

Port and Harbour and Navigation Safety Management

A DISCUSSION PAPER FOR PUBLIC COMMENT

November 2007

DISCUSSION
DOCUMENT



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INFORMATION FOR PERSONS MAKING SUBMISSIONS

We would like to know what you think about the issues raised in this discussion document. When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

Submissions in relation to this discussion paper are invited from all interested parties. Submissions will be considered in the development of policy recommendations to the Government.

To aid respondents in making submissions, Appendix 5 provides a discussion document response template. This template can be downloaded from the Ministry of Transport website www.transport.govt.nz/portandharbour emailed to portandharbour@transport.govt.nz. It is not necessary to provide written copies of email submissions.

You may also post your hard copy submission to:

Attention: Roger Brown
Ministry of Transport
PO Box 3175
WELLINGTON 6140

The closing date for submissions is 19 December 2007.

Submissions or comments provided to the Ministry of Transport on this discussion document will be subject to the Official Information Act (OIA) 1982. The OIA requires information to be made available unless there is good reason, pursuant to the Act, to withhold the information.

If you want information that you provide to be treated as confidential, please clearly identify the material and why you wish the information to be withheld.

The Ministry of Transport is offering stakeholders the opportunity to meet with officials to clarify any issues and answer any questions pertaining to this discussion document. The Ministry will be arranging sessions in Christchurch, Wellington and Auckland to meet interested stakeholders. If you wish to take up this opportunity, please email seaadmin@transport.govt.nz or ring (04) 439 9095.

EXECUTIVE SUMMARY

This document discusses issues raised by the development of the New Zealand Port and Harbour Marine Safety Code 2004 (the Code). The Code establishes best practice guidelines to address harbour safety management shortcomings identified following a series of shipping incidents in 2002-2003, most notably the grounding of the *Jody F Millennium* in Gisborne.

The Code is voluntary because the relevant legislation does not provide for formal implementation of such measures, raising questions over the implications of continued reliance on an entirely voluntary arrangement. The document explores four possible approaches to the matter, as well as a suggestion that the concept of a centralised model for harbour safety delivery should be considered.

The document also invites comments on suggested measures to improve the workability and coherence of the legislative framework for navigation safety management.

PORT AND HARBOUR SAFETY OPTIONS

Option One	<i>Status Quo – retain an entirely voluntary approach</i>
Key Points	<p>The National Advisory Committee on port and harbour safety is well placed to identify and resolve problems with Code implementation and support its members' continuing commitment to the Code.</p> <p>A voluntary approach provides flexibility to change arrangements quickly. Expenses associated with participation in the Code are incurred voluntarily, avoiding compliance cost issues involved with regulatory measures.</p> <p>However, a safety system built entirely on voluntary compliance is reliant on the continuing goodwill and commitment of its participants. While support for the Code is consistent at present, there is no guarantee of future commitment, nor any formal means to address subsequent problems.</p>
Option Two	<i>Provide for formal recognition of the Code</i>
Key Points	<p>Measures in the Code would become the subject of a Ministerially-approved code of practice, which though not binding, would give them the status of an approved, published statutory document.</p> <p>This arrangement would allow flexibility to include practices and standards contained in a document prepared or issued by any organisation or authority, and to amend measures in the Code (following consultation).</p> <p>However, the introduction of formal consultative and approval procedures would involve costs and additional consultation may lead to delays.</p>

