

House of Representatives

Supplementary Order Paper

Tuesday, 5 December 2017

Maritime Transport Amendment Bill

Proposed amendments

Hon Julie Anne Genter, in Committee, to move the following amendments:

Clause 4

Delete *clause 4* (page 4, lines 3 to 7).

Clause 5

In *clause 5*, replace *new section 36(1)(ea)(i) to (vi)* (page 4, lines 12 to 20) with:

- (i) the prescribing of safety-sensitive activities; and
- (ii) a scheme for carrying out drug and alcohol testing of safety-sensitive workers, including the prescribing of—
 - (A) testable drugs; and
 - (B) permissible levels of alcohol or testable drugs for testing purposes; and
 - (C) testing processes and procedures; and
- (iii) the prescribing of matters to be stated in a document under **section 40Z(5)(a)(iii)**; and
- (iv) record keeping by operators and the Director:

Clause 6

In *clause 6*, replace *new Part 4B* (page 4, line 23 to page 9, line 21) with:

Part 4B**Drug and alcohol testing by Director****40X Health and Safety at Work Act 2015 not limited by this Part**

This Part does not limit the Health and Safety at Work Act 2015.

40Y Interpretation

In this Part, unless the context otherwise requires,—

bodily sample means any of the following:

- (a) biological fluid;
- (b) biological tissue (whether living or not);
- (c) breath

Director testing means drug or alcohol testing carried out by the Director under **section 40Z**

drug or alcohol test means—

- (a) a test of a person's bodily sample to determine the presence, but not the level, of alcohol or a testable drug (or both) in the sample; or
- (b) a test of a person's bodily sample to determine the presence and the level of alcohol or a testable drug (or both) in the sample

negative result, in relation to a drug or alcohol test, means that the test reveals—

- (a) that alcohol or a testable drug (or both) is not present in the bodily sample; or
- (b) if the Director, in carrying out Director testing, applies the permissible level of alcohol or a testable drug prescribed by the maritime rules, that alcohol or a testable drug is not present in the body at that specified level; or
- (b) if the Director, in carrying out Director testing, applies the permissible level of alcohol or a testable drug specified in the operator's safety system, that alcohol or a testable drug is not present in the body at that specified level

operator means an operator who—

- (a) operates a ship other than a pleasure craft; and
- (b) holds a maritime document for operating that ship; and
- (c) is required by maritime rules to establish and follow a management system for the purposes of section 17(4)(a)

safety-sensitive activity—

(a) means an activity that could significantly affect the health or safety of any person on board a ship, including the person performing the activity; and

(b) includes an activity prescribed by the maritime rules

safety-sensitive worker—

(a) means an individual who carries out work in any capacity for an operator in a role that involves the worker performing a safety-sensitive activity; and

(b) includes the operator, if the operator is an individual

safety system means the management system referred to in **paragraph (c)** of the definition of operator in this section

testable drug—

(a) means a drug that could impair a safety-sensitive worker's performance of a safety-sensitive activity; and

(b) includes a drug prescribed by the maritime rules; and

(c) may include, for the purposes of **section 40Z(4)(a)**, a drug specified in the operator's safety system as a drug for which testing may be carried out.

40Z Director testing

(1) The Director may carry out drug or alcohol testing of 1 or more safety-sensitive workers of an operator.

(2) Director testing—

(a) must be carried out in relation to alcohol and testable drugs; and

(b) may be carried out without giving advance notification to the operator or to the workers selected for testing; and

(c) may be carried out at any reasonable time and in any reasonable circumstances the Director considers appropriate; and

(d) may be carried out only if the worker consents to be tested; and

(e) must be carried out by a person who is competent to carry out the testing, including by having any necessary experience or qualifications.

(3) Subject to this section, Director testing must be carried out in accordance with the maritime rules.

(4) If the operator's safety system includes a scheme for carrying out drug and alcohol testing of safety-sensitive workers, Director testing may, at the Director's discretion, be carried out in relation to the

- testable drugs and the permissible levels of alcohol and testable drugs—
- (a) specified in the safety system; or
 - (b) prescribed by the maritime rules.
- (5) When carrying out Director testing, the Director must—
- (a) carry a document that states—
 - (i) the name and contact details of the person carrying out the test; and
 - (ii) an explanation of the statutory power to carry out the test; and
 - (iii) any other matter prescribed by the maritime rules; and
 - (b) show the document to the worker on first approaching the worker and at any later time on request; and
 - (c) take reasonable steps to establish the identity of a worker who is to be tested; and
 - (d) ask for the worker’s consent before testing the worker; and
 - (e) give the worker a written statement that contains the information and other matters set out in **subsection (6)**.
- (6) The statement required under **subsection (5)(e)** must contain the following:
- (a) the matters set out in the document referred to in **subsection (5)(b)**;
 - (b) the purpose of the test;
 - (c) a general description of how the test will be carried out, including how the bodily sample will be taken and how it will be analysed;
 - (d) an explanation of the consequences of refusing to consent or of the worker’s test returning a result other than a negative result;
 - (e) advice that the worker will be informed of the result of the test (and approximately when this will happen);
 - (f) advice about the worker’s right to appeal to the District Court under section 424 against the decision to test the worker;
 - (g) advice about the worker’s right to request a second test under **section 40ZA** and any charge for carrying out a second test.
- (7) As soon as practicable after the Director becomes aware of the result of a test, the Director must give the test result to the worker tested and the operator.

