

Explanatory Memorandum

WESTERN AUSTRALIAN MARINE AMENDMENT BILL 2023

Overview

The *Western Australian Marine Act 1982* (WAMA) is the principal WA legislation regulating the safe, accessible, and sustainable use of the state's navigable waters. The WAMA's alcohol or drug, and safe navigation offences have largely remained unchanged since its commencement in 1982.

The Western Australian Marine Amendment Bill 2023 amends the WAMA to –

- introduce a marine alcohol and drug testing regime that enables persons navigating a vessel to be tested following a vessel incident and as a preventative measure. The regime is supported by enforcement powers to facilitate testing in the marine environment. Operationally, the regime will be enforced by the Department of Transport with support from the Western Australia Police Force.
- modernise the existing offence for navigating under the influence for alcohol and drugs and introduce new alcohol or drug navigation offences with penalties consistent to corresponding road law offences.
- modernise the existing safe navigation offences by providing separately for reckless, dangerous, and careless navigation and introducing new offences where the unsafe navigation occasioned death or bodily harm.

Part 3 of the Bill makes consequential amendments to other legislation primarily to avoid duplication with new marine offences, and to ensure those offences are treated consistently with their road law counterparts in sentencing and other matters relating to the administration of justice.

Consistency with Road Law

To enable a consistent legislative and operational approach across the state's roads and waterways, the Bill's marine alcohol and drug testing regime substantially corresponds to the state's road law, primarily the *Road Traffic Act 1974* (RTA).

The marine regime includes similar offences and penalties (including increasing penalties for sequential offending), and evidential and procedural matters such as giving evidence by certificate. However, where necessary, deviations have been made to accommodate the operational challenges with administering and enforcing an effective alcohol and drug testing regime in the marine context and environment.

Testing and liability of skippers

A major difference from driving on the roads is that more than one person can be considered 'navigating' a vessel. In the maritime context, the vessel's master (or skipper) is the individual ultimately in charge and responsible for the vessel's safety and navigation. The master can issue directions to and supervise another individual to operate the vessel to affect its direction and movement. On commercial vessels, the

vessel's pilot has conduct of a vessel and can also issue directions to other individuals to operate the vessel, while still being subject to the master's overall command. A master and a pilot can also directly operate a vessel to control its direction, movement, and propulsion. The actions of the master, pilot and operator(s) are considered 'navigating' a vessel.

This Bill provides that persons responsible for the vessel's navigation are liable for their individual actions for safe navigation. A master, or a person operating a vessel (who can also be the master), may be tested and subsequently liable for alcohol or drug navigation offences if the person is under the influence or over the prescribed limits.

Interaction with Marine Safety (Domestic Commercial Vessel) National Law

This Bill provides that a person who navigates a vessel may be tested for alcohol or drugs regardless of whether the person is navigating a recreational or a commercial vessel regulated by the Marine Safety (Domestic Commercial Vessel) National Law¹.

Section 6(2)(b)(x) of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth) provides legislating of the actions of persons under the influence of alcohol or other drugs is left to the States or Territories.

Glossary of terms

The following terms are used throughout the Explanatory Memorandum.

BAC	blood alcohol content
inspector	person designated as inspector under WAMA section 117
RTA	<i>Road Traffic Act 1974</i>
WAMA	<i>Western Australian Marine Act 1982</i>

¹ Schedule 1, *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth).

PART 1 – PRELIMINARY

1. Short title

Clause 1 provides that this Bill, after it is passed by Parliament and receives Royal Assent, is to be known as the *Western Australian Marine Amendment Act 2023*.

2. Commencement

This clause provides for the commencement of the Amendment Act following Royal Assent.

Part 1 commences on the day the Bill receives Royal Assent.

Section 17 commences depending on when Schedule 1 of the *Criminal Law (Mental Impairment) Act 2023* commences. If this is before assent day, section 17 commences on the day after assent day. Otherwise, section 17 commences immediately after Schedule 1 of that Act comes into operation.

The remainder of the Act commences on a day fixed by proclamation, which may be on different days for different provisions. This is necessary to allow the Department of Transport, as supported by the Western Australia Police Force, to make administrative and operational arrangements to support the implementation of amendments in this Bill. Supporting regulations will also be drafted and timed to commence with the amendments in this Bill to support implementation.

PART 2 – WESTERN AUSTRALIAN MARINE ACT 1982 AMENDED

3. Act amended

This clause provides this Part amends the WAMA.

4. Section 3 amended

This clause inserts defined terms into section 3 of the WAMA. These include –

alcohol or drug testing requirement means a requirement made to a person under Part 3B Division 2 or 3. The term is used in the context of requirements made by inspectors or police officers to facilitate or enable the requiring or taking of a sample for alcohol or drug testing.

analyst, drugs analyst has the same meaning in the RTA, enabling the same analysts certified under road law to perform the same functions under the WAMA.

BAC or blood alcohol content, means the alcohol in a person's blood expressed in grams of alcohol per 100mL of blood. The BAC level is relevant to alcohol navigation offences of or above prescribed BAC levels and as evidence.

bodily harm has the same meaning given in *The Criminal Code*. The term used in the context of navigation offences occasioning bodily harm.

Chemistry Centre (WA) means the body established by the *Chemistry Centre (WA) Act 2007*. Its analysts are authorised by this Bill to analyse blood and oral fluid samples obtained using powers under this Bill.

drug has the meaning given in section 65 of the RTA, meaning –

- (a) a drug to which the *Misuse of Drugs Act 1981* applies;
- (b) a Schedule 4 poison as defined in the *Medicines and Poisons Act 2014*; or
- (c) a substance (other than alcohol) that, when consumed or used by a person, deprives the person (temporarily or permanently) of any of the person's normal mental or physical faculties.

grievous bodily harm has the same meaning in *The Criminal Code*. The term is used in the context of navigation offences in occasioning grievous bodily harm.

leave vessel, accompany officer or wait requirement means a requirement made to a person under section 75G. The term is used in context of requirements made by WAMA inspectors or police officers to facilitate or enable the requiring or taking of samples for alcohol and drug testing.

marine qualification means a WA marine qualification, or a qualification issued by a non-WA jurisdiction that is in relation to navigating or operating a vessel (**navigate** and **operate** are defined in section 75AA). Examples of non-WA issued qualifications include a certificate of competency issued under Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth) that authorises its holder to navigate a vessel. This definition is not intended to include qualifications, such as diplomas, that by themselves, do not authorise their holder to navigate a vessel. The term also includes qualifications required by crew of a vessel.

pilot means a person who does not belong to a vessel and is not considered part of a vessel's crew but has the conduct of a vessel. The definition is consistent with the term in Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth). WA's *Shipping and Pilotage Act 1967* and the *Port Authorities Act 1999*, both have similar requirements for the licensing of pilots for a particular port or pilotage area, including requirements for local knowledge and experience.

prescribed illicit drug means a prescribed illicit drug under the RTA, or a drug prescribed by the regulations for the purposes of this term. Paragraph (a) of this definition has effect so that what is a prescribed illicit drug under road law will be a prescribed illicit drug under the WAMA.

WA marine qualification means a qualification, permit or licence issued under the WAMA to a person that authorises the person to navigate the vessel. The term **navigate** is defined in section 75AA. An example of a WA marine qualification is a recreational skipper's ticket issued under the *Navigable Waters Regulations 1958*, which authorises its holder to navigate recreational vessels.

5. Section 3A amended

Subsection (1) amends section 3A(1) of the WAMA to provide that the Act also applies to pilots, unless provided for otherwise. This is relevant in that a vessel pilot can be liable for safe navigation offences in Part 3A and subject to this Bill's alcohol or drug testing regime in Part 3B.

Subsection (2) amends section 3A(2) of the WAMA to make the 'vessel connected to the State' an inclusive term. A vessel connected to the state is, but is not limited to, the vessels set out in sections 3A(2)(a) to (f) of the WAMA. It is envisaged that vessels connected to the State include vessels originating from non-WA jurisdictions that depart from the WA coast or islands.

6. Section 6 amended

This clause amends section 6(1) of the WAMA and defines **official details** with respect to an inspector designated under section 117 of the WAMA, means the inspector's full name and official title.

7. Part 2 Division 2 Subdivision 4 inserted

This clause introduces a new process to allow inspectors to apply to a Justice of the Peace (or JP) for an order to produce to obtain certain records for the purpose of investigating offences under the WAMA. These provisions are based on Part 6 of the *Criminal Investigations Act 2006*.

It is envisaged that inspectors would use the order to produce process to obtain CCTV footage or receipts from ship repairers or salvagers. Inspectors may also obtain hospital or medical records to investigate Part 3A culpable navigation offences involving death or injury.

Subdivision 4 – Obtaining business records

Section 18A – Terms used

This section fines terms applicable to Subdivision 4.

business is taken to mean any business, including a business of a governmental body or instrumentality or of a local government, or any occupation, trade or calling. For example, a business means a medical centre or a goods or services store.

Business record means a record prepared or used in the ordinary course of a business for the purpose of recording any matter related to the business. For example, CCTV footage.

order to produce means the order issued by a JP under section 18D.

Section 18B – Application of this Subdivision

Subsection (1) provides that an order to produce must not be issued to a person in relation to a business record that relates to, or may relate to an offence under the

WAMA that the person is suspected of having committed. However, this section does not prevent an order being issued on a person who may be suspected of having committed another different offence under the WAMA, so long as it is not an offence that the business record may relate to.

Subsection (2) clarifies that this Subdivision does not prevent an inspector from applying for a warrant (under Part 2 Division 2 Subdivision 2) whether it be applied before or after the JP issues an order to produce.

Section 18C – Application for order to produce

This section provides for how an inspector may apply for an order to produce a business record.

An application must be made in person to a JP (see also section 18E) and must set out all of the particulars described in subsection (3) –

- state the applicant's official details that they are an inspector;
- state the suspected contravention of the WAMA in relation to which the order to produce is required;
- state the grounds on which the applicant suspects that the contravention has occurred;
- set out the prescribed information (in the regulations), if any;
- state the name of the person to whom the order will apply;
- state that the person being asked to produce the business record is not suspected of having committed an offence under the WAMA to which the business record relates (see also section 18B(1));
- describe with reasonable particularity the business record, or class of business record that the applicant wants the person to produce;
- state the grounds on which the applicant suspects the business record or class of business record is relevant to the investigation; and
- whether the original or a copy of the business record, or class of business record, is required.

Section 18D – Issue of order to produce

Subsection (1) provides a JP may issue an order to produce on an inspector's application (under section 18C), if the JP is satisfied, by information on oath and in respect of each of the matters in section 18C(3) that the applicant suspects, there are reasonable grounds for the applicant to have that suspicion. These matters are sections 18C(b), (c), (d), (f) and (h) where the information prescribed requires the applicant has to suspect a matter.

Subsection (2) provides the JP cannot issue the order unless the inspector or some other person has given the JP, either orally or by affidavit, any further information

that the JP may require concerning the grounds on which the issue of the order to produce is sought.

Subsection (3) provides the order to produce must contain certain information set out in paragraphs (a) to (j).

Subsection (4) provides the order must be in the prescribed form (in the regulations).

Subsection (5) provides if a JP refuses to issue an order to produce, that JP must record on the application the fact of, the date and time of, and the reasons for, the refusal.

Section 18E – Order to produce applied for remotely

This section provides that an inspector may apply to a JP by remote communication, instead of in person, for an order to produce under section 18C in an urgent case, or if the inspector believes on reasonable grounds that a JP is not available within a reasonable distance of the inspector.

The JP cannot issue an order that has been applied for by remote communication unless the JP is satisfied of either of those grounds.

Sections 13(5) to (8) of the *Criminal Investigation Act 2006* apply to a remote application made under this section. These are –

- The application must be made in writing unless it is not practicable to send the JP written material, in which case then the application may be made orally and the JP must make a written record of the application and any information given in support of it.
- The application must be made on oath, unless it is not practicable for the JP to administer an oath to the applicant, in which case it may be made in an unsworn form and if the JP issues an order to produce, the applicant must as soon as practicable send the JP an affidavit verifying the application and any information given in support of it.
- If the JP issues an order to produce, then –
 - the JP must, if practicable, send a copy of the original order to the applicant by remote communication, but otherwise the JP must give the applicant by remote communication any information that must be set out in the order (see section 18D(3)); and
 - the applicant must complete a form of an order with the information received and give the JP a copy of the form as soon as practicable after doing so; and
 - the JP must attach the copy of the form to the original order and any affidavit received from the applicant and make them available for collection by the applicant.

- A copy of the original order to produce sent, or the form of the order completed, as the case may be, from the above paragraph, has the same force and effect as the original order.

Section 18F – Service of order to produce

This section provides that an order to produce must be served on the person to whom it applies as soon as practicable after it is issued by a JP. Service may be given in person or by post. Alternatively, it may be given by email or fax or another agreed way between inspector and the person to which the order applies, if that person has consented to the alternative service.

Section 18G – Effect of order to produce

This section provides the order to produce has the effect according to its contents, for example, that the person produce the particular business records. A person who is served with an order commits an offence if they fail to comply without a reasonable excuse.

Section 18H – Powers in relation to order to produce

Subsection (1) provides that an inspector who obtains a business record using an order to produce may retain the record for a reasonable time to determine its evidentiary value. This period is subject to section 40(1) of the WAMA.

Subsection (2) provides an inspector, if necessary to preserve the evidentiary value of the business record document or to subject it to forensic analysis, may seize the document, and irrespective of whether the document is seized or not, the inspector may inspect, examine, take measurements of or conduct tests on the record and make and retain a copy of it.

Subsection (3) provides that section 40(1)(c) – in relation to retention of the business record for 60 days, does not apply for a business record document seized using an order to Produce.

Subsection (4) provides protection of liability for a person who produces a business record in compliance with an order to produce.

8. Section 38 amended

This clause amends section 38(2) of the WAMA and has the effect that a person who produces a record to an inspector as per a section 18G order to produce, may request the inspector give them a copy of that record.

9. Section 59 deleted

Clause 5 repeals section 59 of the WAMA

The current section 59(1) offence for reckless or dangerous navigation is replaced by this Bill with sections 75BD and 75BE.

The current section 59(1) offence for negligent navigation is replaced by this Bill with careless navigation in section 75BF.

The current section 59(2) offence for navigating under the influence of alcohol or drugs is replaced by this Bill with section 75C.

The current section 59(3) offence is repealed. Instead, the action where a person determines, or exercises control over the course or direction of a towed vessel is taken to 'operate' a vessel under section 75AA – so that if a person recklessly, dangerously, or carelessly operates the towed vessel, this may be an offence under sections 75BD, 75BE or 75BF respectively.

The current section 59(4) offence for navigating or being towed without proper care and attention is replaced by this Bill with careless navigation in section 75BF.

10. Section 64 amended

This clause amends the definition in section 64 of **marine incident**, to provide that –

- the definition of marine incident applies to sections 64A, 64B and 64D; and
- the definition of marine incident is now applicable to any vessel, for example any commercial, pleasure or prescribed vessels.

11. Section 64A amended

This clause amends section 64A of the WAMA, which relates to a vessel master's duties following the vessel's involvement in a marine incident.

Subclause (1) amends section 64A(1) to provide the master's duty to render assistance to the extent they can without endangering their vessel, crew or any passengers, applies irrespective of the type or class of vessel that is involved in an incident. In other words, the master of a domestic commercial vessel, pleasure or recreational vessel, or prescribed vessel, involved in an incident has this duty to render assistance.

Note this duty differs from the master's duty in section 85 of Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth). Section 85 of that Act provides a vessel master of a domestic commercial vessel – not just the master involved in the marine incident – has an obligation to render assistance, where reasonable, to a vessel in distress.

Subclause (2) creates a crime where the master of the vessel involved in a marine incident that occasions death, grievous bodily harm, or bodily harm to a person, and the master fails to comply, without reasonable excuse, to –

- stand by to render assistance to persons or other vessels involved in the incident until satisfied that there is no need, or no further need to render assistance, and
- render assistance to persons and other vessels involved in the incident.

The maximum penalty is dependent on whether the incident occasions death, grievous bodily harm, or bodily harm. A summary penalty is available on a summary conviction for this offence. The offender will be disqualified from holding or obtaining

a WA marine qualification for at least 2 years (if death or grievous bodily harm is occasioned), or at least 12 months (if bodily harm is occasioned).

The subclause (2) offence and penalties correspond to section 54 of the RTA. The increased maximum penalties in the context of marine incidents involving injury align with road law, and also reflects that the death or injury may have been prevented or be reduced in severity if the master could have rendered assistance to that person.

Subclause (3) sets the maximum penalty at \$5000 for a master's failure to render assistance for marine incidents not occasioning death or injury, or where the master fails to provide their contact and vessel identification details to an injured person or any other master or vessel owner involved in an incident.

12. Section 64B amended

This clause amends section 64B of the WAMA which relates to a vessel master or owner's duty to give a report following a marine incident involving injury, death, or vessel damage that affects the vessel's seaworthiness.

Subclause (1) amends section 64B to provide the master or owner's duty to give a report applies following a vessel's involvement in the above marine incident, irrespective of the type or class of vessel that is involved in an incident. In other words, the master of a domestic commercial vessel, pleasure or recreational vessel, or prescribed vessel, involved in such a marine incident, has this duty to give a report.

Subclause (3) inserts section 64B(3A) that creates a crime where the master or owner of a vessel fails to report the marine incident that involved death, grievous bodily harm or bodily harm, to the chief executive officer as soon as possible, without reasonable excuse. The maximum penalty is dependent on whether the incident occasions death, grievous bodily harm or bodily harm. A summary penalty is available on summary conviction for this offence. The offender will be disqualified from holding or obtaining a WA marine qualification for at least 12 months.

Section 64B(3A) and its penalties correspond to section 56 of the RTA with respect to incidents occasioning death and injury.

