for application in chapter 6, part 8.

Division 4 and clauses 147 to 149 provide for amendments to the *Transport Planning and Coordination Act 1994*.

**Division 2**            **Amendment of *Transport Operations (Passenger Transport) Act 1994* (TOPTA)**

**Clause 135** states that this division amends TOPTA.

**Clause 136** inserts a new section 83A which prohibits a person from using a stretched passenger car to provide a public passenger service (other than a community transport service or courtesy transport service) unless the vehicle is operated under a limousine service licence.

**Clause 137** inserts a new section 145 which enables the chief executive to declare, by gazette notice, a vehicle to be a forward-control passenger vehicle or a luxury motor vehicle. A declaration made under this section expires 6 months after the day it is published.

**Clause 138** inserts a new chapter 13 part 4.

**Clause 139** amends the dictionary in schedule 3 of TOPTA. The definition of a *disqualifying offence* is amended to include offences made against the Act. The definition of a *luxury motor vehicle* is replaced to allow that it now includes vehicles declared by regulation and vehicles declared by the chief executive under the new section 145. Definitions are inserted for *stretched* and *stretched passenger car*. Definitions are also inserted for *forward-control passenger vehicle*, *motor vehicle*, *off-road passenger vehicle*, *passenger car*, and *passenger vehicle* which were all previously defined in the *Transport Operations (Passenger Transport) Regulation 2005*. The new definition for *forward-control passenger vehicle* is extended to include vehicles declared by regulation and vehicles declared by the chief executive under the new section 145.

**Division 3**            **Amendment of *Transport Operations (Road Use Management) Act 1995* (TORUM).**

**Clause 140** states that this Division of the Act amends TORUM.

**Clause 141** amends existing section 78 of TORUM to provide that a person who drives a motor vehicle on a road while subject to an immediate driver licence suspension or disqualification (as introduced by clause 143 of this Bill) will be disqualified from holding or obtaining a Queensland driver

licence for at least 2 years but not more than 5 years. The exact period of disqualification will be decided by the court. Clause 144 (described below) provides that when deciding the period of disqualification to be imposed, the court may take into account the period of the immediate suspension or disqualification that has already been served.

**Clause 142** introduces blood/breath alcohol concentration limits for people who are supervising a learner driver. Currently, the *Transport Operations (Road Use Management – Driver Licensing) Regulation 1999* requires learners to be under the supervision of a person who has held an open licence for the relevant class of vehicle for at least 1 year. The blood/breath alcohol concentration limits to be imposed on supervisors are equivalent to the limits that would apply to the supervisor if they were actually driving the vehicle. For example, a person supervising in a standard car will need to have a blood/breath alcohol concentration below 0.05 and, if they are supervising in a truck or bus, their blood/breath alcohol concentration must not exceed zero. The amendments achieve this outcome by providing that the supervisor is in charge of the motor vehicle for the purposes of the existing drink driving provisions within TORUM. The Bill makes clear that these amendments will in no way effect the application of the drink driving provisions to the learner. The definition of "supervisor" excludes accredited driver trainers when acting in a professional capacity as they are already subject to a zero blood/breath alcohol concentration limit. The definition does, however, include a person purporting to be a supervisor. This will ensure that a person who is directing a learner driver when they are not authorised to do so (for example, they have not held the appropriate licence for the requisite period), will also be subject to the blood/breath alcohol limits.

**Clause 143** inserts new sections 79B to 79D into TORUM. New section 79B provides for the immediate suspension of the Queensland driver licence of a person charged with:

- driving a motor vehicle while under the influence of liquor (section 79(1) of TORUM) and an analysis certificate indicates the person is over the high alcohol limit;
- failing to provide a specimen of blood or breath for analysis (section 80(11) of TORUM);
- a drink driving offence under section 79(2), (2A), (2B) or (2J) of TORUM while an earlier such charge is still pending; or
- dangerous operation of a motor vehicle with a circumstance of aggravation that the person was adversely affected by an intoxicating

substance that is alcohol and the person was over the high alcohol limit (section 328A of the Criminal Code);

If the person's authority to drive on Queensland roads is under a non-Queensland driver licence, that authority is immediately suspended. Where a person is unlicensed at the time of being charged, the amendments provide for that person to be immediately disqualified from holding or obtaining a Queensland driver licence. These immediate suspensions and disqualifications will apply from the time of the relevant charge until the person is dealt with by a court or the charge is withdrawn or otherwise discontinued. Section 79B(6) clarifies that an immediate licence suspension under this section will supersede any 24 hour licence suspension under existing section 80(22AA) of TORUM.