Option Three	<i>Introduce statutory provisions to supplement the existing Code or a formal code of practice</i>
Key Points	<p>Several possible options are explored in this context including:</p> <ul style="list-style-type: none"> • local harbour safety control becoming a statutory function of regional councils • imposing safety duties on port facility operators and other marine service providers • requiring port marine service providers to hold a maritime document • providing explicit powers for the Director of Maritime New Zealand in respect of port and harbour safety • extending maritime rule making powers to include port and harbour marine safety. <p>In the Ministry's view, a suitably balanced mix of these functions, duties and powers, allied to a voluntary Code, could offer the best long term approach to port and harbour safety management.</p>
Option Four	<i>Make the Code mandatory</i>
Key Points	<p>While making the Code mandatory has the benefit of apparent simplicity, the financial and legal ramifications could be considerable.</p> <p>Matters that can readily be included such as recommended practice and guidance in a voluntary instrument would take on a new meaning if they became mandatory.</p> <p>Converting the Code into a mandatory instrument through the rules process would limit the flexibility to modify and update its requirements.</p>

CENTRALISED HARBOUR CONTROL

Current port and harbour control measures rely heavily on local authorities, which act individually, possess varying levels of capability and face many competing demands on their resources. This has implications in terms of consistency of standards and for future port and harbour safety outcomes. It has been suggested to government that centralised delivery of the harbour-control function could produce better safety outcomes. The document looks at how such an arrangement might work, with the caveat that a convincing case would need to be made in order to justify such a far-reaching step.

NAVIGATION SAFETY

A lack of jurisdictional clarity affects the relationship between local and central government navigation control responsibilities. Existing arrangements involve a patchwork of local and national controls under separate statutes, which is complex, confusing and creates compliance problems and inconsistency in standards. A consolidated regime could allow better harmonisation of roles and responsibilities, regulatory process and compliance and enforcement mechanisms.

The document discusses whether legislation should clarify regional councils' responsibility for navigation safety within their regions, together with measures to improve the enforceability of safety controls. It also canvasses the merits of consolidating all navigation safety controls, including port and harbour safety, in one statute, preferably the Maritime Transport Act.

ORGANISATION OF ISSUES FOR DISCUSSION PURPOSES

1. Regulation of commercial maritime activities and recreational boating activities involve quite different operational and regulatory demands, though the Maritime Transport Act and Local Government Act 1974 deal with both.
2. Commercial maritime activity is concentrated around ports and harbours, where ship size, frequent ship movements, and the hazards inherent to navigation in confined waters all contribute to a risk profile that has long demanded active regulatory intervention.
3. By contrast, recreational boating does not carry with it the scale of risk to life, property and the environment presented by commercial ship operations. Most interventions suitable for commercial shipping would be unreasonable or impractical for recreational boats – the main exception being the collision prevention rules and local navigation rules designed to manage conflicts between water surface activities.
4. The fact that commercial vessels must operate within the maritime system means vessels and their operators can readily be identified for compliance purposes. This includes the application of user charges to recover navigation safety-related costs that a regional council may incur in respect of commercial operations. Most such costs involve council activities related to operations in and around ports and harbours. Recreational boating activity is more dispersed and irregular than commercial activity which, combined with the absence of any identification system, complicates the enforcement of regulatory controls.
5. The discussion that follows therefore deals separately with marine safety in the commercial harbour setting and general navigation safety, with its greater emphasis on recreational vessels.
6. The paper concludes with a general discussion on whether all navigation safety controls, both for commercial harbours and general navigation, should be consolidated in a single statute.

PORT AND HARBOUR SAFETY MANAGEMENT: OVERVIEW

LEGISLATIVE FRAMEWORK

7. Under the Harbours Act 1950, harbour boards were responsible for all commercial and regulatory aspects of port and harbour management. Commercial port undertakings were transferred to port companies under the Port Companies Act 1988. Local government reform in 1989 abolished the boards and transferred their regulatory functions to regional government.
8. The Harbours Act was repealed in 1999 and regulatory functions and powers relating to navigation safety were transferred to the Local Government Act 1974. The Local Government Act 2002 repealed the specific statutory reference to regulation of navigation safety being a regional council function, but did not alter council powers to regulate navigation safety.
9. The Maritime Transport Act 1994 provides for national regulation of maritime safety (among other matters). Maritime New Zealand is responsible for maritime safety administration under the Act. Duties, powers and requirement of rules made under the Act cover all aspects of ship safety, including navigation safety. Navigation safety controls under the Maritime Transport Act prevail over local navigation safety controls under the Local Government Act 1974.
10. Appendix 1 provides a detailed description of the legislative background and Appendices 2, 3 and 4 provide detail on legislative content and the relationship between local and national level controls.