Subclause (3) inserts section 64B(3C) to provide a person commits an offence if they fail to provide the report without reasonable excuse following a vessel incident that does not involve death or injury.

13. Section 64D inserted

This clause inserts section 64D into the WAMA.

Section 64D – Marine incidents: power to require responsible person to give information

This section corresponds to section 57 of the RTA and applies if a vessel (irrespective of whether it is a pleasure, commercial or prescribed vessel) is involved in a marine incident.

The responsible person (either the master, vessel owner, or another person who appears to be in possession or control of the vessel) must comply with an inspector or police officer's requirement to provide any information within their power to give that may assist in identifying a person who was the master, or person operating a vessel at the time a marine incident. A person who fails to do so without reasonable excuse commits an offence. Imprisonment is a sentencing option for this offence where the marine incident occasioned the death, grievous bodily harm, or bodily harm to a person.

See also section 133(1) of the WAMA which requires an owner or a person being in possession or control of a vessel, to provide an authorised person with information within their power to give that may lead to the identification of who was the person in charge at the time when an offence under this Act is alleged to have been committed. Section 64D is distinct from section 133(1) in that it is applicable following a marine incident occasioning death or injury, whereas section 133(1) is applicable where it can be alleged an offence under the Act has been committed.

14. Part 3A inserted

This clause inserts Part 3A into the WAMA, containing offences for reckless, dangerous and careless navigation of vessels, and alcohol or drug related navigation offences.

Subclause (1) inserts Part 3A Divisions 1 to 3 in the WAMA.

Subclause (2) inserts Part 3A Division 4 in the WAMA.

Part 3A – Safe navigation of vessels and alcohol and drug related offences

Division 1 – Preliminary

Section 75A – Terms used

Section 75A defines terms applicable to Part 3A. This includes –

0.08+ and illicit drug offence means an offence against section 75DD for navigating a vessel with a BAC of excess 0.08 and a prescribed illicit drug is present in the person's oral fluid or blood.

0.08+ offence means an offence against section 75DA for navigating a vessel with a BAC of excess 0.08.

circumstances of aggravation has the meaning given in section 75AF and is used in the context of where a person may commit an offence or navigate a vessel in circumstances of aggravation.

involved, for a vessel in relation to an incident, has the meaning given in section 75AB. The term is used in the context of vessels involved in incidents occasioning death or bodily harm, in relation to testing powers and also navigation offences.

operate and **navigate**, in relation to a vessel, has the meaning for their respective terms in section 75AA.

Section 75AA – When individual operates or navigates vessel

This section defines the terms **operate** and **navigate**.

Subsection (1) provides a person operates a vessel if the person determines, or exercises control over the course or direction of the vessel, or the means of propulsion of the vessel. A person is considered operating a vessel if they have physical control of a thing, such as a wheel, an outboard motor, the tiller, or the sails, that affect the course or direction of the vessel or its movement.

A person also operates a vessel if they are determining the vessel's means of propulsion. For example, by activating a vessel's engine, raising the sails, or raising the anchor so that the vessel can move.

A person may operate a vessel whether or not that vessel is underway. A vessel may not be underway, but a person is still operating the vessel if they are exercising some control over the course or direction or the means of propulsion. For example, a person may operate a vessel by starting the engine even if the vessel is not yet moving through the water. A person may also operate a vessel by deciding to stop the engine and allowing the vessel to drift on the current or tide.

Use of equipment or devices on the vessel that are unrelated to its movements or affecting its course, direction or means of propulsion are not within the scope of the term. For example, a person on a vessel operating a winch to retrieve a net is not considered operating a vessel as the action is not related to the vessel's movement.

A person may operate a vessel even if it is being towed by another vessel. For example, a person may be able to exercise some control over the course or direction of the towed vessel.

A person who pilots the vessel is also taken to be operating a vessel. For example, a pilot, who has conduct of a vessel, when piloting, is operating a vessel.

Subsection (2) provides a person navigates a vessel if they are either operating a vessel, or if they have command or charge of the vessel while the vessel is being operated or attempted to be operated.

For example, the master of a vessel is navigating the vessel by issuing directions to other persons on the vessel that affect the vessel's movement. The master is also navigating by operating a vessel if the master is at the wheel or tiller or adjusting the sails which affect the vessel's movement.

The effect of these defined terms is that a person who was operating a vessel, or the master who was navigating a vessel, can be required to provide a sample for alcohol or drug testing, and be liable for safe navigation and alcohol or drug navigation offences.

Section 75AB – When vessel is involved in incident

This section defines when a vessel is **involved** in an incident.

A vessel is involved in an incident if its presence occasioned the incident, or the use of the vessel is an immediate or proximate cause of death, or injury to a person, or damage to property occasioned by the incident.

See section 75BH inserted by this Bill which provides a non-exhaustive list of circumstances in which a vessel is involved in an incident occasioning death, grievous bodily harm or bodily harm.

Section 75AC– Person taken to be in command or charge of vessel for the purposes of Parts 3A and 3B

In practice, there is only one master of a vessel. The master, having command or charge of a vessel, is ultimately responsible for the vessel's navigation and safety.

The term 'master' is defined in section 3 of the WAMA as the person having command or charge of a ship (vessel). A master is also commonly referred to as the vessel's skipper.

This section sets out, for purposes of Parts 3A and 3B, the presumption where a person is taken to be in command or charge of a vessel, or effectively the vessel's master. This presumption is rebuttable in court proceedings for relevant offences where it would apply.

Subsection (2) provides a person is taken to be in command or charge of a vessel at a particular time, if –

- the person was the only person on the vessel, or the only adult on the vessel;
- the person appears to be in command or charge of the vessel, without contradiction by any other person on the vessel;
- the majority, or all of the other persons on the vessel acknowledge that the person is the master; or
- of all the individuals on the vessel, the person has ultimate control over the vessel being operated, whether or not the vessel is underway, or the person is operating the vessel. For example, the person issues directions to a vessel's pilot (who has conduct of a vessel) and override the pilot's directions to operators on the movement of the vessel.

Subsection (3) provides a vessel owner is taken to be in command or charge of the vessel if the owner is on the vessel, and they hold a marine qualification. This presumption would not apply to an owner who is disqualified from holding or obtaining a WA marine qualification.

Subsection (4) recognises that in the marine context, there is only ever one master of a vessel at any one time. This subsection provides that a person continues to have command or charge of a vessel until it has been handed over to another person, and the other person has accepted this handover. For example, on a commercial vessel, this handover would be recorded in the vessel's logbook.

Section 75AD – Person is incapable of having proper control of vessel

This section provides what a reference in Part 3A and 3B to a person being incapable of having proper control means in relation to the person operating a vessel, a vessel's pilot, or the vessel's master.

A master who is operating a vessel (for example, having direct control at the wheel or tiller) can be considered as incapable of having proper control over the course or direction of the vessel, the means of propulsion of the vessel, and being incapable of having proper command or charge of the vessel.

Section 75AE – Person with BAC of 0.15 or above taken to be incapable of proper control

This section corresponds to section 59B(5) of the RTA.

A person with a BAC of or in excess of 0.15g is taken to be under the influence of alcohol to such an extent as to be incapable of having proper control of a vessel. This section applies in proceedings where 'under the influence of alcohol to such an extent as to be incapable' is a relevant element of the offence.

See section 75AD in relation to what 'incapable of having proper control' means in relation to the person operating a vessel, a pilot or the vessel master.

Section 75AF – Circumstances of Aggravation

This section corresponds to sections 49AB(1) and (2) of the RTA and lists the circumstances where a person may commit an offence or navigate a vessel in circumstances of aggravation. These are –

- When a person unlawfully navigates a vessel without consent from a vessel owner, or the vessel master.
- Where a speed limit applies to the vessel, or to the waters in which the vessel is operating – the vessel is exceeding the speed limit by 10 knots or more.

Unlike on roads, a speed limit does not apply in navigable waters unless one has been imposed by notice under section 67 of the WAMA.

Speed limits are imposed generally where there are potential navigational hazards. In some instances, limits apply in waters where there is likelihood of the vessel coming into close proximity with other boats or objects in the water. Generally, the limits imposed are between 5 to 12 knots (approximately 9.26 to 22.22 km/hr).

For example, 8 knot speed limits apply when approaching bridges, entering boating harbours, and around mooring control areas to ensure the safety of water-users and surrounding property. An excess speed of 10 knots, while equating approximately to 18.52 km/hr, is more than double the 8 knot speed limit.

- Where a person navigates a vessel to escape pursuit by an inspector or a police officer, irrespective of whether the pursuit was proceeding or had ended at the time of the alleged offence.

Division 2 – Safe operation of vessels and alcohol and drug related offences

Division 2 creates offences relating to the safe navigation of vessels, including for instances where death or bodily harm has occurred.

Subdivision 1 – Dangerous navigation of vessels occasioning death, grievous bodily harm or bodily harm

Section 75B – Dangerous navigation of vessel occasioning death

This section corresponds to section 59 of the RTA with respect to driving occasioning death.

Subsection (1) provides a person commits a crime if they navigate a vessel occasioning the death of another person, while under the influence of alcohol, drugs, or alcohol and drugs, to such an extent as to be incapable of having proper control of a vessel.

As per section 75AE, a person with a BAC of 0.15g or above is taken to be under the influence of alcohol to such an extent as to be incapable of having proper control of a vessel.

Subsection (2) provides a person commits a crime if they navigate a vessel occasioning the death of another person, in a manner that is dangerous to the public or to any person, having regard to all the circumstances of the case. Circumstances of the case are a consideration of the time, place and circumstances at the time of the alleged dangerous navigation, including but not limited to the weather and water conditions, or the amount of traffic that was or could be reasonably expected at the time.

The maximum statutory penalty for a subsection (2) is higher if the offence was committed in circumstances of aggravation. An alternative verdict is available on trial for the offence.

Subsection (3) provides the court must order the person disqualified from holding or obtaining a WA marine qualification for at least 2 years.

Section 75BA – Dangerous navigation of vessel occasioning grievous bodily harm

This section corresponds to section 59 of the RTA with respect to driving occasioning grievous bodily harm.

Subsection (1) provides a person commits a crime if they navigate a vessel occasioning grievous bodily harm to another person, while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of a vessel.

As per section 75AE, a person with a BAC of 0.15g or above is taken to be under the influence of alcohol to such an extent as to be incapable of having proper control of a vessel.

Subsection (2) provides a person commits a crime if they navigate a vessel occasioning grievous bodily harm to another person in a manner that is dangerous to the public or to any person, having regard to all the circumstances of the case.

The maximum statutory penalty for a subsection (2) offence is higher if the offence was committed in circumstances of aggravation.

A summary conviction penalty and an alternative verdict on trial is available for the above offences.

Subsection (3) provides a court sentencing a person for any of the above offences must order the person be disqualified from holding or obtaining a WA marine qualification for at least 2 years.

Section 75BB – Dangerous navigation of vessel occasioning bodily harm

This section corresponds to section 59A of the RTA.

Subsection (1) provides a person commits a crime if they navigate a vessel occasioning bodily harm to another person while under the influence of alcohol, drugs, or alcohol and drugs, to such an extent as to be incapable of having proper control of a vessel.

As per section 75AE, a person with a BAC of 0.15g or above is taken to be under the influence of alcohol to such an extent as to be incapable of having proper control of a vessel.

A summary conviction penalty is available for a subsection (1) offence. An alternative verdict is available on trial for this offence.

Subsection (3) provides a person commits a crime if they navigate a vessel occasioning bodily harm to another person in a manner that is dangerous to the public or to any person, having regard to all the circumstances of the case.

The maximum statutory penalty for a subsection (3) offence is higher if the offence was committed in circumstances of aggravation. A summary conviction penalty is available for a subsection (3) offence, and an alternative verdict is available on trial. For a subsection (3) offence, the minimum disqualification if the offence was committed in circumstances of aggravation is 2 years, otherwise at least 12 months.

Section 75BC – Careless navigation of vessel occasioning death, grievous bodily harm or bodily harm

This section corresponds to section 59BA of the RTA.

A person commits an offence for navigating a vessel occasioning death, grievous bodily harm or bodily harm without due care or attention. This summary offence carries a maximum penalty of \$36,000 or imprisonment for up to 3 years, and disqualification from holding or obtaining a WA marine qualification for a minimum 3-month period.

The offence of careless navigation (section 75BF) is an alternative verdict on trial for this offence.

Subdivision 2 – Reckless, dangerous and careless navigation of vessels

Section 75BD – Reckless navigation of vessel

This section corresponds to sections 60 and 60B of the RTA.

This offence replaces current section 59(1) of the WAMA of navigating a vessel in a reckless manner.

A person commits an offence if the person wilfully navigates a vessel in a manner that is inherently dangerous, or dangerous to the public or any person, having regard to all the circumstances of the case.

The penalties reflect that reckless navigation is considered more serious than dangerous or careless navigation, and increase depending on whether it is a second or subsequent offence. An alternative verdict for dangerous or careless navigation is available on trial for this offence.

Subsection (2) provides it is a crime if the person commits reckless navigation in circumstances of aggravation to escape pursuit by an inspector or police officer. A summary conviction penalty is available. The Bill deviates from road law by not mandating imprisonment for a subsection (2) offence. Sentencing options under Part 5 of the *Sentencing Act 1995* apply.

Section 75BE – Dangerous navigation of vessel

This section corresponds to section 61 of the RTA.

This offence replaces current section 59(1) of the WAMA of navigating a vessel in a dangerous manner.

A person commits an offence if they navigate a vessel in a manner that is dangerous, having regard to all the circumstances of the case. Manner would include speed.

The penalties reflect that dangerous navigation is considered more serious than careless navigation, but not as serious as reckless navigation. The penalties increase depending on whether it is a second or subsequent offence. A previous offence of equal or more severity is counted as a prior offence against this section.

Where the offence is a crime when it is committed in circumstances of aggravation to escape pursuit by an inspector or police officer, higher penalties apply. The Bill deviates from road law by not mandating imprisonment. Sentencing options under Part 5 of the *Sentencing Act 1995* apply.

An alternative verdict for careless navigation is available on trial for this offence.

Section 75BF – Careless navigation of vessel

This section corresponds to section 62 of the RTA.

This offence replaces current offences in sections 59(1) and (4) of the WAMA of navigating in a negligent manner or without proper care and attention, respectively.

A person commits an offence if they navigate a vessel without due care and attention. The action of navigating a vessel in a negligent manner would be considered captured by this offence. The adoption of 'careless' over 'negligent' is to provide for consistency with road law.

The penalty for the offence reflects that careless navigation is considered less serious than reckless or dangerous navigation.

Subdivision 3 – Provisions relating to offences in Subdivisions 1 and 2
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Section 75BG – Application of Subdivision

This section provides Subdivision 3 applies for the purposes of an offence against Part 3A, Subdivision 1 and 2.

Section 75BH – Circumstances occasioning death, grievous bodily harm or bodily harm

This section corresponds to sections 59B(1) and (2) of the RTA.

This section sets out the marine equivalents of circumstances in which a vessel is involved in an incident occasioning the death, grievous bodily harm, or bodily harm to another person. This is a non-exhaustive list.

Section 75BI – Provisions for offences involving incidents occasioning death, grievous bodily harm or bodily harm

This section corresponds to sections 59(2), 59A(2) and 59BA(2) of the RTA, as is relevant.

Subsection (2) provides that for purposes of a navigation offence involving a vessel incident occasioning death, grievous bodily harm, or bodily harm, it is not relevant that the death or harm could have been avoided by proper precaution by another person (including the injured person) or might have been prevented by proper care or treatment.

Subsections (3) and (4) provide that where the vessel incident occasioned death and the casualty received treatment, but died as a result, the vessel incident is still taken to have occasioned the death if the treatment was reasonably proper in the circumstances and had been provided in good faith.

Section 75BJ – Defence: death or harm not attributable to alcohol or drugs

This section corresponds to section 59B(6)(a) of the RTA.

It is a defence to a charge of a navigation offence involving an incident occasioning death or injury, where an element of the offence was that the person was under the influence of an alcohol or a drug – that the death or harm was not attributable to the person being under the influence.

Section 75BK – Defence: death or harm not attributable to manner of operation or level of care and attention

This section corresponds to sections 59B(6)(b) and (7) of the RTA.

It is a defence to a charge of a navigation offence occasioning death or injury, where an element of the offence related to the manner of navigation, that the death or injury was not attributable to person's manner of navigation, or the level of care or attention when navigating the vessel, as is relevant.

Section 75BL – Defence: inspector or police officer navigating vessel in certain circumstances

This section replicates the defence in section 61A of the RTA and applies it to the marine environment.

It provides a defence to reckless or dangerous navigation related offences for police officers and inspectors who are on official duty, when navigating recklessly or dangerously (usually in pursuit of a vessel) if that navigation was substantially in accordance with the Commissioner of Police or the Department of Transport CEO's policies, guidelines, and directions, and it was reasonable in the public interest.

<h3>Division 3 – Navigation of vessels while under the influence of alcohol or drugs or impaired by drugs</h3>

This Division creates marine alcohol or drug navigation offences similar to alcohol or drug driving offences under Part 5 Division 2 of the RTA.

In most instances, the offences attach to a person who navigates, or attempts to operate a vessel under the influence, or over a prescribed BAC limit or with any trace of a prescribed illicit drug in their system.

The offences provide for 'attempt to operate' to be consistent with 'attempt to drive' for corresponding alcohol or drug driving offences under road law. The distinction for 'attempt to operate' is provided because a person cannot attempt to be the person in command or charge of a vessel – a person is either the master, or they are not. However, a person can attempt to operate (and pilot) a vessel.

Section 75C – Navigation of vessel while under influence of alcohol or drugs

This section corresponds to section 63 of the RTA, in particular the section 63(1) offence.

A person who navigates or attempts to operate a vessel under the influence of alcohol or drugs to such an extent as to be incapable of having proper control of a vessel, commits an offence.