- (8) A safety-sensitive worker who has been tested or selected for testing under this section may appeal against the decision to test that worker to the District Court under section 424.

40ZA Worker may request second Director test

- (1) A worker who has undergone Director testing may, immediately after the test is carried out, ask the Director to carry out a second test for the same substance by the same method.
- (2) The Director must carry out a second test requested under this section.
- (3) If a second test is carried out under **subsection (2)**,—
- (a) that second test and its results replace the first test and its results for the purposes of this Part; but
 - (b) **subsections (1) and (2)** do not apply so as to require a further test.

40ZB What happens if worker refuses consent or test result is not negative

- (1) A safety-sensitive worker who has been selected for Director testing may refuse to consent to the testing.
- (2) If a worker refuses to consent to Director testing or is tested and returns a result other than a negative result, the Director must notify the operator for whom the worker carries out work of that fact as soon as practicable.
- (3) If the Director notifies the operator under **subsection (2)**, the operator must prohibit the worker from performing safety-sensitive activities until the operator reasonably believes that the worker is able to safely perform those activities.
- (4) **Subsection (3)**—
- (a) applies regardless of any scheme for carrying out drug and alcohol testing of safety-sensitive workers in the operator's safety system; but
 - (b) does not in any other way limit the operation of that scheme.

40ZC Use of test results in criminal proceedings

Test results obtained from Director testing are not admissible in any criminal proceedings other than the prosecution of an offence against any of the following:

- (a) this Act;
- (b) the Health and Safety at Work Act 2015;
- (c) the Hazardous Substances and New Organisms Act 1996.

Clause 7

Delete *clause 7* (page 9, lines 22 to 24).

New clause 7A

Before *clause 8* (page 9, before line 28), insert:

7A New section 2A inserted (Transitional, savings, and related provisions)

After section 2, insert:

2A Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.

Clause 28

Replace *clause 28* (page 15, line 28 to page 16, line 13) with:

28 New Schedule 1AA inserted

Insert the **Schedule 1AA** set out in **Schedule 1** of this Act as the first schedule to appear after the last section of the principal Act.

Clause 34

Delete *clause 34* (page 18, line 34 to page 19, line 14).

Schedule 1

In the *Schedule 1* heading, replace “**s 7**” (page 20, line 3) with “**s 28**”.

In *Schedule 1*, new *Schedule 1AA*, replace *clauses 1 to 6* (page 20, line 9 to page 21, line 29) with:

1 Interpretation

In this Part, **commencement date** means the date on which **Part 2** of the Maritime Transport Amendment Act **2017** comes into force under **section 2(1)** of that Act.

2 Amendments apply to pollution damage occurring after commencement

The amendments made by **Part 2** of the Maritime Transport Amendment Act **2017** apply in relation to pollution damage only if that damage is caused by or results from an escape or a discharge of oil from a ship that occurs on or after the commencement date.

3 References to Maritime Transport (Fund Convention) Levies Order 1996

Every reference in any enactment or document to the Maritime Transport (Fund Convention) Levies Order 1996 must, unless the context otherwise requires, be read as a reference to the **Maritime Transport (International Oil Pollution Compensation Levies) Order 1996**.

Explanatory note

This Supplementary Order Paper supersedes Supplementary Order Paper No 4.

This Supplementary Order Paper makes changes to the Bill in relation to—

- the proposed drug and alcohol testing scheme for persons working for certain commercial operators; and
- the proposed amendment relating to coastal shipping.

Drug and alcohol testing

Clause 6 of the Bill inserts *new Part 4B* into the principal Act, which provides as follows:

- it requires a category of commercial operator to establish and implement drug and alcohol management plans (**DAMPs**). An operator (**DAMP operator**) is a person who operates a ship other than a pleasure craft, holds a maritime document for operating the ship, has established a safety management system under the maritime rules, and whose ship operation involves activities by workers (**safety-sensitive workers**) that could significantly affect the health or safety of any person on board:
- the principal feature of a DAMP is that it allows an operator to carry out random drug or alcohol testing of safety-sensitive workers. The testing for drugs is focused on drugs (**testable drugs**) that could impair the work performance of a safety-sensitive worker (or that are specified in the DAMP):
- the scheme also allows the Director of Maritime Safety to test safety-sensitive workers (**Director testing**) for alcohol and testable drugs:
- the scheme provides for safety-sensitive activities (the relevant activities carried out by safety-sensitive workers) to be to be prescribed by the maritime rules.