Section 79C specifies when a person is charged for the purpose of the new immediate suspension and disqualification.

Section 79D requires a police officer to give a person who is subject to an immediate licence suspension or disqualification, a notice informing the person of that suspension or disqualification. The notice will need to be given as soon as practicable after the person is charged. The notice is intended for the person's information. A failure by a police officer to give the notice will not invalidate the suspension or disqualification or effect anything done in relation to those actions provided the officer has a reasonable excuse for any failure to give the notice. The section also requires the Commissioner of the Queensland Police Service to give notice about the details of any immediate suspension or disqualification to the chief executive of Queensland Transport. That notice will need to be given as soon as practicable after the person is charged.

**Clause 144** provides that when the court is determining an appropriate period of disqualification for the offence which led to the immediate suspension or disqualification, it may take into account the period of that immediate suspension or disqualification that has already been served. Clause 141 (as described above) provides, however, that the court must impose a disqualification of between 2 and 5 years.

**Clause 145** inserts a head of power for a regulation to be made to enable a court to make orders authorising a person whose Queensland driver licence has been immediately suspended under section 79B(2) (described in clause 143 above) to continue driving under that licence in certain circumstances. The regulation may provide for a range of matters including, for example, how and when applications for orders are to be made and the criteria for deciding an application for an order.

**Clause 146** inserts a transitional provision into TORUM to provide that the immediate suspensions and disqualifications under new section 79B (described in clause 143 above) will only apply where both the relevant offence and the charge for that offence occur after the commencement of these provisions.

## **Division 4            Amendments of Transport Planning and Coordination Act 1979 (TPC)**

**Clause 147** states that this division amends the TPC.

**Clause 148** provides for an amendment to section 28D of the *Transport Planning and Coordination Act 1994* to allow a local government to deal with land for a local government tollway as well as an approved tollway project.

**Clause 149** inserts a new section 28DA which confirms that acquisitions commenced by local government under an approved tollway project are not affected by the fact a local government tollway is declared.

## **Division 5            Other minor amendments of legislation**

**Clause 150** refers to Schedule 1 and Schedule 2 which make minor amendments which are explained below.

### **Schedule 1**

Amendment is to correct a reference to the *Marine Safety Act* in the *Off-shore Facilities Act 1986* which should be a reference to the *Transport Operations (Marine Safety) Act 1994*.

Amendment to the *Transport Infrastructure Act 1994* to provide a transitional provision for the *Maritime and Other Legislation Amendment Act 2006*, relating to the making and approval of a waterway transport management plan.

Amendment to the *Transport Operations (Passenger Transport) Regulation 2005* to amend the heading of section 105, insert section 135A which prescribes vehicles for the definition of a forward control passenger vehicle

and to omit s.156 and definitions of *forward-control passenger vehicle, motor vehicle, off-road passenger vehicle, passenger car and passenger vehicle* from Schedule 11.

Amendment to section 37 of the *Transport Planning and Coordination Act 1994* to omit s.29(2) and insert 'function or' before 'power' in s.37. This amendment is driven by changes to section 27A of the *Acts Interpretation Act 1954*.

## **Schedule 2**

This Bill also includes changes to the *Transport Infrastructure (Gold Coast Waterways) Management Plan 2000, the Transport Infrastructure (Sunshine Coast Waterways) Management Plan 2000 and the Transport Infrastructure (Yeppoon Waterways) Management Plan 2000*.