See section 75AD which provides what a reference to 'incapable of having proper control' is taken to mean, depending on whether the person was operating the vessel, the pilot or the master.

Section 75AE provides a person with a BAC of 0.15g or above to be taken to be under the influence of alcohol to such an extent as to be incapable of having proper control.

An alternative verdict is available on trial for this offence.

Penalties for this offence increase with sequential offending. Prior offences for other serious or equal alcohol or drug navigation offences are counted.

In particular, the applicable penalty for the first offence against this section depends on whether the person has a one or more prior convictions against an 0.08+ offence (section 75DA), 0.08+ and prescribed illicit drugs offence (section 75DD), or an 0.08+ *and* 0.08+ and prescribed illicit drugs offence (sections 75DA and 75DD). These must be prior convictions (as opposed to an offence previously committed by the person). Spent convictions are not counted, except with respect to calculating the period of disqualification.

A police officer may arrest a person for this offence without a warrant.

See section 75CG for rights of a person charged with this offence.

A defence for this offence is available under section 75CB.

Section 75CA – Navigation of vessel while under influence of both alcohol and drugs

This section corresponds to section 63 of the RTA, in particular the section 63(2) offence.

A person who navigates or attempts to operate a vessel under the influence of both alcohol and drugs to such an extent as to be incapable of having proper control of a vessel, commits an offence.

See section 75AD which provides what a reference to ‘incapable of having proper control’ is taken to mean, depending on whether the person was the person operating the vessel, the pilot or the master.

Section 75AE provides a person with a BAC of 0.15g or above is taken to be under the influence of alcohol to such an extent as to be incapable of having proper control.

Penalties for this offence increase with sequential offending. The maximum penalties are higher than section 75C to recognise that the person was under the influence of both alcohol and one or more drugs.

Prior offences for other serious alcohol or drug navigation offences are counted. In particular, the applicable penalty for the first offence against this section depends on whether the person has a one or more prior convictions against an 0.08+ offence (section 75DA), 0.08+ and prescribed illicit drugs offence (section 75DD), or an 0.08+ *and* 0.08+ and prescribed illicit drugs offence (Section 75DA and 75DD).

These must be prior convictions (as opposed to an offence previously committed by the person). Spent convictions are not counted, except with respect to calculating the period of disqualification.

A defence is available in section 75CB. An alternative verdict is available on trial for this offence.

A police officer may arrest a person for this offence without a warrant.

See section 75CG for rights of a person charged with this offence.

Section 75CB – Defence: under influence of drug prescribed or administered for therapeutic reasons

This section corresponds to the defence that arises under section 63(7) of the RTA.

It is a defence to a charge against section 75C(1) or 75CA(1), in circumstances where the accused was alleged to have been under the influence of a drug, or a combination of alcohol and drugs, that the drugs were a prescribed for or administered to the person charged, by a medical professional for therapeutic reasons and if the person charged was not aware, or could not have been expected to be aware that the drug was likely to adversely affect their ability to properly control a vessel.

Section 75CC – Master must not permit person under influence of alcohol or drugs or both to operate vessel

This offence is not in the RTA. It reflects that in the marine context, the vessel's master is ultimately responsible for the vessel's navigation and safety.

This section creates an offence for a master who knows, or is aware, or has reason to suspect that a person is under the influence of alcohol or drugs, and still permits that person to operate the vessel.

A master is not required to suspect the person is under the influence to such an extent as the person is incapable of having proper control of the vessel – it is enough that the master suspects the person is under the influence of alcohol or drugs and allows that person to operate the vessel.

The penalty is a maximum fine of \$3750, which corresponds to the maximum fine for a first offence against section 75C – navigating a vessel under the influence of alcohol or drugs.

Section 75CD – Navigation of vessel while impaired by drugs

This section corresponds to section 64AB of the RTA.

A person commits an offence if they navigate or attempt to operate a vessel while impaired by drugs. This offence can be established by the prosecution using the approach set out in section 75CE, or by establishing that the person was impaired and navigating the vessel.

A defence is available in section 75CF. The penalties increase for sequential offending. An alternative verdict is available on trial for this offence.

A police officer may arrest a person for this offence without a warrant.

See section 75CG for rights of a person charged with this offence.

Section 75CE – When person may be convicted of navigation of vessel while impaired by drugs offence

This section corresponds to section 64AB(5) of the RTA.

This section provides that the accused may be convicted of an offence against section 75CD(1), if in proceedings, the prosecution can establish all of the following –

- that the accused navigated, or attempted to operate a vessel;
- at the time of the navigation, or attempted vessel operation, 1 or more drugs was present in the accused's body;
- the accused's behaviour, condition or appearance was consistent with that associated with a person who has consumed or used the particular drug, or those particular drugs that were present in the person's body; and
- that the behaviour associated with the accused who consumed or used that particular drug or drugs, would be inconsistent with the person being capable of having proper control of a vessel.

See section 75AD for what constitutes having proper control of a vessel depending on whether the person was a person operating, the pilot or the vessel master.

Section 75CF – Defence: impaired by drug prescribed or administered for therapeutic reasons

This section corresponds to section 64AB(8) of the RTA.

This section provides a defence to the charge of an offence in section 75CD for navigating while impaired by drugs. Where it is alleged, or it appears on the evidence that the person charged was impaired by one or more particular drugs, then it is a defence for the accused to provide that –

- the drug or drugs had been taken as per a doctor, nurse practitioner or dentist prescription, or administered by one of them, for therapeutic purposes; and
- if the accused had received the particular drug, or drugs, in a packaged form, that the packaging did not include a label advising that the drug was likely to affect a person in the way that would be inconsistent with having proper control of a vessel; and
- the accused could not reasonably have been expected to have been aware, and was not aware, that those drugs would render them incapable of having proper control of a vessel.

Section 75CG – Rights of person charged with particular offences

This section corresponds to sections 63(4) to (4b) of the RTA.

This section provides a person charged with an offence under sections 75C, 75CA or 75CD the rights to be examined by a medical practitioner nominated by the person charged.

The right arises in circumstances where the person charged is under arrest or is in custody for any other reason when they are charged. If a sample of the person's blood had been taken pursuant to an alcohol or drug testing requirement, then this right does not apply. This is because, under section 75IF, a sample of blood is taken and sent to the Chemistry Centre on behalf of the person and is available for independent examination at their request.

Division 4 – Navigation of vessels with particular BAC or prescribed illicit drug present
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Section 75D – Navigation of vessel while BAC is 0.05 or above

This section corresponds to section 64AA of the RTA.

A person who navigates a vessel, or attempts to operate a vessel, with a BAC of 0.05 g or above commits an offence. This offence sets the prescribed alcohol limit on the state's waterways at 0.05g BAC.

The applicable penalty is set out in the sentencing matrix Table. Increasing penalties apply depending on whether the offence is a first, second or subsequent offence. A previous offence of equal or more severity is counted as a prior offence against this section.

Section 75DA – Navigation of vessel while BAC is 0.08 or above

This section corresponds to section 64 of the RTA.

A person who navigates a vessel, or attempts to operate a vessel, with a BAC of 0.08g or above commits an offence. The applicable penalty is set out in the sentencing matrix Table. Increasing penalties apply depending on whether the offence is a first, second or subsequent offence.

A previous offence of equal or more severity is counted as a prior offence against this section. An alternative verdict is available on trial for this offence.

A police officer may arrest a person without a warrant for this offence.

Section 75DB – Navigation of vessel while prescribed illicit drug present

This section corresponds to section 64AC of the RTA.

A person who navigates, or attempts to operate, a vessel with any trace of a prescribed illicit drug present in their oral fluid or blood commits an offence. This is irrespective of the amount or concentration of the prescribed illicit drug that is present in the person's system.

Increasing penalties apply depending on whether the offence is a first, second or subsequent offence. A previous offence of equal or more severity is counted as a prior offence against this section.

See section 75DE – mistaken belief about a prescribed illicit drug is not a defence to a charge against this section.

Section 75DC – Navigation of vessel while BAC is 0.05 or above and prescribed illicit drug is present

This section corresponds to section 64B of the RTA.

A person who navigates a vessel, or attempts to operate a vessel, with a BAC of 0.05g or above, and has a prescribed illicit drug in their oral fluid or blood, commits an offence. A police officer may arrest a person for this offence without a warrant.

Increasing penalties apply depending on whether the offence is a first, second or subsequent offence, and is set out in the sentencing matrix Table. A previous offence of equal or more severity is counted as a prior offence against this section. An alternative verdict is available on trial for this offence.

See section 75DE – mistaken belief about a prescribed illicit drug is not a defence to a charge against this section.

Section 75DD – Navigation of vessel while BAC is 0.08 or above and prescribed illicit drug is present

This section corresponds to section 64B of the RTA.

A person who navigates a vessel, or attempts to operate a vessel, with a BAC of 0.08 g or above, and has a prescribed illicit drug in their oral fluid or blood, commits an offence. A police officer may arrest a person for this offence without a warrant.

Increasing penalties apply depending on whether the offence is a first, second or subsequent offence, and is set out in the sentencing matrix Table. A previous offence of equal or more severity is counted as a prior offence against this section. An alternative verdict is available on trial for this offence.

See section 75DE – mistaken belief about a prescribed illicit drug is not a defence to a charge against this section.

Section 75DE – Mistaken belief about prescribed illicit drug is not defence

This section corresponds to section 64D(2) of the RTA. It is relevant to offences against sections 75DB, 75DC and 75DD. A person charged against one of those sections cannot bring the defence that the person took the drug mistakenly believing it was another drug.

15. Part 3B inserted

This clause inserts Part 3B into the WAMA.

Part 3B provides the powers for inspectors or police officers to require persons to provide samples for alcohol or drug testing purposes, related enforcement powers to facilitate testing, and offences for failing to comply with testing related requirements.

Part 3B – Testing for alcohol and drugs

Division 1 – Preliminary

Section 75E – Terms used

Subsection (1) defines terms for the purposes of Part 3B including –

authorised drug tester has the meaning given in section 75EB. The term is used in the context of persons who can conduct drug testing of oral fluid samples.

authorised operator has the meaning given in section 75EA. The term is used in the context of persons who can operate breath analysing equipment to undertake analysis of a breath sample.

breath analysing equipment, drug testing device, preliminary breath testing device, preliminary oral fluid testing device have the same meaning as their corresponding term in the RTA, allowing the same devices and equipment used under road law to be used under the WAMA. Alternatively, different devices could be approved for testing purposes under the WAMA.

involved, for a vessel in relation to an incident, has the meaning given in section 75AB. The term is used in the context of vessels involved in incidents occasioning death or bodily harm, in relation to testing powers and also navigation offences.

operate and ***navigate***, in relation to a vessel, has the meaning for their respective terms in section 75AA.

preliminary breath test means a preliminary test under the RTA, or a test of a sample of a person's breath sample using a preliminary breath testing device.

preliminary oral fluid test means a test of a person's sample of oral fluid using a preliminary oral fluid testing device.

prescribed sample taker replicates the same term in the RTA and is relevant to the appropriately qualified medical professional or person who may be able to take blood samples.

stop is defined as an inclusive term, which includes to stop the vessel's motor, to drop anchor, or for the vessel to be fastened to a mooring, wharf or jetty.

Subsection (2) provides that for purposes of Part 3B, anything done by a person acting under the supervision of an analyst, drugs analyst, medical practitioner or a prescribed sample taker is taken to have been done by the analyst, drugs analyst, medical practitioner or a prescribed sample taker (as the case requires).

Section 75EA – Authorised operators for operating breath analysing equipment

This section defines an authorised operator as an inspector or police officer who is competent to operate all types of breath analysing equipment under the WAMA. In practice, the authorised operator is a person who has undertaken the relevant training and is competent to use breath analysing equipment to analyse breath samples.

An authorised person under section 65 of the RTA is taken to be an authorised operator under the WAMA. This allows persons certified by the Commissioner of Police under the RTA to not be recertified under the WAMA to operate breath analysing equipment. However, this option remains available under subsection (2) should the Commissioner certify non-road authorised operators for the purposes of the WAMA.

An authorised operator may provide evidence by certificate in proceedings for alcohol navigation offences – see section 124HF.

Section 75EB – Authorised drug testers for operating drug testing devices

This section defines an authorised drug tester, as an inspector or police officer who is authorised/certified to collect oral fluid and conducts the subsequent drug testing under the WAMA.

A person authorised under the RTA to conduct drug testing is taken to be an authorised drug tester under the WAMA. This allows persons authorised by the Police Commissioner under the RTA to not have to be re-authorised under the WAMA to conduct drug testing. However, this option remains available under subsection (2) should the Commissioner certify non-road authorised drug testers for the purposes of the WAMA.

An authorised drug tester may provide evidence by certificate in proceedings for relevant drug navigation offences – see section 124HM.

Section 75EC – Using breath sample to work out BAC

This section corresponds to section 65A of the RTA and provides the approach or method to determine the BAC based on the measurement in subsection (1).

Breath analysing equipment may determine a person's BAC by providing the BAC in the analysis result either directly or enabling it to be worked out using the subsection (1) measurement.

Similarly, a preliminary breath testing device will indicate a person's BAC, or that the BAC is or not above a particular level, either by giving that indication directly or allowing it to be worked out using the measurement in subsection (1).

Section 75ED – Powers additional to other powers

This section clarifies that the powers of an inspector or police officer under Part 3B is additional to, and does not limit, and other powers that an inspector or police officer may have under the WAMA or another written law.

Division 2 – Testing for alcohol

Division 2 provides powers for inspectors and police officers to require persons relating to navigating a vessel to provide breath samples, or to allow their blood sample to be taken by an appropriately qualified medical professional (prescribed sample taker) to be tested for alcohol. Blood samples can be tested for drugs in addition to alcohol.

Subdivision 1 – Preliminary breath tests

Section 75EE – General power to require breath sample for preliminary breath test

This section corresponds to section 66(1) of the RTA.

This section provides a person who an inspector or a police officer reasonably believes is or was the person navigating, or attempting to operate a vessel, or is or was the master of the vessel, to provide a breath sample for a preliminary breath test. The preliminary breath test must be conducted by the officer who made the requirement.

The inspector or a police officer may make a requirement under Part 3B, Division 4 to make a requirement under this section, or to take a sample in accordance with the requirement.

Section 75EF – Power to require breath sample for preliminary breath test following incident

This section corresponds to section 66(1a) of the RTA and provides the power to require a preliminary breath sample following a vessel incident that occasions injury to a person or damage to property.

Where a police officer or inspector does not know or has doubt about who was navigating the vessel at the time of the incident, the officer may require a person who they believe on reasonable grounds may have been navigating the vessel at the time of the incident, to provide a breath sample for a preliminary breath test.

It's envisaged this power may be used following preliminary investigation and it is unclear who was the vessel master, or who had been operating the vessel. There may be reasonable grounds to believe any person on the vessel may have been navigating at the time of the incident, and as such, any person who had been on the vessel may be required to provide a preliminary breath sample.

The preliminary breath test must be conducted by the officer who made the requirement.

The inspector or a police officer may make a requirement under Part 3B, Division 4, to support the making of a requirement under this section or to take a sample in accordance with the requirement.

Section 75EG – Compliance with Requirement

This section corresponds to section 66(3) of the RTA in relation to a preliminary breath test.

A person complies with a requirement to provide a preliminary breath test sample if they comply with providing the breath sample in accordance with the directions of the inspector or police officer who made the requirement.

See section 75H for the offence for failure to comply with this requirement.

Subdivision 2 – Breath analysis or blood samples following preliminary breath test or commission of certain offences

Section 75EH – Power to require breath or blood sample following requirement for preliminary breath test

This section corresponds to sections 66(2) and 66(5)(b) of the RTA.

An inspector or police officer may require a person to provide a breath sample for analysis, or allow a prescribed sample taker to take a sample of the person's blood for analysis if –

- the person's preliminary breath test indicated they have a BAC of 0.05g or above; or
- the person failed (or refused) to comply with a requirement to provide a breath sample for a preliminary breath test.

Where the inspector or police officer has the power (or might be able to) require a person to provide a sample of breath for a preliminary breath test, but it appears to the officer that the person may be incapable of complying with the requirement because of their physical condition – the officer may require the person to allow a prescribed sample taker to take a blood sample for analysis. This corresponds to section 66(5)(b) of the RTA.

Only authorised operators can conduct breath analysis. A blood sample taken by a prescribed sample taker may be analysed by Chemistry Centre (WA) analysts for alcohol to determine the person's BAC. The same blood sample may also be analysed for drugs.

The inspector or a police officer may make a requirement under Part 3B, Division 4, to support the making of a requirement under this section or to take a sample in accordance with the requirement.

See section 75IA in relation to timeframe – a breath or blood sample can only be taken under this section within 4 hours of the circumstances giving rise to the requirement.

Section 75EI – Power to require breath or blood sample for analysis following commission of certain offences

This section corresponds to sections 66(2)(c), (ca) and (d) of the RTA.

An inspector or police officer may require a person who they reasonably believe was navigating, or attempting to operate, a vessel, to provide a breath sample for analysis, or allow a prescribed sample taker to take a blood sample for analysis, if the officer reasonably believes that the person has committed an offence for navigating under the influence (sections 75C and 75CA).

In addition, where the officer believes on reasonable grounds that the vessel was involved in the commission of an offence against dangerous navigation occasioning death, grievous bodily harm or bodily harm (sections 75B, 75BA or 75BB), or in an incident occasioning injury to a person or damage to property – and it is unclear to

the officer who was navigating at the time – the officer may require a person who they reasonably believe may have been navigating the vessel at that time to provide a breath sample for analysis, or to allow a prescribed sample taker to take a blood sample for analysis.

Only authorised operators can conduct breath analysis. A blood sample taken by a prescribed sample taker may be analysed by Chemistry Centre (WA) analysts for alcohol to determine the person's BAC. The same blood sample may also be analysed for drugs.