The amendment of *clause 6* replaces proposed *new Part 4B* with a scheme that no longer imposes any new obligations on an operator but continues to provide for Director testing. In particular,—

- (a) *new section 40X* has not changed and continues to provide that the new scheme does not limit the Health and Safety at Work Act 2015.
- (b) the definitions in *new section 40Y* (Interpretation) have been changed to support the revised scheme as follows:

- the revised scheme relates to the same category of commercial operator, although all references to DAMPs have been removed. The operator is still identified as a person who is required by the Act and the maritime rules to establish a safety management system:
 - safety-sensitive activities and testable drugs are both prescribed by the maritime rules:
- (c) *new sections 40Z to 40ZB*, as set out in the Bill, provided for an operator's obligation to prepare a DAMP and to carry out random testing, and are omitted from the revised scheme.
- (d) *new section 40Z* in the revised scheme replaces *new section 40ZC* in the Bill. It allows the Director to carry out drug or alcohol testing of safety-sensitive workers of the operator. In particular,—
- this section continues to provide for how the test is to be carried out—requiring, for example, that the testing be carried out without notification but with the consent of the worker:
 - as there is no longer a DAMP that provides for drug or alcohol testing, testing is generally carried out in accordance with the maritime rules—testing procedures and the identification of testable drugs and permissible levels of alcohol and drugs:
 - if an operator's safety management system specifies testable drugs and permissible levels, the Director has a discretion to test by reference to these specifications.
- (e) *new section 40ZA* replaces *new section 40ZE* in the Bill. This section still requires the Director to carry out a second test if asked by the worker tested. The provision has been amended to clarify that the results of the second test replace the results of the first test for the purposes of *new Part 4B*.
- (f) *new section 40ZB* replaces *new section 40ZD* in the Bill. As in the Bill, this section allows a worker to refuse testing, requires the Director to notify the operator of this refusal and also of a non-negative test result, and requires the operator to prohibit the worker from performing the relevant activities until resumption of work is safe. However,—
- *new subsection (3)* allows the safe resumption of work as a matter to be determined by operator's reasonable belief; and
 - *new subsection (4)* clarifies the way in which this prohibition interacts with the operator's safety system; and
 - the operator is no longer required to implement the response plan that was required as a part of the DAMP.
- (g) *new section 40ZC* replaces *new section 40ZF* in the Bill, and makes the same provision for the use of test results in specified criminal proceedings.

A number of amendments are consequential upon the revision of the drug and alcohol testing scheme:

- *clause 5* of the Bill, which inserts *new paragraph (ea)* in section 36 of the Act (Maritime rules relating to other matters), is amended so that the new rule-making powers reflect the revised drug or alcohol testing scheme:
- *clauses 4, 7, and 28 and Schedule 1* of the Bill, which are concerned with *new Schedule 1AA* of the principal Act (transitional, savings, and related provisions), are amended and *new clause 7A* is inserted. As the revised drug and alcohol testing scheme does not impose any obligation on an operator to prepare a DAMP, the transitional provisions in *new Schedule 1AA* are no longer required. However, transitional provisions are still required in support of the oil pollution compensation provisions of the Bill. For this reason, *clauses 4 and 7* and the drug or alcohol testing provisions currently in *new Schedule 1AA* are deleted and that schedule is now provided for in *new clauses 7A and 28*.

Schedule 1 of the Bill, which contains *new Schedule 1AA* is amended, by removing the drug or alcohol testing transitional provisions and inserting the oil pollution compensation transitional provisions as a consequence of the change made to *clause 28* of the Bill.

Coastal shipping

Clause 34 is deleted. *Clause 34* of the Bill amends section 198 of the principal Act, which provides that passengers and goods may be carried between New Zealand ports only by a New Zealand ship or a foreign ship that is either chartered to a New Zealand-based operator or passing through New Zealand waters on a continuous international journey. The amendment in *clause 34* excludes from the limitation the carriage of goods between a mainland port and a port on a New Zealand offshore island, which would allow foreign ships to operate solely for the carriage of such goods.

Departmental disclosure statement

The Ministry of Transport has prepared a disclosure statement to assist with the scrutiny of this Supplementary Order Paper. The disclosure statement provides access to information about any material policy changes to the Bill and identifies any new significant or unusual legislative features of the Bill as amended.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=sop&subtype=government&year=2017&no=6>