The inspector or a police officer may make a requirement under Part 3B, Division 4, to support the making of a requirement under this section or to take a sample in accordance with the requirement.

See section 75IA in relation to timeframe – a breath or blood sample can only be taken under this section within 4 hours of the circumstances giving rise to the requirement.

Section 75EJ – Compliance with requirement

This section corresponds to section 66(3) of the RTA in relation to providing a breath sample for analysis.

A person complies with a requirement to provide a breath sample for analysis if it is provided in accordance with the directions of the authorised officer conducting the analysis.

A person complies with the requirement to allow a prescribed sample taker to take a blood sample for analysis by allowing the inspector or police nominated sample taker to take that sample and by complying with the sample taker's directions.

See section 75HB for the offence for failure to comply with this requirement.

Section 75EK – Further sample of breath for breath analysis

This section corresponds to sections 68(7), (11) and (12) of the RTA.

An inspector or police officer may require a person who has already provided a prior sample of breath for analysis in accordance with a requirement, to be required to provide a second sample for analysis if the breath analysing equipment does not indicate the analysis result in the prescribed manner.

A person cannot be required to provide a third sample for analysis if the breath analysing equipment fails a second time to provide the analysis result. See section 75EN – the police officer or inspector may instead be able to require the person to allow a sample of blood to be taken by a prescribed sample taker for analysis.

See section 75IA in relation to timeframe – a breath sample for analysis can only be taken within 4 hours of the circumstances giving rise to the requirement.

Section 75EL – When inspector or police officer must not impose testing requirement because of physical incapacity

This section corresponds to section 66(4)(c) of the RTA.

An inspector or police officer must not require a person to provide a sample of breath for analysis because it appears that the person's physical condition makes them incapable of providing a sample of breath that is sufficient for the breath analysing equipment to operate.

See section 75EN – in the above circumstances, the option for a blood sample may be available.

Section 75EM – Breath analysis indicates BAC of 0.05 or above

This section corresponds to sections 68(9) and (10) of the RTA.

If the breath analysis equipment indicates the result of the analysis is 0.05g BAC or above, the authorised operator of the equipment must immediately give the person whose sample was analysed, a statement that contains certain information.

See section 124HF, where an authorised operator may provide evidence by certificate in subsequent court proceedings stating that they have provided the written statement to the accused.

<h3>Subdivision 3 – Blood samples in other circumstances including following serious incident</h3>

Section 75EN – Power to require blood sample in other circumstances

This section corresponds to sections 66(5)(a) and 66(11)(b)(ii) of the RTA.

This section provides in circumstances where an inspector or police officer could have made a requirement to a person to provide a breath sample for analysis, but is prevented from doing so because either one of the following occurs, then the officer may require the person to allow a prescribed sample taker to take a blood sample for analysis –

- the breath analysis of two samples has failed (section 75EK), or
- because the person is incapable of providing that sample and complying with the requirement to provide a breath sample for analysis because of the person's physical condition (section 75EL).

Further, in circumstances where the person's breath analysis of their sample returns a result indicating that there is no alcohol in the person's blood, or that the result does not reasonably explain the person's behaviour (conduct), condition or appearance – the inspector or police officer may require the individual allow a prescribed sample taker to take a sample of blood for analysis.

Operationally this may arise where the individual's appearance or behaviour suggests they are affected by drugs, or the person's low BAC result is not consistent with the person's appearance (for example, the person appears significantly impaired.) This section will give officers the option to require a blood sample to test for those drugs.

The inspector or a police officer may make a requirement under Part 3B, Division 4 to make a requirement under this section, or to take a sample in accordance with the requirement.

Where the individual is incapable of complying with a requirement to allow a prescribed sample taker to take a blood sample, then the prescribed sample taker may be caused to take a blood sample for analysis.

See section 75IA in relation to timeframe – a blood sample for analysis can only be taken within 4 hours of the circumstances giving rise to the requirement.

A blood sample obtained under this section may be analysed for both alcohol and drugs.

Section 75EO – Power to require blood sample following incident occasioning death or serious bodily harm

This section corresponds to sections 63(8A) to (8) of the RTA.

This section provides for what is operationally known as testing following “crash blood” circumstances, where the option to require a blood sample for analysis is available within 12 hours of an incident occasioning death, grievous bodily harm or serious bodily harm.

In these circumstances, an inspector or police officer may require the person who the officer has reasonable grounds to believe was navigating, or attempting to operate, the vessel at the time, to allow a prescribed sample taker to provide a blood sample for analysis.

If it appears to the officer that the person’s physical condition renders that person incapable of complying with the requirement, then the officer may cause a nominated prescribed sample taker to take a sample of the person’s blood for analysis.

The blood sample can be analysed for both alcohol and drugs.

See section 75AB for definition of a vessel being involved in an incident.

For purposes of subsection (1)(a), the term serious bodily harm replicates the same term from road law, which provides it is bodily harm to a person that an officer believes on reasonable grounds is likely to require treatment at a hospital, whether or not that treatment is practicable. Under road law, the term captures grievous bodily harm, which has been provided for separately in this section. The circumstances to be able to test for blood following such incidents are the same under this section and the road law.

The inspector or a police officer may make a requirement under Part 3B, Division 4, to support the making of a requirement under this section or to take a sample in accordance with the requirement.

See section 75EP in relation to timeframe – a blood sample for analysis can only be taken within 12 hours of the incident.

Section 75EP – When inspector or police officer must not require blood sample to be taken

This section corresponds to section 66(8) of the RTA and provides a blood sample can only be taken under section 75EO within 12 hours of the vessel incident occasioning death, grievous bodily harm or serious bodily harm.

Section 75EQ – Compliance with requirement

This section provides a person who is required to allow a prescribed sample taker to take a sample of blood for analysis under section 75EN or 75EO, will comply with that requirement by –

- allowing a prescribed sample taker nominated by the inspector or police officer to take a sample of their blood for analysis, and
- complies with the sample taker's directions.

See sections 75HB and 75HC for the offence for failure to comply with this requirement.

Division 3 – Testing for drugs

Division 3 provides for powers for inspectors and police officers to require persons navigating a vessel to provide oral fluid samples, or to allow their blood sample to be taken by an appropriately qualified medical professional (prescribed sample taker) to be tested for drugs (and alcohol).

Subdivision 1 – Preliminary oral fluid tests

Section 75F – General power to require oral fluid sample for preliminary oral fluid test

This section corresponds to section 66C of the RTA other than 66C(3).

This section provides a person who an inspector or a police officer reasonably believes is or was the person navigating, or attempting to operate a vessel, or is or was the master of the vessel, to provide a breath sample for a preliminary oral fluid test. In other words, to undergo an oral fluid test. The preliminary oral fluid test must be conducted by the officer who made the requirement.

The inspector or a police officer may make a requirement under Part 3B, Division 4 to make a requirement under this section, or to take a sample in accordance with the requirement.

Section 75FA – Powers to require oral fluid samples for preliminary oral fluid tests

This section corresponds to section 66C(3) of the RTA and provides the power to require a preliminary breath sample following a vessel incident that occasions injury to a person or damage to property.

Where a police officer or inspector does not know or has doubt about who was navigating the vessel at the time of the incident, the officer may require a person who they believe on reasonable grounds may have been navigating the vessel at the time of the incident, to provide an oral fluid sample for a preliminary oral fluid test.

It's envisaged this power may be used following preliminary investigation and it is unclear who was the vessel master, or who had been operating the vessel. There may be reasonable grounds to believe any person on the vessel may have been navigating at the time of the incident, and as such, any person who had been on the vessel may be required to provide a preliminary oral fluid sample.

The preliminary oral fluid test must be conducted by the officer who made the requirement in accordance with the prescribed procedure.

The inspector or a police officer may make a requirement under Part 3B, Division 4, to support the making of a requirement under this section or to take a sample in accordance with the requirement.

Section 75FB – Compliance with requirement

This section corresponds to section 66C(6) of the RTA.

A person complies with a requirement to provide a preliminary oral fluid test sample, or undergoes a preliminary oral fluid test, if they comply with providing the sample in accordance with the directions of the inspector or police officer who made the requirement.

See section 75H for the offence for failure to comply with this requirement.

Subdivision 2 – Drug testing and blood samples

Section 75FC – Power to require oral fluid sample for drug testing following preliminary oral fluid test

This section corresponds to section 66D of the RTA.

An inspector or police officer may require a person who had been required to provide an oral fluid sample for a preliminary oral fluid test to provide another oral fluid sample for drug testing if –

- the preliminary oral fluid test indicates the sample contained a prescribed illicit drug; or
- the person failed (or refused) to comply with the requirement to provide a sample for a preliminary oral fluid test.

The inspector or a police officer may make a requirement under Part 3B, Division 4, to support the making of a requirement under this section or to take a sample in accordance with the requirement.

See section 75IA in relation to timeframe – an oral fluid sample for drug testing can only be taken within 4 hours of the circumstances giving rise to the requirement.

An authorised drug tester must conduct the drug testing and collect the oral fluid sample in the manner prescribed by the regulations and conduct the drug testing in accordance with the procedure prescribed by the regulations.

Section 75FD – Further sample of oral fluid for drug testing

This section corresponds to sections 69B(4), (5) and (6) of the RTA.

An inspector or police officer may require a person who has already provided a sample of oral fluid for drug testing in accordance with a requirement, to be required to provide a second sample for drug testing if the drug testing device fails. A drug testing device fails if it is not in proper working order, or it does not indicate a positive or negative result.

A person cannot be required to provide a third sample for drug testing if the drug testing device fails a second time to provide the result. See section 75FF – the police officer or inspector may instead be able to require the person to allow a sample of blood to be taken by a prescribed sample taker for analysis.

See section 75IA in relation to timeframe – an oral fluid sample for drug testing can only be taken within 4 hours of the circumstances giving rise to the requirement.

Section 75FE – When inspector or police officer must not impose testing requirement because of physical incapacity

This section corresponds to section 66D(3)(b) of the RTA.

An inspector or police officer must not require a person to provide a sample of breath for analysis because it appears that the person's physical condition makes them incapable of providing a sample of oral fluid that is sufficient for a drug testing device to operate.

See section 75FF – in the above circumstances, the option for a blood sample may be available.

Section 75FF – Power to require blood sample instead of oral fluid sample

This section corresponds to section 66E of the RTA.

This section provides in circumstances where an inspector or police officer could have made a requirement to a person to provide an oral fluid sample for drug testing, but is prevented from doing so because either one of the following occurs, then the officer may require the person to allow a prescribed sample taker to take a blood sample for analysis –

- the drug testing of two oral fluid samples has failed (section 75FD), or
- the person is incapable of complying with the requirement to provide an oral fluid sample for drug testing due to the person's physical condition (section 75FE). In these circumstances, the officer may cause a prescribed sample taker nominated by the officer to take a sample of the person's blood for analysis.

The inspector or a police officer may make a requirement under Part 3B, Division 4 (such as requiring a person to leave a vessel or wait at a place), to support the making of a requirement under this section or to take a sample in accordance with the requirement.

The blood sample taken under this requirement can be analysed for both alcohol and drugs.

Section 75FG – Compliance with requirement

Subsection (1) corresponds to section 66D(2) of the RTA and provides a person complies with a requirement to provide an oral fluid sample for drug testing by providing the sample in accordance with the directions of an authorised drug tester.

Subsection (2) provides a person who is required to allow a prescribed sample taker to take a sample of blood for analysis, will comply with that requirement by –

- allowing a prescribed sample taker nominated by the inspector or police officer to take a sample of their blood for analysis, and
- complies with that sample taker's directions.

See section 75HD for the offence for failure to comply with this requirement.

Subdivision 3 – Assessment of drug impairment and related provisions

Subdivision 3 provides for inspectors and police officers to require persons navigating a vessel to undergo an assessment of drug impairment, and to allow their blood sample to be taken by an appropriately qualified medical professional (prescribed sample taker) to be tested for drugs (and alcohol).

Results of the drug impairment assessment and analysis of the blood sample may be used in establishing the section 75CD offence of navigating while impaired by drugs.

Section 75FH – Assessments of drug impairment

This section corresponds to section 66A of the RTA.

Subsection (1) and (3) provide that an inspector or police officer may require a person who the officer believes on reasonable grounds was navigating, or attempting to operate, a vessel while impaired by something affecting the person's capacity to navigate the vessel (other than only alcohol) to undergo a drug impairment assessment.

Subsection (2) and (3) provide the ability in circumstances where there has been a vessel incident where a person has been injured or property has been damaged, and an inspector or police officer does not know who was the person navigating the vessel, or attempting to operate the vessel, but can require a person who the officer believes on reasonable grounds *may* have been doing so, to undergo a drug impairment assessment if the officer similarly believes the person was impaired by something other than alcohol that would have affected the person's capacity to navigate a vessel.

It is envisaged this power may be used following preliminary investigation and it is unclear who was the vessel master, or who was operating the vessel at the time of the incident. This may be reasonable grounds to believe any person on the vessel may have been navigating at the time of the incident, but of those persons, only those who appear impaired by something other than alcohol, may be required to undergo a drug impairment assessment.

The inspector or police officer must conduct the person's drug impairment assessment in accordance with the procedure prescribed in the regulations.

The inspector or a police officer may make a requirement under Part 3B, Division 4, to support the making of a requirement under this section or to enable a drug impairment assessment in accordance with the requirement.

Section 75FI – When inspector or police officer must not impose testing requirement because of physical incapacity

This section corresponds to section 66A(6) of the RTA.

An inspector or police officer must not require a person to undergo a drug impairment assessment if it appears that the person's physical condition makes them incapable of complying with that requirement.

See section 75FJ – in the above circumstances, the option for a blood sample may be available.

Section 75FJ – Power to require blood samples for drug analysis

This section corresponds to section 66B of the RTA.

It provides that an inspector or police officer may require a person to allow a prescribed sample taker to take a sample of the person's blood for analysis if –

- the person has undergone a drug impairment assessment as required by an officer, and the assessment indicates the person is drug impaired; or
- the person failed to comply with a requirement to undergo a drug impairment assessment; or
- the person is prevented from undergoing a drug impairment assessment because of the person's physical condition.

The inspector or a police officer may make a requirement under Part 3B, Division 4 (such as requiring a person to leave a vessel or wait at a place) to support a requirement made under this section, or to take a sample in accordance with the requirement.

If the person is incapable of complying with the requirement to allow a prescribed sample taker to take a blood sample because of their physical condition, then the inspector or police officer may cause a prescribed sample taker nominated by the officer to take a sample of blood for analysis.

See section 75IA in relation to timeframe – a blood sample for analysis can only be taken within 4 hours of the circumstances giving rise to the requirement.

A blood sample obtained under this section may be analysed for both alcohol and drugs.

Section 75FK – Compliance with requirement

Subsection (1) corresponds to section 66A(5) of the RTA.

This section provides a person who is required to undergo a drug impairment assessment complies with the requirement by undergoing the assessment in accordance with the directions of the inspector or police officer.

Subsection (2) provides a person who is required to allow a prescribed sample taker to take a sample of blood for analysis under section 75FJ, will comply with that requirement by –

- allowing a prescribed sample taker nominated by the inspector or police officer to take a sample of their blood for analysis, and
- complies with the sample taker's directions.

See section 75HE for the offence for failure to comply with this requirement.

Division 4 – Enforcement powers relating to testing for alcohol and drugs
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Division 4 sets out enforcement powers for inspectors and police officers to facilitate and support the marine alcohol and drug testing regime in this Bill. These powers are additional to other inspector and police powers (Section 75ED).

Section 75G – Requirement to leave vessel, accompany inspector or police officer to place or wait at place

This section corresponds to sections 66, 66A, 66B, 66C, 66D and 66E of the RTA in relation to powers to require the person providing a sample for an alcohol or drug test to leave the vehicle, wait at a place, or accompany a police officer to a place and to wait at that place.

Subsection (1) empowers an inspector or police officer to require a person to do one or more of the following:

- leave a vessel,
- accompany an inspector or police officer, or
- wait at a specified place (for example, a jetty or a wharf).

The requirement may be made to facilitate marine alcohol and drug testing, for purposes of –

- imposing an alcohol or drug testing requirement (defined in section 3 as a requirement in this Part related to the purposes of alcohol or drug testing) on the person;
- enabling a sample to be taken for testing, or
- enabling a drug impairment assessment to be carried out.

Subsection (2) addresses the operational complexity of undertaking marine alcohol and drug testing operations by providing flexibility to enable an officer to make a subsection (1) requirement in whichever order, and as many times that is necessary and reasonable in the circumstances to facilitate and achieve an alcohol or drug testing purpose. For example, after a requirement is made for a person to wait on the vessel at a jetty for the purposes of giving a sample, it may be reasonable to require a person to accompany the officer to a different nearby location, or to disembark a vessel if local conditions make a test location unsuitable for safety reasons.

Subsection (3) provides a requirement under this section remains in force until the inspector or police officer gives a subsequent inconsistent direction or indicates to the person that the requirement no longer has effect.

A person must comply with a requirement under this section in accordance with the directions of the inspector or police officer. A person who fails to comply with a requirement under this section commits an offence under section 75HB.

Section 75GA – Requirement to stop vessel or navigate to suitable location

This section empowers an inspector or police officer to make a requirement to the person navigating (including operating) the vessel to stop, or to navigate the vessel to a specified location. This is a discretionary requirement that can only be made for the purposes of imposing an alcohol or drug testing requirement (defined in section 3) on a person, or for another alcohol or drug testing purpose under Part 3A or 3B.

The power to require a person to stop a vessel is specifically for the purposes related to alcohol and drug testing. It corresponds to powers under the RTA to stop a vehicle in similar circumstances. The term 'stop' is defined in section 3 and in practice may include stopping a vessel's engine, dropping anchor or fastening a vessel to a mooring, jetty or other structure.

The power to require a master or person operating a vessel to navigate to a specified place is a power tailored to the marine environment to address the challenges and risks that testing present on the open water. For example, the weather, water or other conditions may make it unsuitable. Safer testing locations may be alongside a jetty or on shore. It is envisaged officers make an assessment, depending on the time, place and circumstances whether to exercise discretion to make this requirement. For example –

- where the master or person operating the vessel appears heavily intoxicated or impaired, officers may recognise it is an unsuitable risk to require that person to navigate to a suitable location (see alternative power in section 75GB to move the vessel);
- where the intercept location is not suitable for safe testing;
- where there is a master and an unqualified vessel operator, the officer may impose the requirement on the master over the unqualified operator.

Under this section, an inspector or police officer may make a requirement on a person to navigate a vessel to a specific place, for the purposes of imposing an

alcohol or drug testing requirement, or for another purpose relating to this Part or Part 3A.

Subsection (3) addresses the operational complexity of undertaking marine alcohol and drug testing operations by providing flexibility to enable an officer to make further requirements under this section, if reasonable and necessary in the circumstances to facilitate an alcohol or drug testing requirement, or for another purpose under this Part or Part 3A.

For example, after a requirement is made for a person to navigate to a nearby jetty for the purposes of alcohol and drug testing, it may become apparent the jetty is unsuitable due to the presence of other water users at the site, or it is not safe. In that instance, it would be reasonable to require a person to move to a different location to be able to require a sample for testing.

A person's action in navigating a vessel to a suitable location may be considered acting in obedience to a lawful authority. Consequently, any actions after a requirement or direction made under this section to navigate the vessel to comply with this requirement would not attract criminal responsibility – see section 31 of *The Criminal Code*.

Therefore, the material time of navigating, for purposes of alcohol or drug navigation offences, is the time immediately before the requirement or direction under this section was made. See section 124H definition of **material time**.

Subsection (4) provides a requirement under this section may be given orally, or by means of a sign or signal, or in any other manner.

Subsection (5) provides the requirement remains in force until the inspector or police officer gives a subsequent inconsistent direction or indicates to the person that the requirement no longer has effect.

A person must comply with a requirement under this section in accordance with the directions of the inspector or police officer. A person who fails to comply with a requirement under this section commits an offence under section 75HB.

Section 75GB – Power to board and move vessel

This section allows an inspector or police officer to board a vessel and to take control of the vessel for the purposes of moving it to another place. The inspector or police officer must have a reasonable belief that the vessel has been used in connection with an offence under Part 3A or 3B, or for the purposes of imposing an alcohol or drug testing requirement on a person.

This discretionary power addresses circumstances where it may not be desirable require a person navigate their own vessel to a nearby location (for example, both the master or person operating the vessel appear heavily intoxicated), or there may not be a suitable location nearby that can accommodate the vessel, (for example if the vessel is very large). In these circumstances, an inspector or police officer may move the vessel to a place for safe custody. Operational options to move the vessel include taking the vessel under tow or boarding and navigating the vessel to a place.

To support the above power, subsection (2) provides that an inspector or police officer may require a person on board the vessel to take reasonable steps to facilitate boarding and moving the vessel. A person must comply with a requirement under this section in accordance with the directions of the inspector or police officer. A person who fails to comply with this requirement commits an offence under section 75H.

Section 75GC – Power to prevent use of vessel by alleged offender

This section corresponds to section 71B of the RTA.

This section gives an inspector or police officer the power to take steps to prevent the further use of a vessel by an alleged offender after they have been suspected of committing certain alcohol or drug navigation offences. Such steps include taking control of the vessel or handing over control of the vessel to another person.

This section applies if the inspector or police officer has a reason for suspecting that the person has committed an offence against any of the offence provisions relating to impairment or prescribed levels of alcohol and drugs.

The requirement can be made if the officer is satisfied that the requirement is necessary in the circumstances and in the interests of the offender, or any other person, whether or not the offender has been charged with a relevant offence.

The inspector or police officer may require the person to immediately hand over a key, or a device or thing that allows a vessel to be operated (or moved). For example, if a vessel does not have keys, an officer may require a safety lanyard that is linked to a kill-switch on the vessel or an outboard motor, a portable fuel tank, battery, or detachable fuel hose.

Alternatively, the officer may require the person to give the device to another person who was in the offender's company if the officer is satisfied that person is authorised to navigate a vessel and is responsible and able to navigate the vessel properly. This power is subject to section 75GE.

Under subsection (7), the officer may require the person to undergo a preliminary breath test as part of considering whether the person can navigate properly.

In the event that an inspector or police officer takes charge of the vessel under this section, they are obliged to take steps that are appropriate and practicable to ensure that the vessel is secure and does not pose a hazard to other vessels or water users. An inspector or police officer may move the vessel to another location in order to achieve this.

See section 75GE in relation to returning the device.

Section 75GD – Compliance with requirement

This section corresponds to the offence in section 71B(8) of the RTA.

This section provides that a person commits an offence if they fail to comply with a requirement under section 75GC(3), obstructs or attempts to obstruct an inspector or police officer in the exercise of their power under section 75GC(3), (5) or (7).

Section 75GE – Return of keys to vessel

This section corresponds to sections 71B(5) and (7) of the RTA and applies where a person has handed over a key or device to an inspector or police officer in compliance with section 75GC(3)(a).

Subsection (2) provides that if a person requests the device to the vessel, the inspector or police officer must comply with that request if satisfied the person is entitled to the lawful possession of the vessel, or is or was in the company of a person who is entitled to the lawful possession of the vessel, and that the person is authorised to navigate the vessel and is responsible and able to do so properly.

Subsection (3) provides that an inspector or police officer may require the person to undertake a preliminary breath test for the purposes of ascertaining whether they are fit to operate the vessel properly.

Subsection (4) provides that if the vessel device is not handed over within 24 hours after a request is made, then the person may apply to the Magistrates Court for an order that the key be given to a person named in the court application.

Section 75GF – Prohibiting person navigating vessel for 24 hours if prescribed illicit drug present

This section corresponds to section 71BA of the RTA.

This section gives an inspector or police officer the power to issue a prohibition notice personally to a person to prevent the person from navigating a vessel for 24 hours if –

- drug testing of the person's oral fluid sample indicated a prescribed illicit drug is present; or
- the person's preliminary oral fluid test indicated a prescribed illicit drug was present, but the officer is precluded from requiring the person to provide an oral fluid sample for drug testing because the person's physical condition makes them incapable, and the officer has required the person to allow a prescribed sample taker to take the person's blood for analysis;
- the person's preliminary oral fluid test indicated a prescribed illicit drug was present, but the officer is precluded from requiring further oral fluid samples for drug testing because the drug testing device twice failed; or
- the person refuses to comply with a requirement to provide an oral fluid sample for drug testing.

A person who is given a prohibition notice commits an offence if they fail to comply with the notice.

Section 75GG – Requirements for prohibition notice

This section corresponds to section 71BA(2) of the RTA.

The prohibition notice given under section 75GF must –

- specify the grounds that led to it being given;
- the time that the notice was issued and the time when it will cease to have effect; and
- a statement to the effect that the person must not navigate a vessel for a period commencing on receipt of the notice and ending 24 hours after the notice was received.

Division 5 – Failure to comply with alcohol or drug testing requirements

This division creates offences for persons who fail to comply with an inspector or police officer's alcohol or drug testing requirement, including the requirements under Part 3B Division 4 to facilitate the testing regime.

The penalties for the offences generally reflect what the person would have been liable for if they had committed an alcohol or drug navigation offence.

This approach is to ensure the effectiveness of the testing regime to deter persons from refusing to provide a sample or undergo a test to avoid criminal liability for any subsequent alcohol or drug navigation offence that attaches to the sample/testing.

Subdivision 1 – General offences relating to failure to comply with alcohol or drug testing requirements

Section 75H – Failure to comply with requirement: preliminary breath test or preliminary oral fluid test or boarding or moving vessel

This section corresponds to section 67A of the RTA.

A person commits an offence under this section if they fail to comply with an inspector or police officer's requirement –

- to provide a sample of breath for a preliminary breath test;
- to provide a sample of oral fluid for a preliminary oral fluid test;
- to leave the vessel, accompany officer or wait at a place for the purposes relating to a requirement to provide a sample for a preliminary breath or oral fluid test.
- to take reasonable steps to facilitate an inspector or police officer with boarding or moving a vessel.

Increasing penalties apply depending on whether the offence is a first, second or subsequent offence. A previous offence of equal or more severity is counted as a prior offence against this section.

Section 75HA – Defence: compliance with later requirement

This section corresponds to section 67A(6) of the RTA with respect to a preliminary breath test.

It is a defence to an offence under section 75H for the person charged to prove that the person complied with a later requirement that effectively enabled a breath or blood sample to be obtained for analysis, or provided an oral fluid sample for drug testing.

For example, if the person failed to provide a preliminary breath sample, but then complies with a later requirement to provide a breath sample for analysis, then the person would have a defence to section 75H under this section.

See also the defence in section 75HJ for the defence of substantial reasons, which is available to a charge against this offence.

Section 75HB – Failure to comply with requirement: breath analysis or blood sample or stop vessel or navigate to specified place

This section corresponds to section 67 of the RTA.

A person commits an offence under this section if they fail to comply with an inspector or police officer's requirement—

- to provide a sample of breath for analysis;
- to allow a prescribed sample taker to take a blood sample for analysis;
- to leave the vessel, accompany officer or wait at a place requirement for the purposes relating to one of the above two requirements; or
- to stop a vessel or navigate a vessel to a specified place.

The penalty for this offence is aligned to penalties for navigating a vessel while under the influence of alcohol or drugs in section 75C. The penalties are similar as the failure to comply with these requirements prevent the exercise of additional powers to obtain a sample for alcohol or drug testing, or to undergo a drug impairment assessment.

The rationale of having penalties equivalent to an offence for navigating under the influence helps to ensure the effectiveness of the alcohol and drug testing regime by deterring persons from refusing to provide a test sample to avoid criminal liability for a subsequent alcohol or drug navigation offence. This approach is consistent with the RTA.

A person who commits an offence against this section may be arrested by a police officer without a warrant.

See section 75HJ for the defence of substantial reasons, which is available to a charge against this offence.

Increasing penalties apply depending on whether the offence is a first, second or subsequent offence. A previous offence of equal or more severity is counted as a prior offence against this section.

Section 75HC – Failure to comply with requirement: incident occasioning death, grievous bodily harm or bodily harm

This section corresponds to section 67(3) of the RTA.

A person commits a crime under this section if they fail to comply with any of the requirements listed in section 75HB(1) in the circumstance of aggravation.

Subsection (2) provides the circumstance of aggravation is where an inspector or police officer makes a requirement listed in section 75HB(1) and the officer advises the person that the officer believes that the vessel the person was, or is believed to have been navigating, was involved in an incident occasioning the death of, or grievous bodily harm, or bodily harm to another person, and the officer explains the consequences of failing to comply with the section 75HB(1) requirement.

Being a circumstance of aggravation, the maximum statutory penalty for this offence is greater than the maximum penalties for an offence against section 75HB.

For purposes of sentencing, a previous offence against section 75HB is counted as a prior offence to this section.

A person who commits an offence against this section may be arrested by a police officer without a warrant.

Section 75HD – Failure to comply with requirement: oral fluid sample for drug testing or blood sample

This section corresponds to section 67AB of the RTA.

A person commits an offence under this section if they fail to comply with an inspector or police officer's requirement –

- to provide an oral fluid sample for drug testing;
- to allow a prescribed sample taker to take a blood sample for analysis where the officer was precluded from making a requirement to provide an oral fluid sample for drug testing because the person's physical condition rendered them incapable;
- to leave the vessel, accompany officer or wait at a place requirement for the purposes relating to one of the above two requirements.

The penalty for this offence is aligned to penalties for navigating a vessel with a prescribed illicit drug in their oral fluid or blood under section 75DB.

Increasing penalties apply depending on whether the offence is a first, second or subsequent offence. A previous offence of equal or more severity is counted as a prior offence against this section.

A person who commits an offence against this section may be arrested by a police officer without a warrant.

See section 75HJ for the defence of substantial reasons, which is available to a charge against this offence.

Section 75HE – Failure to comply with requirements relating to assessment of drug impairment

This section corresponds to section 67AA of the RTA.

A person commits an offence under this section if they fail to comply with an inspector or police officer's requirement –

- to undergo an assessment of drug impairment;
- to allow a prescribed sample taker to take a blood sample for analysis that arose following the person failing to undergo a drug impairment assessment, or because their physical condition made them incapable of complying with the drug impairment assessment requirement; or
- to leave the vessel, accompany officer or wait at a place requirement for the purposes relating to one of the above two requirements.

The penalty for this offence is aligned to penalties as if the person committed the offence of navigating while impaired by drugs under section 75CD.

Increasing penalties apply depending on whether the offence is a first, second or subsequent offence. A previous offence of equal or more severity is counted as a prior offence against this section.

A person who commits an offence against this section may be arrested by a police officer without a warrant.

See section 75HJ for the defence of substantial reasons, which is available to a charge against this offence.

Subdivision 2 – Failure to comply with drug testing requirements in circumstances relating to person's BAC

Section 75HF – Term used: Drug testing requirement

This section corresponds to section 67AD(1) of the RTA.

A drug testing requirement is defined as the requirement made by an inspector or police officer for –

- a person to provide a sample of oral fluid for drug testing under section 75FC;
- where the person is incapable of providing that sample because of their physical condition or the drug testing device twice fails – to allow a sample of blood to be taken by a prescribed sample taker for analysis; or
- to leave the vessel, accompany officer or wait at a place requirement for the purposes relating to one of the above two requirements.

Section 75HG – Failure to comply with drug testing requirement: BAC of 0.05 or above

This section corresponds to section 67AD(2) of the RTA.

A person commits an offence under this section if –

- following a breath analysis conducted by an authorised operator, the result was 0.08g BAC or above; and
- the person then fails to comply with a drug testing requirement (defined in section 75HF).

The penalty for this offence is aligned to penalties for navigating with a BAC of or more than 0.05g and a prescribed illicit drug in the person's system under section 75DC.

Increasing penalties apply depending on whether the offence is a first, second or subsequent offence. A previous offence of equal or more severity is counted as a prior offence against this section. An alternative verdict is also available on trial for the offence.

A person who commits an offence against this section may be arrested by a police officer without a warrant.

Section 75HH – Failure to comply with drug testing requirement: BAC of 0.08 or above

This section corresponds to section 67AD(4) of the RTA.

A person commits an offence under this section if –

- following a breath analysis conducted by an authorised operator, the result was 0.08g BAC or above' and
- the person then fails to comply with a drug testing requirement (defined in section 75HF).

The penalty for this offence is aligned to penalties for navigating with a BAC of or more than 0.08g and a prescribed illicit drug in the person's system under section 75DD.

Increasing penalties apply depending on whether the offence is a first, second or subsequent offence. A previous offence of equal or more severity is counted as a prior offence against this section. An alternative verdict is also available on trial for this offence.

A person who commits an offence against this section may be arrested by a police officer without a warrant.

Section 75HI – Failure to comply with drug testing requirement: BAC of 0.15 or above

This section corresponds to section 67AD(6) of the RTA.

A person commits an offence under this section if –

- following a breath analysis conducted by an authorised operator, the result was 0.15g BAC or above'; and

- the person then fails to comply with a drug testing requirement (defined in section 75HF).

The penalty for this offence is aligned to penalties for navigating with a BAC of or more than 0.15g and a prescribed illicit drug in the person's system under section 75CA.

Increasing penalties apply depending on whether the offence is a first, second or subsequent offence. A previous offence of equal or more severity is counted as a prior offence against this section. An alternative verdict is also available on trial for this offence.

A person who commits an offence against this section may be arrested by a police officer without a warrant.

Subdivision 3 – Defence for failing to comply with alcohol or drug testing requirement

Section 75HJ – Substantial reasons for failing to comply with requirements or later providing certain samples

This section corresponds to sections 67(5), 67AA(6), 67AB(5) and 67AE(3) of the RTA.

It is a defence to the offences in Part 3B Division 5 for failing to comply with an alcohol or drug testing requirement if the accused can prove the substantial reason for failing to comply was a reason other than to avoid providing information that might be used as evidence.

Division 6 – General provisions relating to alcohol and drug testing

Section 75I – Responsibility to facilitate medical assistance

This section corresponds to sections 66(10), 66B(3) and 66E(3) of the RTA.

Where it appears to an inspector or a police officer that a person, on whom the officer would require to provide a sample or undergo a test for alcohol or drug testing purposes, is unconscious or seriously injured, the inspector or police officer is required to facilitate the provision of medical assistance for the person.

Section 75IA – When inspector or police officer must not impose testing requirement because of passage of time

This section corresponds to sections 66(4)(b), 66(6), (12), 66A(6), 66B(4), 66D(3)(a) and 66E(4) of the RTA.

Where an inspector or police officer may require a person to provide a sample of breath for analysis, or oral fluid sample for drug testing, or to allow a prescribed sample taker to take a blood sample for analysis, or to undergo a drug impairment assessment – that requirement cannot be made if the sample or assessment cannot be completed within 4 hours after the circumstances giving rise to the requirement occurs.

This section does not prevent a blood sample from being obtained within 12 hours of a vessel incident, see section 75EP.

This section does not apply to requiring samples for preliminary breath tests or preliminary oral fluid tests.

Section 75IB– Taking of oral fluid samples for oral fluid analysis

This section corresponds to section 69B of the RTA.

This section provides that, where a sample of a person's oral fluid is taken for analysis pursuant to section 75FC and, in the opinion of the authorised drug tester, drug testing conducted on the sample indicates that the sample contains a prescribed illicit drug, the sample is to be divided into 2 parts.

One part is to be given to an inspector or a police officer for the purpose of conveying it to the Chemistry Centre (WA) for analysis in connection with the alleged offence.

The second part of the oral fluid sample is to be given to an inspector or a police officer for the purpose of it being conveyed, on behalf of the person, to and to be retained by the Chemistry Centre (WA) for a period of 3 months. The sample is then to be conveyed to the Chemistry Centre (WA) by either an inspector, police officer, or another person engaged for that purpose.

Under section 75IF, at any time within the 3-month period after the taking of the sample, the person from whom the sample was taken can apply to the Chemistry Centre (WA) to request that the Chemistry Centre (WA) convey the sample to an analyst nominated by the person for the sample to be analysed.

The cost of conveying and analysing the sample is to be borne by the person.

Section 75IC – Authorisation for prescribed sample takers authorised to take blood samples

This section corresponds with section 66F of the RTA.

This section authorises a prescribed sample taker to take a sample of a person's blood:

- if an inspector or police officer has required the person to allow a prescribed sample taker nominated by the inspector or police officer to take the sample for analysis; or
- where an inspector or police officer causes a prescribed sample taker to take the sample for analysis.

No action lies against a prescribed sample taker for taking a sample under these circumstances.

Section 75ID – Authorisation to take blood samples when person deceased

This section applies where a person may have been on a vessel involved in a serious incident and person is dead on arrival at hospital or dies in hospital before a

sample of the person's blood can be taken and, if that person were alive, they may have been required to allow a sample of blood to be taken or may have had blood taken for the purposes of analysis.

The section empowers the medical practitioner who reports the death under the *Coroners Act 1996* section 17 'obligation to report death' to take a sample of blood from the person's body; or as soon as practicable after reporting the death, notify the coroner that a sample of blood should be taken from the person's body because of the circumstances of the person's death.

If the coroner is notified, the coroner may direct and authorise a pathologist to take a sample of blood from the person's body.

A person is not obliged to take a sample of blood under this clause if another sample of blood has previously been taken from person's body in accordance with an alcohol or drug testing requirement.

Section 75IE – Taking blood samples for analysis

This section corresponds with section 69 of the RTA.

This section provides how a prescribed sample taker is to take a sample of a person's blood pursuant to an alcohol or drug testing requirement.

A sample must be taken in accordance with the regulations or otherwise in a proper manner. Where a sample of a person's blood is taken for analysis, two samples are to be taken or, if one sample is taken, the sample is to be divided into 2 parts.

One part is to be given to an inspector or a police officer for the purpose of conveying it to the Chemistry Centre (WA) for analysis in connection with the alleged offence.

The second part of the blood sample is to be given to an inspector or a police officer for the purpose of it being conveyed, on behalf of the person, to, and to be retained by, the Chemistry Centre (WA) for a period of 3 months. The sample is then to be conveyed to the Chemistry Centre (WA) by either an inspector, police officer, or another person engaged for that purpose.

Section 75IF – Oral fluid and blood samples delivered to Chemistry Centre (WA)

This section corresponds with section 70A of the RTA.

This section provides that oral fluid samples (section 75IB) or blood samples (section 75IE) delivered to the Chemistry Centre (WA) on behalf of a person must be retained and appropriately stored for 3 months.

At any time within the 3 month period after the taking of an oral fluid (section 75IB) or blood sample (section 75IE), the person from whom the sample was taken may apply to the Chemistry Centre (WA), requesting that the Chemistry Centre (WA) convey the sample to an analyst nominated by the person for the sample to be analysed.

The cost of conveying and analysing the sample is to be borne by the person.

Section 75IG – Samples of oral fluid or blood not to be used to obtain DNA profile

This section corresponds with section 71A of the RTA.

This section prohibits the use of an oral fluid sample taken under section 75IB or a blood sample under section 75IE to obtain the subject's DNA profile.

Division 7 – Administrative matters
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Section 75J – Regulations relating to alcohol and drug testing and other matters

This section provides the head of power for regulations to be made regarding breath testing, breath analysis, oral fluid testing and drug testing, the taking of a sample of oral fluid or blood and the destruction of a sample or other forensic material taken under Part 3B of the WAMA.

The regulations may apply or adopt instruments under the RTA for a purpose under the WAMA without or without modifications, or as in force at a particular time, or from time to time.

Section 75JA – Minister may approve alcohol and drug testing devices

This section corresponds with sections 65 and 72 of the RTA.

This section empowers the Minister to approve, by notice published in the Government Gazette, breath testing devices and oral fluid devices.

Section 75JB – Delegation by Commissioner of Police

This section provides a power of delegation for the Commissioner of Police to delegate the Commissioner's powers under the following sections to a police officer, a class of police officers, or to an employee of the Public Service principally assisting in the administration of the *Police Act 1892* –

- section 75EA(2) (Commissioner of Police may certify that a police officer is competent to operate breath analysing equipment);
- section 75EB(2) (Commissioner of Police may certify that a police officer is competent to operate a drug testing device);
- section 124HP(2) (Commissioner of Police may issue certificate certifying a police officer was an authorised operator or an authorised drug tester).

The power is not able to be sub-delegated by the person to whom a power is delegated under this provision.

16. Section 79 amended

This clause amends section 79 of the WAMA relating to powers to make regulations giving effect to the international convention of the Prevention of Collisions Convention for vessels while they are in State waters.

This clause inserts section 79(3) to provide that the regulations may make provision for applying, adopting, or incorporating the international convention with or without modification. This clarifies that the convention may be modified to apply to the State's inland waters.

17. Section 99 amended

This clause amends section 99 of the WAMA in relation to regulation making powers for pleasure vessels and prescribed vessels.

This clause amends section 99(1)(k) to clarify that regulations can be made providing for the licensing of owners, masters, operators and crew of pleasure vessels and prescribed vessels, including the issue of licences, authorising the chief executive officer to grant exemptions in relation to licences and in assessing the competency of people to hold licences.

This clause inserts section 99(1)(ka) to empower the making of regulations providing for schemes to assess the competency of people holding such licences. For example, assessments to hold a recreational skipper's ticket.

Section 43(8)(d) of the *Interpretation Act 1984* does not limit the regulation making powers inserted by subclause (2).

Section 43(8)(d) of that Act provides subsidiary legislation may be made so as to provide, in a specified case or class of case for the exemption of persons or things or a class of persons or things from the provisions of the subsidiary legislation, whether unconditionally or on specified conditions or conditions additionally imposed and either wholly or to such an extent as is specified or otherwise determined.

18. Section 100 amended

This clause amends section 100 of the WAMA and provides that the requirement upon master or owner of a seaplane to provide information within their power to give, to an inspector or police officer when required under section 64D.

19. Section 107 amended

This clause deletes the definition of marine qualification in section 107 of the WAMA. This Bill defines the term **marine qualification** to apply to the WAMA in section 3.

20. Section 114 amended

This clause amends section 114(3)(b) of the WAMA relating to maximum amounts that may be set for modified penalties in the regulations. This clause provides that a modified penalty, for an offence in Part 3A or 3B, and section 124GS of the WAMA, is not to exceed \$2000. This is consistent with section 82 of the *Road Traffic (Administration) Act 2008*.

This amendment will allow modified penalties to correspond and be consistent with their road law counterparts. For example, the modified penalty for an offence of

driving with excess 0.05 or above is \$1000. This is more than 20 percent of the statutory penalty for a first offence at \$1250.

21. Section 123 amended

This clause amends section 123(3) of the WAMA to extend the protection of liability to the Minister, chief executive officer, Commissioner of Police and the State for any liability that any of them might otherwise have had for another person having done anything in good faith in the performance, or purported performance of a function under the WAMA.

This protection aligns with the protection under road law in section 135(2) of the *Road Traffic (Administration) Act 2008*.

22. Section 124FA inserted

This clause inserts section 124FA in the WAMA.

Section 124FA – Approved forms

This section provides that forms used in the enforcement of WAMA provisions may be approved by the chief executive officer.

It is intended that all certificates and forms under the RTA used by WA Police in the enforcement of the RTA alcohol and drug testing regime may be used for corresponding purpose in the marine regime introduced by this Bill.

Certificates that are prescribed for a purpose under the RTA are taken to be, under this section, to be the form of a certificate for a corresponding purpose under the WAMA.

These forms are taken to be approved forms under the WAMA and in accordance with subsection (4), the form can be used in proceedings even if the form is not modified (by markings or substituted text) in any way.

Example of this is the RTA certificate² for the equivalent of an authorised operator, indicating the result of a breath analysis test, prescribed under the RTA and to be used for the corresponding purpose in relation to breath testing under the WAMA.

The chief executive officer may also apply or adopt an RTA form approved or prescribed under the RTA for use for a corresponding purpose under the WAMA.

The chief executive officer is to make the approved forms, other than any prescribed RTA forms and certificates, available on the Department's website.

23. Part 8A inserted

This clause inserts Part 8A in the WAMA, relating to disqualifying persons, via court order or notice, from holding or obtaining WA marine qualifications.

Subclause (1) inserts the heading to Part 8A and Division 1.

² Form 3 – Schedule 1, *Road Traffic (Breath Analysis) Regulations 1975*.

Subclause (2) inserts Part 8A Division 2.

Subclause (3) inserts Part 8A Division 3 and 4.

Part 8A – Disqualification from holding or obtaining WA marine qualifications

Since July 2013, domestic commercial vessels' crewing qualifications have been regulated by the Marine Safety (Domestic Commercial Vessel) National Law³, with certificate of competency marine qualifications issued to mariners by the Commonwealth's Australian Maritime Safety Authority (AMSA).

Part 8A disqualifications relate to disqualifying persons from holding or obtaining marine qualifications that are issued under the WAMA.

With respect to Commonwealth marine qualifications, it is envisaged that the chief executive officer would notify AMSA, the National Regulator, of a mariner's conviction for any safe navigation or alcohol or drug related navigation offence in Part 3A and 3B for it to be addressed accordingly under the National Law.

Consequently, it is recognised that a person who has been disqualified from holding or obtaining a WA marine qualification, may still be authorised to navigate a domestic commercial vessel regulated by the National Law if their national qualifications remain active.

Division 1 – Preliminary

Section 124G – Terms used

This section defines terms for the purposes of Part 8A.

alleged offence, in relation to a person, has the meaning given in section 124GA(1).

disqualification notice has the meaning given in section 124GA(3) and refers to the notice given by an inspector or police officer that disqualifies a person from holding or obtaining a WA marine qualification for a period of 2 months.

disqualification order means an order of the court disqualifying a person from holding or obtaining a WA marine qualification for a specified period.

disqualified means, in relation to a person, that the person has been disqualified from holding or obtaining a WA marine qualification by either a court disqualification order or under a disqualification notice.

[Subclause (2) inserts Part 8A Division 2.]

Division 2 – Disqualification notices

³ Schedule 1, *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Commonwealth).

Section 124GA – Disqualification by inspector or police officer

This section corresponds to section 71C of the RTA and empowers an inspector or a police officer to give a person a notice that disqualifies the person from holding or obtaining a WA marine qualification with immediate effect in certain circumstances (a “disqualification notice”).

Subsection (1) sets out the alleged offences for when an inspector or police officer may give a disqualification notice. These offences are generally for excess 0.08g BAC and above or their corresponding “failure to comply” offences.

Subsection (2) provides that reasonable grounds include the result of analysis of a sample of a person’s breath or a person’s blood. For example, where a person’s breath analysis result is above excess 0.08g BAC, an officer may give that person a disqualification notice.

Subsection (3) provides that the inspector or police officer may give a disqualification notice stating that the person is disqualified for 2 months starting from when the notice is given.

Subsection (4) requires the disqualification notice to be given in person.

Subsection (5) requires the inspector or police officer giving the disqualification notice to include the time and date that the notice is given to the person and the time and date that the disqualification period ends. The latter will ensure that the person clearly understand when their WA marine qualification authorisation will resume.

Section 124GB – Requirements for disqualification notice

This section corresponds to section 71C(4) of the RTA and sets out relevant information that must be contained in the disqualification notice.

In particular, the disqualification notice must contain details of the offence it is reasonably suspected the alleged offender has committed that empowers the giving of the notice, including the time, place, location and particulars of the alleged offence, and circumstances in which the alleged offender can apply to a court for an order revoking the notice.

Section 124GC – Limitation on giving disqualification notice

This section corresponds to section 71C(6) of the RTA.

This section provides that if, for any reason, a disqualification notice is not given to an alleged offender on the spot, it may be given subsequently, provided that it is given within 10 days of the date of the alleged offence. In most cases, it is envisaged that disqualification notices would be given to alleged offenders on the spot, following the provision and analysis of a breath sample.

Where an inspector or police officer forms a reasonable suspicion that an offence has been committed based on the analysis of a blood sample, this section will empower the officer to give the alleged offender a disqualification notice on the day

the analysis result is received. A result may be received more than 10 days after the date of the alleged offence.

Section 124GD – Period of disqualification under disqualification notice

This section provides that the disqualification notice has effect for a period starting when the notice is given to the person and ends 2 months after the day that it was given to the person unless it is revoked earlier by a police officer or inspector or a court under section 124GG or 124GH respectively.

Section 124GE – Amendment of disqualification notice

This section corresponds to section 71C(8) of the RTA.

This section allows an inspector or police officer to give a written notice correcting any false or incorrect information contained in a disqualification notice. Examples of this may be if incorrect information is included on the notice in error, or if a person has supplied false or incorrect information that has been included in the notice. The validity of the disqualification and of the disqualification notice will be unaffected.

Section 124GF – Particulars of disqualification notice given to chief executive officer

This section corresponds to section 71C(9) of the RTA.

Where an inspector or police officer gives a written notice correcting any false or incorrect information in a disqualification notice, this section requires the officer to provide details of the correction to the chief executive officer in order to allow those records to be amended.

These records are essential in enabling inspectors and police officers to enforce unauthorised navigation offences in the WAMA and its regulations, in particular navigating while under disqualification in section 124GS.

Section 124GG – Revocation of disqualification notice by inspector or police officer

This section corresponds to section 71E of the RTA and sets out when an inspector or police officer must revoke a disqualification notice.

Subsection (1) states that an officer must immediately revoke a disqualification notice before the disqualification period has elapsed if –

- an inspector or police officer discovers that the breath analysing equipment that was used to analyse the alleged offender's breath sample, the result of which analysis led to the giving of the disqualification notice, was faulty at the time of the analysis; or
- if a charge for the alleged offence that led to the giving of the disqualification notice has not been laid within 1 month following the giving of the disqualification notice; or
- if the charge for the alleged offence that led to the giving of the disqualification notice is withdrawn.

Subsection (2) provides that if the disqualification notice is revoked for one of these reasons, the inspector or police officer must notify the person to whom the disqualification notice was given, regarding the revocation, as soon as possible.

The inspector or police officer must also notify the chief executive officer of the revocation as soon as possible, in order to enable the chief executive officer's records relating to the person's authorisation to navigate a vessel to be updated.

Section 124GH – Court may order revocation of disqualification notice

This section corresponds to section 71F of the RTA.

This section allows a person who has been given a disqualification notice, to apply to a court for an order directing that the chief executive officer or Commissioner of Police revoke the disqualification notice.

The court may only make such an order where it is satisfied exceptional circumstances exist that warrant the revocation of the disqualification notice. The onus is on the applicant to satisfy the court that such circumstances exist.

The chief executive officer or the Commissioner of Police have a right to be heard when the court considers the application. In order to enable the chief executive officer or the Commissioner to make submissions at this time, the applicant should provide their details and the exceptional circumstances at least 14 days before the application is heard by the court.

Subsection (6) provides that where the court makes an order directing that the disqualification notice be revoked, the court must notify the chief executive officer of the order. This would allow the chief executive officer's records relating to marine qualifications and the person's authorisation to navigate vessels to be updated accordingly.

Section 124GI – Disqualification notice automatically revoked on acquittal or dismissal of charge

This section corresponds to section 71G of the RTA.

This section will operate to revoke a disqualification notice, if a court either:

- acquits a person of the offence that led to the giving of a disqualification notice; or
- dismisses a charge that led to the giving of a disqualification notice.

Subsection (2) also requires a court to notify the chief executive officer of the revocation. This would allow the chief executive officer's records relating to marine qualifications and the person's authorisation to navigate vessels to be updated accordingly.

Section 124GJ – Period of disqualification under disqualification notice to be taken into account in sentencing

This section corresponds to section 71H of the RTA.

This section provides that –

- where a court convicts a person of an offence because of which the person was previously given a disqualification notice; and
- as a result of that conviction, the court is required to impose a period of disqualification upon the person;

the period of the disqualification imposed by the court is to be reduced by the period of disqualification to which the person was subject by virtue of the disqualification notice.

For example, where a court must impose a minimum period of disqualification of 6 months, and the person has served 1 month of their disqualification notice period, the court would impose a disqualification period of 5 months commencing from the end of the disqualification notice period – thereby totalling a 6-month disqualification period.

[Subclause (3) inserts Part 8A Division 3 and 4.]

Division 3 – Provisions relating to disqualifications orders by a court

Section 124GK – Application of division

The provisions in the Division apply when a court sentencing a person for an offence makes a disqualification order against the person.

Section 124GL – Notifying chief executive officer of disqualification order

This section corresponds to section 20 of the *Road Traffic (Authorisation to Drive) Act 2008*.

The chief executive officer maintains a register of WA marine qualifications. To enable the chief executive officer to keep records regarding disqualifications and suspensions of WA marine qualifications, a court making a disqualification order is to ensure information about the order is given to the chief executive officer. This will be details of the order and the office to which the disqualification relates, as well as any other information prescribed under this section.

Section 124GM – Removal of disqualification

This section corresponds to sections 24(1) to (5) of the *Road Traffic (Authorisation to Drive) Act 2008*.

This section provides that a disqualified person may apply to a court for an order removing the disqualification after the specified period set out in subsection (2). If the disqualification is for no more than 6 years, this is 3 years. If the disqualification is for between 6 and 20 years, this is for half of the disqualification period. If the disqualification is for more than 20 years this is for 10 years.

Subsection (3) provides that applications must be made to the Supreme Court if the disqualification was imposed by that court. Any other application must be made to the District Court.

Subsection (4) allows the court to make an order removing the disqualification from a day specified in the order or to refuse the application.

Subsection (5) provides criteria that the court must consider in deciding whether to grant or refuse the application, including public safety and the nature of the offence(s).

Section 124GN – Removal of disqualification: additional provisions

This section corresponds to sections 24(6), (8) to (11) of the *Road Traffic (Authorisation to Drive) Act 2008*.

This section provides that an applicant for the removal of disqualification may be ordered to pay all or part of the costs of the application.

The chief executive officer has the right to be heard in proceedings for an application. The chief executive officer is relevant to such applications by virtue of the Department being primarily responsible for the administration and enforcement of the WAMA. This includes maintaining a register of WA marine qualifications, offences, and infringements.

If the court refuses an application, the applicant must wait at least 1 year to make further application.

Any right to appeal against a disqualification order is not affected by this section, or section 124GM.

Section 124GO – Notifying chief executive officer of disqualification order

This section corresponds to section 24(7) of the *Road Traffic (Authorisation to Drive) Act 2008*.

The chief executive officer maintains a register of WA marine qualifications. To enable the chief executive officer to keep records regarding disqualifications and suspensions of WA marine qualifications, a court ordering a disqualification be removed is to ensure information about the order is given to the chief executive officer to enable those records to be updated accordingly.

Division 4 – Effect of disqualifications and other matters

Section 124GP – Effect of disqualification

This section provides, by operation of the law, for the suspension of any WA marine qualification (unless it is otherwise cancelled under regulations made under section 124GQ) held while a person is disqualified from holding or obtaining a WA marine qualification. Any WA marine qualification obtained by a person while under disqualification has no effect.

The resultant period of suspension does not extend the ordinary expiration period of a WA marine qualification.

Section 124GQ – Other effects of disqualification

This section corresponds to section 21 of the *Road Traffic (Authorisation to Drive) Act 2008*.

This section provides the head of power to make regulations to provide for the circumstances in which a WA marine qualification held by a person that is disqualified from holding or obtaining a WA marine qualification may be cancelled.

Regulations may also provide for the recognition of a disqualification under the law of another Australian jurisdiction or an overseas jurisdiction. Recognition may result in the suspension or cancellation of a WA marine qualification.

Section 124GR – Calculating period of disqualification

This section corresponds to section 23A of the *Road Traffic (Authorisation to Drive) Act 2008*.

This section provides that any period of disqualification for a person does not count down while a person is in custody serving a term of imprisonment or while appealing against the conviction or sentence that gave rise to the disqualification.

Section 124GS – Navigating certain vessels when disqualified from holding or obtaining a WA marine qualification

This section corresponds with sections 49(1)(a) and (3)(b) of the RTA.

This section creates the offence of navigating a vessel for which a WA marine qualification is required, while the person is disqualified. For example, a disqualified person commits this offence if they are the master, or is in charge, of a recreational vessel and is supervising or directing another person to operate the vessel. Similarly, a disqualified person commits this offence by operating a recreational vessel under the supervision of a master (whether or not that master is disqualified or not).

Any period of disqualification imposed by a court under this section is cumulative upon another period for which the person is disqualified or any period of suspension of a WA marine qualification held by the person.

A defence to the charge is available if the person holds an exemption certificate issued by the chief executive officer under the WAMA from holding a WA marine qualification.

A police officer may arrest a person for this offence without a warrant.

See comments at clause 9 of this Bill with respect to marine qualifications for domestic commercial vessels.

24. Part IX Divisions 1 and 2 inserted

This clause inserts Part IX Division 1 and 2 into the WAMA.

Subclause (1) inserts Part IX Division 1.

Subclause (2) inserts Part IX Division 2.

Division 1 — Evidentiary provisions for alcohol-related and drug-related offences

This Division provides for evidentiary provisions in relation to the alcohol and drug navigation and testing offences in Part 3A and 3B. It includes providing for certificate evidence to be introduced in proceedings and provide prima facie evidence of the matters stated on the certificate. Certificates may be given in court in lieu of a person attending court and giving oral evidence of those matters.

Subdivision 1 — Preliminary

Section 124H – Terms used

This section defines terms used in Part IX Division 1. These include –

alcohol-related offence has the meaning given in section 124HC(1). The term is used with respect to evidence in proceedings for alcohol navigation related offences.

approved expert has the meaning given in section 70(7) of the RTA and is a qualified clinical pharmacologist approved by the Minister.

authorised drug tester has the meaning given in section 75EB. The term is used in the context of persons who can conduct drug testing of oral fluid samples.

authorised operator has the meaning given in section 75EA. The term is used in the context of persons who can operate breath analysing equipment to undertake analysis of a breath sample.

certificate means a certificate in the form approved under section 124FA.

drug-related offence has the meaning given in section 124HI(1). The term is used with respect to evidence in proceedings for drug navigation related offences.

material time has the meaning given in section 124HC (alcohol-related offence) or 124HI (drug-related offence).

navigate and ***operate***, in relation to a vessel, has the meaning given in section 75AA.

preliminary breath test means a preliminary test under section 65 of the RTA, or a test of a sample of a person's breath sample using a preliminary breath testing device.

preliminary oral fluid test means a test of a person's sample of oral fluid using a preliminary oral fluid testing device which has the meaning given in section 75E.

sampling equipment means the equipment referred to in section 70 of the RTA as the prescribed blood sampling equipment used for taking blood samples under Part 3B.

Section 124HA – Certificate is evidence of stated facts

This section corresponds to sections 70(2), (3b), (3c) and (3d) of the RTA in relation to the certificate being prima facie evidence of the matters certified on the certificate.

This section provides that in proceedings for an alcohol or drug related offence, where a certificate that is purported to be signed by a person, and states any of the matters that the person may certify under this Division, then that certificate is evidence of the stated facts without proof of the person's signature.

Section 124HB – No limit on other evidence in proceedings

This section corresponds to section 70(4) of the RTA.

This section clarifies that nothing in this Division limits other evidence being introduced in proceedings for an offence against the WAMA or another written law that is relevant to whether or not a person is guilty of the offence. For example, it is the accused may bring evidence relating to independent analysis of samples.

Subdivision 2 – Evidence in proceedings for alcohol-related offences

Section 124HC – Alcohol-related offence and material time

Subsection (1) defines an **alcohol-related offence**.

These are –

- the alcohol navigation offences listed in the Table; or
- an offence against the WAMA or another written law if it is relevant in the proceeding whether or not a person was under the influence of alcohol at a material time, or the extent to which a person was under the influence of alcohol at a material time (for example, it may be relevant for proceedings against section 280 Manslaughter in *The Criminal Code*).

Subsection (2) provides that a **material time**, for purposes of proceedings is –

- the time the person was alleged to have navigated, or attempted to operate, a vessel while the person had a particular BAC; or
- for an offence other than those listed in the subsection (1) Table, the material time when the person was alleged to be under the influence or the extent of that influence.

Section 124HD – Evidence in proceeding for alcohol related offence

This section corresponds to sections 70(1) of the RTA and provides for evidence that may be given in a proceeding for an alcohol-related offence. These include –

- the provision of a sample of breath by a person for analysis, if the sample is provided within 4 hours after the material time;
- the analysis of the sample of the person's breath by breath analysing equipment operated by an authorised operator;
- the manner in which the breath analysing equipment indicated a result of the breath analysis and what was the result;
- the taking of a sample of blood from the person by a prescribed sample taker, if the sample is taken within 4 hours after the material time, or 12 hours following an incident involving a vessel that occasioned death, grievous bodily harm or serious bodily harm;
- the analysis of the sample of the person's blood for alcohol by an analyst; and
- the result of the analysis of the sample.

Section 124HE– Evidence of authorised operator of breath analysing equipment

This section corresponds to section 70(3) of the RTA.

This section provides that in a proceeding for an alcohol-related offence, evidence given by an authorised operator (a person competent to operate breath analysing equipment) about the following is evidence of that fact –

- the device operated by the authorised operator to conduct an analysis of a breath sample was breath analysing equipment;
- the authorised operator operated the breath analysing equipment in the prescribed manner; and in compliance with the regulations relating to the type of breath analysing equipment;
- when operated, the breath analysing equipment indicated a result in the prescribed manner.

Section 124HF – Certificate of authorised operator of breath analysing equipment

This section corresponds to section 70(2)(bb) of the RTA and provides what matters that may be stated in a certificate signed by an authorised operator (a person competent to operate breath analysing equipment). The certificate can be used in proceedings for alcohol-related offences.

An authorised operator may certify in a certificate that, on a specified date or at a specified time:

- the accused provided a sample of breath for breath analysis; and
- the person was an authorised operator; and
- the sample of breath provided was analysed using a device that was breath analysing equipment that was operated by the person; and

- the person used the breath analysing equipment in the prescribed manner and in accordance with the regulations relating to breath analysis conducted using that type of breath analysing equipment; and
- at the conclusion of the breath analysis, the breath analysing equipment indicated a result in the prescribed manner; and
- the result of the breath analysis was the specified result; and
- in accordance with section 75EM(3), the person gave the accused the written statement or statement printed by the breath analysing equipment referred to in that section.

Section 124HG – Certificate of analyst relating to analysis of blood sample for alcohol

This section corresponds to section 70(2)(e) of the RTA and provides what matters that may be stated in a certificate signed by an analyst (person who has been certified by the Chemistry Centre (WA) chief executive officer to analyse samples for alcohol).

The certificate can be used in proceedings for alcohol-related offences.

Section 124HH – Proof of person’s BAC for certain offences

This section corresponds to section 71(2) of the RTA, and it applies in court proceedings to alcohol-related offences referred to in section 124HC(1)(a).

Subsection (2) inserts the rebuttable presumption from RTA section 71(2) and provides that in the absence of proof to the contrary, the accused is taken to have a particular BAC at the time they navigated, or attempted to operate, a vessel if it is proved the accused had that BAC –

- within 4 hours after the time of the navigation or attempted operation of the vessel; or
- if the proof of the accused’s BAC relates to a sample of the person’s blood taken in accordance with a requirement made under section 75EO — within 12 hours after the time of the navigation or attempted operation.

Subsection (3) provides that evidence the accused consumed alcohol during the relevant period is not admissible to rebut the presumption.

Subsection (4) defines the **relevant period** to be between the latest time it was alleged the accused navigated, or attempted to operate, and the provision of breath or blood sample.

Subsection (3) is a deviation from road law that is necessary to address the operational challenges with regulating an effective marine alcohol testing regime. Unlike on the road, where police officers may stop drivers on the side of the road for testing, in the marine environment, officers may make requirements to the person to provide samples for alcohol or drug testing once the vessel is secure or has been moved to a suitable location such as a wharf or jetty. The risk arises that the person,

being isolated from the inspector or police officer during this period of navigation, may consume additional alcohol before providing the breath or blood sample for analysis.

For example, inspectors may encounter a person who is the vessel master in open water. The officer requires the master to stop, and if appropriate given the time, place and circumstances, to navigate the vessel to the nearest jetty, approximately 10 minutes away, for testing purposes.

The master complies, but during the 10 minutes, consumes alcohol while navigating to the jetty. The master subsequently returns a positive preliminary test result and an evidentiary sample that is in excess of 0.08g BAC. The master is then charged for the appropriate alcohol-related offence.

During court proceedings, the accused may seek to rebut the presumption in subsection (2) by bringing evidence on the balance of probabilities to show they had consumed alcohol when complying with the requirement to navigate, and therefore the BAC indicated by the analysis result could not have been their BAC at the time right before they were stopped for alcohol or drug testing. Such evidence would jeopardise the prosecution. Subsections (3) and (4) address this risk to ensure the marine alcohol and drug testing regime is not undermined in this way.

Subdivision 3 — Evidence in proceedings for drug-related offences

Section 124HI – Drug-related offence and material time

Subsection (1) defines a **drug-related offence**.

These are –

- the drug navigation offences listed in the Table; or
- an offence against the WAMA or another written law if it was relevant in the proceeding whether or not a person was under the influence, or impaired by drugs at a material time, or the extent to which a person was under the influence of, or impaired by, a drugs at a material time (for example, it may be relevant for proceedings against section 280 Manslaughter in *The Criminal Code*).

Subsection (2) provides that a **material time**, for purposes of proceedings is –

- the time the person was alleged to have navigated, or attempted to operate, a vessel while the person, had a prescribed illicit drug present in the person's body; or was under the influence of drugs, or was impaired by drugs, or
- for an offence other than those listed in the subsection (1) Table, the material time when the person was alleged to be under the influence of drugs, or the extent of that influence, or impaired by drugs.

Section 124HJ – Evidence in proceedings for drug related offences

This section corresponds to section 70(3a) of the RTA and provides for evidence that may be given in a proceeding for a drug-related offence. These include –

- the taking of a sample of blood from a person by a prescribed sample taker, if the sample was taken within 4 hours of the material time; or 12 hours following an incident involving a vessel that occasioned death, grievous bodily harm or serious bodily harm;
- the analysis of a sample of blood for drugs by a drugs analyst and the result obtained from the analysis;
- the behaviour, condition or appearance of the accused at the material time;
- the behaviour or a condition associated with a person who has consumed or used a particular drug or particular drugs;
- the usual effect that the behaviour or a condition associated with a person who has consumed or used a particular drug or particular drugs has on a person's capacity to have proper control of a vessel;
- the provision of a sample of oral fluid by the person, if the sample is provided within 4 hours after the material time;
- The analysis of the sample of the person's oral fluid for drugs by a drugs analyst, and the result obtained from the analysis.

Subsection (2) provides that subsection (1) does not limit the admissibility of other evidence that may then be given in the proceeding.

Section 124HK – Certificate of authorised drug tester

This section corresponds to section 70(3b)(k) of the RTA and provides what matters that may be stated in a certificate signed by an authorised drug tester.

The certificate can be used in proceedings for drug related offences.

Section 124HL – Certificate of drugs analyst relating to analysis of oral fluid or blood sample for drugs

This section corresponds to section 70(3b)(f) of the RTA and provides what matters that may be stated in a certificate signed by an drugs analyst.

The certificate can be used in proceedings for drug related offences.

Section 124HM – Certificate of approved expert relating to usual effect of particular drugs

This section corresponds to sections 70(3b)(g) and (h) of the RTA and provides what matters that may be stated in a certificate signed by an approved expert relating to the usual effect of particular drugs.

This certificate can be used in proceedings, in particular for an offence against section 75CD for navigating while impaired by drugs.

Section 124HN – Certificate of inspector or police officer

This section corresponds to sections 70(3b)(i) and (j) of the RTA and provides what matters that may be stated in a certificate signed by a police officer or inspector in relation to an assessment of drug impairment.

This certificate can be used in drug related offence proceedings, in particular for an offence against section 75CD for navigating while impaired by drugs.

Section 124HO – Proof of presence of drugs

This section corresponds to sections 64AB(7) and 64D(1) of the RTA and applies in proceedings for offences for navigation while impaired by drugs, or navigating where a prescribed illicit drug is present in the person's oral fluid or blood. In these offences, the presence or trace of a particular drug may be relevant in establishing the offence.

Subsection (2) provides that in absence of evidence to the contrary, the presence of a drug in a person's body is taken to be proved if –

- the presence of that drug in the person's body is proved within 4 hours after the material time; or
- where a sample of the person's blood was taken in accordance with a requirement made under section 75EO — within 12 hours after the time of the navigation or attempted operation.

Subdivision 4 – Other evidentiary provisions

Section 124HP– Certificate of chief executive officer, Commissioner of Police or CEO of Chemistry Centre (WA)

This section corresponds to sections 70(2),(3b), (3c) and (3d) of the RTA.

Subsection (1) provides that the chief executive officer may certify in a certificate that, on a specified date or during a specified period the inspector was competent to operate breath analysing equipment or a drug testing device.

Subsection (2) provides that the Commissioner for Police may certify in a certificate that, on a specified date or during a specified period the specified police officer was competent to operate breath analysing equipment or a drug testing device. See section 75JB – the Commissioner may delegate this function.

Subsection (3) provides the chief executive officer of the Chemistry Centre (WA) may certify in a certificate that, on a specified date or during a specified period a specified person was an analyst or a drugs analyst.

Subsection (4) provides the effect similar to section 124HA, in that a certificate referred to in this section is evidence of the facts stated in the certificate without proof of the person's signature.

Section 124HQ– Certificate of technologist who prepared sampling equipment

This section corresponds to sections 70(2)(c) and (3b)(b) of the RTA and provides, for purposes of section 124HA, what matters that may be stated in a certificate signed by a technologist. The certificate can be used in proceedings for both drug and alcohol related offences.

Section 124HR – Certificate of prescribed sample taker

This section corresponds to sections 70(2)(d) and (3b)(d) of the RTA and provides, for purposes of section 124HA, what matters that may be stated in a certificate signed by a prescribed sample taker. The certificate can be used in proceedings for both drug and alcohol related offences.

Section 124HS – Evidence of delivery of blood or oral fluid samples

This section corresponds to section 70B of the RTA and provides for purposes of section 124HA, that evidence of delivery of blood or oral fluid samples to an analyst or drugs analyst can be given in the form of a certificate for use in proceedings for alcohol-related offences or drug-related offences.

Section 124HT – Procedural requirements for admissibility of particular certificate evidence

This section corresponds to sections 70(5), (5a), (5b) and 70B(3), (4) and (5) of the RTA and provides procedural requirements for the admissibility of particular certificate evidence in proceedings.

Subsection (1) sets out the relevant certificate evidence subject to these procedural requirements.

Subsection (2) provides a copy of the certificate must be served on the accused at least 28 days before the day it is to be adduced in the proceeding otherwise it is not admissible unless the accused consents to it being adduced.

Subsection (3) provides the accused cannot challenge any matter in the admitted certificate unless the accused writes of their intention to challenge the matter and serves this notice (which specifies the matter that is being challenged) on the prosecutor at least 14 days before the day on which the certificate is produced, or if the court grants the accused leave to do so.

Section 124HU – Evidence relating to preliminary oral fluid test, drug testing and preliminary breath test is admissible in certain proceedings with consent

This section corresponds to sections 70(5c), (5d) or (5e) and (6) of the RTA and provides for matters relating to a preliminary breath test, preliminary oral fluid test, or drug testing, including the results, may be admissible in certain alcohol or drug related proceedings only with the accused's consent.

[Subclause (2) inserts Part IX Division 2.]

Division 2 – Provisions relating to sentencing for dangerous navigation and alcohol and drug related offences
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Section 124I – Term used: young person

This section provides the definition ‘young person’ for the purposes of Division 2. It brings in the meaning of young person provided in section 4(1) of the *Young Offenders Act 1994* which is:

- (a) a person who has not reached the age of 18 years; or
- (b) a person to whom that Act applies because of section 4.

Section 4 of that Act provides that if a person commits an offence prior to turning 18, that person is treated as a young person in respect to that offence or any order made in dealing with the person for that offence.

Section 124IA – Limitation on period for which previous offences taken into account

This section corresponds to section 107 of the *Road Traffic (Administration) Act 2008*.

This section provides a 20-year limit on how long a conviction for an offence can be considered as a ‘strike’, or a prior offence, when determining whether the offence is a first, second or subsequent offences.

Section 124IB – Sentencing for particular offences: option for community based order or youth community based order

This section corresponds to sections 106(3) and (4) of the RTA.

This section provides sentencing options for specified offences and circumstances. It provides for, in lieu of imposing a fine, a court imposing a community-based order or a youth community based order, must impose at least a community service requirement or community work conditions respectively.

Section 124IC – Sentencing for particular offences if community based order or intensive supervision order imposed

This section corresponds to sections 106(4) and (5) of the RTA.

This section provides sentencing options for specified offences and circumstances. It provides for where a court orders the release of the offender and imposes a community based order or an intensive supervision order under the *Sentencing Act 1995* or a youth community based order or intensive youth supervision order under the *Young Offenders Act 1994*, the court must impose at least a community service requirement or community work conditions respectively.

Section 124ID – Pre-sentence report required for sentencing for navigation while impaired by drugs offence

This section corresponds to section 106(6) of the RTA.

This section requires a court sentencing a person for an offence against section 75CD(1) Navigation of vessel while impaired by drugs to order a pre-sentence report about the offender under the *Sentencing Act 1995* Part 3 Division 3.

Section 124IE – Sentencing for first offence of navigation while impaired by drugs or failure to comply with drug impairment assessment

This section corresponds to section 106(7) of the RTA.

This section provides sentencing requirements for a first offence against section 75CD Navigation of vessel while impaired by drugs or section 75HE Failure to comply with requirements related to assessment for drug impairment.

In relation to an adult offender, the court must, either instead of, or in addition to a fine, order the release of the person and impose a community based order under the *Sentencing Act 1995* with at least a programme requirement as a primary requirement.

For an offender who is a young person, the court must, either instead of, or in addition to a fine, impose a youth community based order under the *Young Offenders Act 1994*, imposing at least attendance conditions on the offender.

Section 124IF – Sentencing for second or subsequent offence of navigation while impaired by drugs or failure to comply with drug impairment assessment

This section corresponds to sections 106(8) to (10) of the RTA.

This section provides sentencing requirements for a second or subsequent offence against section 75CD Navigation of vessel while impaired by drugs, or section 75HE Failure to comply with requirements related to assessment for drug impairment. The requirements do not apply if the court imposes a custodial sentence on the offender.

In relation to an adult offender, the court must, either instead of, or in addition to, a fine, order the release of the person and impose a community based order or an intensive supervision order under the *Sentencing Act 1995* with at least a programme requirement as a primary requirement.

For an offender who is a young person, the court must, either instead of, or in addition to, a fine, impose a youth community based order or an intensive youth community based order under the *Young Offenders Act 1994*, imposing at least attendance conditions on the offender.

Section 124IG – Mandatory disqualification

This section corresponds to section 106A of the RTA.

This section applies where a court is required to disqualify a person from holding or obtaining a WA marine qualification under the WAMA, whether it be permanent, for a minimum period, or for between a minimum and maximum period.

Regardless of any other sentence a court may impose on a person, the court must disqualify the person for the period specified, or for at least the minimum period and no more than the maximum period. In accordance with section 124GJ, the court

must take into account the period that the offender was disqualified by a section 124GA disqualification notice.

The specified period cannot be reduced in mitigation.

Section 124IH – Minimum fines

This section corresponds to section 121 of the *Road Traffic (Administration) Act 2008*.

This section provides that where a penalty in the WAMA is expressed to be a minimum fine, the amount of the fine is irreducible in mitigation.

25. Part IX Division 2 heading inserted

This clause inserts the heading for Part IX Division 3 – General matters.

26. Section 133 amended

This section amends section 133 of the WAMA to give police officers who are not inspectors the option to use section 133 with respect to the Part 3A, 3B and section 124GS offences.

27. Part X Division 3 inserted

This clause inserts Part X Division 3 into the WAMA relating to repeal and transitional provisions.

Division 3 – <i>Western Australian Marine Amendment Act 2023</i>

Section 138 – Offences against repealed section 59

This section modifies the effect of section 11 of *The Criminal Code* for the purposes of charges laid in connection with an offence following the repeal of WAMA section 59.

Section 11 of *The Criminal Code* provides that a person cannot be punished for doing or omitting to do an act, unless the act or omission constituted an offence under the law in force when it occurred, nor unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence.

This section provides that a person may be prosecuted and punished for an offence after the day that clause 5 of this Bill comes into effect, provided the offence against section 59 that is alleged to have occurred was committed before the day on which section 5 came into operation.

Section 139 – Transitional regulations

This clause provides that regulations may be made to facilitate the transition of the current WAMA that are necessary and appropriate to accommodate the amendments in this Bill.

PART 3 — OTHER ACTS AMENDED

Part 3 of the Bill makes consequential amendments to other Acts generally to avoid any duplication with new marine offences, and to ensure the new safe and alcohol or drug navigation offences are treated consistently with their road law counterparts in sentencing and other matters relating to the administration of justice.

28. *Bail Act 1982* amended

Schedule 2 of the *Bail Act 1982* provides what are serious offences for section 3(1) of that Act.

A person arrested for a serious offence:

- cannot be released without bail by an authorised officer or justice; and
- in an urban area, cannot be released on bail after being charged with a serious offence whilst on bail or early release order for another serious offence unless they can satisfy a court that there are exceptional reasons why they should not be kept in custody.

This clause adds item 3A to Schedule 2 of the *Bail Act 1982*. New culpable navigation occasioning death, grievous bodily harm, or bodily harm offences are included in the Schedule as serious offences for the purposes of that Act. The offences correspond to existing RTA culpable driving offences in item 3 of the Schedule.

29. *Community Protection (Offender Reporting) Act 2004* amended

Part 5A of the *Community Protection (Offender Reporting) Act 2004* provides for the publication of information about certain offenders covered by that Act. Included are persons convicted of a serious sexual offence.

Section 85A of that Act defines what is a **serious sexual offence** for this purpose, which include offences in the *High Risk Serious Offenders Act 2020* Schedule 1 with exceptions. One exception being section 59 of the RTA of dangerous driving causing death or grievous bodily harm. Consequently, an offence against section 59 of the RTA is not considered a serious sexual offence for the purposes of Part 5A of the Offender Reporting Act.

This clause amends section 85A and inserts the corresponding marine offences of dangerous navigation occasioning death and dangerous navigation occasioning grievous bodily harm. Accordingly, section 85A will exclude these offences from the definition of serious sexual offence.

30. *The Criminal Code* amended

Sections 279 and 280 of *The Criminal Code* provide the offences of Murder and Manslaughter respectively. Both offences provide for alternative verdicts. An alternative verdict may be found where proven facts of the case do not cover all the elements of the offence charged but do in respect to the alternative offence.

Both offences currently provide the offence of dangerous driving causing death or grievous bodily harm under section 59 of the RTA as an alternative offence. Subclause (2) and (3) amend sections 279 and 280 of the Code by adding corresponding offences for navigation of vessel occasioning death in sections 75B(1) or 75B(2).

Section 284 of the Code provides the offence of culpable driving (not of motor vehicle) causing death or grievous bodily harm. The offence covers culpable driving of a conveyance other than a motor vehicle. This is because culpable driving of a motor vehicle is adequately covered by the offence in section 59 of the RTA of dangerous driving causing death or grievous bodily harm.

Subclauses (4) and (5) amend section 284 to remove its application to vessels as they will be covered by the new specific offences for dangerous navigation occasioning death.

Section 297(1) of the Code provides for the offence of grievous bodily harm. It includes section 59 of the RTA– dangerous driving causing death or grievous bodily harm as an alternative offence. Subclause (6) amends section 297 of the Code and inserts the corresponding offences in sections 75BA(1) or (2) dangerous navigation of vessel occasioning grievous bodily harm.

31. *Criminal Investigation Act 2006* amended

Section 28(1) of the *Criminal Investigation Act 2006* provides that an officer (either police or prescribed officers) who requests a person who is not in lawful custody to accompany the officer must inform the person of their rights that, as they are not under arrest, they do not have to accompany the officer and they are free to leave at any time unless they are subsequently placed under arrest.

This does not reflect the status of a person who is under a requirement to accompany a police officer or to remain at a place for the purposes of breath, blood or oral fluid testing under sections 66, 66B, 66D or 66E of the RTA, as the person would be subject to a penalty for not complying with such a requirement.

Accordingly, section 28(2) provides that section 28(1) does not apply to a person to whom such a requirement applies.

Section 135(2)(b) of the *Criminal Investigation Act 2006* provides that a person accompanying a police officer to, or waiting at, a police station or other place under sections 66, 66B, 66D or 66E of the RTA is taken to be in custody for the purposes of performing a search for a security risk item.

This clause inserts in sections 28(2) and 135(2) the corresponding marine requirement facilitating breath, blood or oral fluid testing under section 75G. Note that inspectors (who are not police officers) are not prescribed officers under the *Criminal Investigation Act 2006*.

32. *Criminal Law (Mental Impairment) Act 2023* amended

The *Criminal Law (Mental Impairment) Act 2023* (the CLMI Act) was enacted in early 2023 to replace the *Criminal Law (Mentally Impaired Accused) Act 1996*.

The CLMI Act contains a prescribed set of serious offences. In some circumstances under the CLMI Act, the alleged commission of a serious offence or the risk of commission of a serious offence by a mentally impaired accused warrants special treatment. Schedule 1 of the CLMI Act, once commenced, prescribes section 59 of the RTA as a serious offence.

This clause amends the CLMI Act for when Schedule 1 of that Act commences, to prescribe the sections 75B, 75BA and 75BB offences in Schedule 1. This means that these offences, will receive the same consideration as their corresponding RTA offences when applying the CLMI Act provisions.

33. *Criminal Law (Mentally Impaired Accused) Act 1996* amended

Section 21 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (the CLMIA Act) provides that a superior court dealing with a person who has been found not guilty by reason of unsoundness of mind in connection with prescribed class of offences must impose a custody order.

Schedule 1 of the CLMIA Act lists these offences. One of the offences prescribed in Schedule 1 is section 59 of the RTA - dangerous driving causing death or grievous bodily harm.

This clause amends the CLMIA Act to prescribe the corresponding offences in sections 75B, 75BA and 75BB offences in Schedule 1. This means that these offences will be treated in the same way as their corresponding RTA offences when applying the CLMIA Act provisions.

34. *Evidence Act 1906* amended

The Second Schedule of the *Evidence Act 1906* lists offences in respect to which, in a criminal proceeding, a spouse or ex-spouse of the accused (including where any person being tried jointly with the accused) is compellable to give evidence on behalf of the prosecution.

Currently, certain RTA offences in relation to dangerous driving and failure to report marine incidents or give certain information after those incidents, and to stop and assist in serious incidents are listed. This clause adds the new corresponding marine offences to the Second Schedule.

35. *High Risk Serious offenders Act 2020* amended

Schedule 1 of the *High Risk Serious offenders Act 2020* lists offences that are serious offences for the purposes of the Act. Serious offences are offences that determine an offender's eligibility to be considered for an order under that Act.

Schedule 1 currently includes the offence of dangerous driving causing death or grievous bodily harm under section 59 of the RTA. This clause adds to the Schedule the new corresponding offences for dangerous navigation occasioning death or grievous bodily harm.

36. *National Disability Insurance Scheme (Working Screening) Act 2020* amended

Schedules 1 and 2 of the *National Disability Insurance Scheme (Worker Screening) Act 2020* list offences that are Class 1 or Class 2 offences for the purposes of the Act.

When a person is charged with, or convicted of, a Class 1 offence or Class 2 offence has consequences throughout that Act. Class 1 offences and Class 2 offences are relevant to:

- The determination as to whether a person is a 'disqualified person' or 'presumptively disqualified person' under Part 1 of the Act;
- A person's entitlement to apply for a clearance under Part 2 Division 1 of the Bill or to cancel an exclusion under Part 2 Division 5 of the Act;
- The CEO's decision on whether to grant a clearance to an applicant under Part 2 Division 1 of the Act; and
- Whether there is a presumption that the person is an unacceptable risk to people with disability when conducting a risk assessment under Part 2 Division 2 of the Act.

Currently, section 59 of the RTA is included as a Class 1 offence where the offence is committed with intent to cause death or grievous bodily harm and as a class 2 offence where there is no intent.

Sections 75B and 75BA are new offences of dangerous navigation of a vessel causing death and dangerous navigation of a vessel causing grievous bodily harm. The offences correspond to, and will carry the same penalties as, the offences in section 59 of the RTA.

This clause will add these corresponding offences to the schedules.

37. *Sentencing Act 1995* amended

This clause amends the *Sentencing Act 1995*.

Section 45(5)(a) of the *Sentencing Act 1995* provides that the effect of a spent conviction does not affect the court's right or duty to disqualify a person from holding or obtaining a driver licence, with the effect being a prior spent conviction is counted as a prior offence for the purpose of determining what disqualification period applies in sentencing. Similarly, section 45(5)(b) of that Act provides a spent conviction does not prevent the driver licence from being cancelled, nor the person being disqualified. Subclause (2) replicates this effect in sentencing for the marine navigation offences.

Section 107 of the *Sentencing Act 1995* provides for the disqualification of a person from holding a marine qualification. Subclause (3) updates the term from 'marine qualification' to 'WA marine qualification' in line with the terminology introduced into the WAMA by this Bill. The clause also links the definition of WA marine qualification to section 3(1) WAMA.

This Bill introduces the ability to the WAMA for a court to disqualify a person from holding or obtaining a WA marine qualification, accordingly, subclause (4) will provide that section 107 of the *Sentencing Act 1995* will not affect the right or duty of a court to do so.

Schedule 1A of the *Sentencing Act 1995* lists offences that are relevant indictable and simple offences for the purposes of that Act. Section 9D of that Act provides that where a declared criminal organisation is involved in a relevant offence, mandatory minimum sentences apply.

Currently, sections 59 and 59A of the RTA are listed. Subclause (7) adds the corresponding culpable navigation offences to the Schedule.

38. *Working with Children (Screening) Act 2004* amended

Schedule 2 of the *Working with Children (Screening) Act 2004* lists Class 2 offences. Class 2 offences are offences relevant to:

- the decision to issue an Assessment Notice or Negative Notice;
- certain prohibitions relating to child-related work; and
- reporting obligations under that Act.

Class 2 offences currently include s. 284(3)(c) and s. 284(3)(d) of *The Criminal Code* harm for culpable driving of a conveyance and section 59 of the RTA for dangerous driving causing death or grievous bodily harm.

Sections 75B and 75BA are new offences of dangerous navigation of a vessel causing death and dangerous navigation of a vessel causing grievous bodily harm. The offences effectively replicate and will carry the same penalties as the section 59 RTA offences. Clause 13(5) will remove circumstances involving the navigation of a vessel from section 284 of the Code.

Accordingly, this clause adds the new offences of dangerous navigation of a vessel causing death and dangerous navigation of a vessel causing grievous bodily harm to Schedule 2 of the *Working with Children (Screening) Act 2004*.

39. *Young Offenders Act* amended

The *Young Offenders Act 1994* provides power for police to administer a caution or refer a matter to a Juvenile Justice Team instead of laying a charge against a juvenile. There are exceptions to this arrangement for certain offences that are listed in Schedules 1 and 2 of that Act.

Schedule 1 offences are those for which a caution cannot be given, which cannot be referred to a Juvenile Justice Team and for which a conviction will normally be recorded.

Subclause (2) amends Schedule 1 by inserting new offences covering culpable navigation, navigating while under the influence of alcohol, drugs, or alcohol and drugs, navigating in excess of or above 0.05 and 0.08 BAC and failure to comply

with requirements in relation to alcohol, drug or oral fluid testing. The new offences reflect the corresponding RTA offences listed in the schedule.

Schedule 2 offences are those for which a caution cannot be given; which cannot be referred to a Juvenile Justice Team; for which a conviction will normally be recorded; and which may lead to detention of an offender who repeatedly commit offences.

Subclause (3) amends Schedule 2 to insert new offences covering culpable navigation occasioning death, grievous bodily harm and bodily harm, and failure to render assistance in relation to marine incident occasioning death, grievous bodily harm or bodily harm. The new offences correspond to the RTA offences listed in the schedule.