ROLE OF REGIONAL GOVERNMENT

11. The harbour control measures carried over from the Harbours Act have preserved the same basic mechanisms that were available to harbour boards for regulating navigation in commercial ports:
 - Bylaws specify local rules governing the navigation and operation of shipping in and adjacent to a port.
 - Council-appointed harbourmasters and enforcement officers manage navigation safety, bylaw implementation and enforcement. The harbourmaster role may be performed by a port company employee exercising delegated powers.
12. Harbourmasters' powers provide the primary mechanism for day to day navigation safety management. Funding is provided from general rating, sometimes supplemented by user charges. Regional councils with port company shareholdings also have access to dividend income to assist in meeting the costs associated with assuming former harbour board functions, duties and powers.
13. Local harbour control focuses on safety factors associated with the movement of commercial shipping in and around ports and harbours, relying on a combination of standing requirements specified in bylaws and the direct powers of intervention available to the harbourmaster.
14. The separation of commercial port operations and regulatory functions has distanced the local regulator and harbourmaster from operational decision-making processes that can affect harbour safety. While this was part of a conscious effort to prevent commercial pressures from influencing regulatory decision-making, it has led to local regulators losing direct access to on-the-ground operational information.

ROLE OF MARITIME NEW ZEALAND

15. National level maritime safety controls focus on the safe design, construction, equipment, crewing, management and operation of ships - the objective being effective and consistent national application of safety requirements. Compliance is based around a mix of statutory duties on ship owners, regulatory requirements specified in rules, and powers that the Director of Maritime New Zealand may exercise over participants in the maritime system (holders of maritime documents under the Act). Funding is provided largely from marine safety charges levied on commercial shipping.
16. Because it is focused on ships and their operation, the Maritime Transport Act contains few provisions applicable to a port company or other provider of port marine services (except in the capacity of owner or operator of a ship, or provider of navigational aids). The Director of Maritime New Zealand's power under Section 54 of the Act to carry out audits and inspections in the interests of maritime safety can, however, apply to acts undertaken by port service providers in respect of any ship. This is not well defined and the Act does not provide for formal follow-up action in such instances.
17. The result is that port marine activities that have the potential to markedly influence the level of maritime safety are essentially self-regulated through operators' management and operational systems and practices.

PORT COMPANIES AND OTHER PORT FACILITY OPERATORS

18. When port reform placed commercial port undertakings in the hands of port companies, no duties were imposed on the companies in relation to the possible impacts of their operations on marine safety. Commercial imperatives and liability considerations were seen as providing the incentive to operate safely.
19. While the Health and Safety in Employment Act 1992 imposes duties on port facility operators as employers, those duties focus on managing risks to employees and others in the workplace. A port facility operator's duties under the Act do not extend to persons employed on board ships but whose safety may be affected as a consequence of its operational practices or decisions. As already noted, the Maritime Transport Act 1994 is concerned with regulating participants in the maritime system but port facility operators are not within that system.

20. Ultimately, therefore, only the port facility operator is in a position to decide what safety practices and procedures to follow in the management and operation of its services to shipping.

PORT AND HARBOUR SAFETY MANAGEMENT: PROBLEMS REVEALED BY SHIPPING INCIDENTS

21. The quality of marine safety management in New Zealand ports and harbours was called into question by number of serious shipping incidents that happened in close succession. In February 2002, the log carrier *Jody F Millennium* grounded when leaving Gisborne harbour, resulting in the largest marine oil spill response yet required in this country. The bulk carrier *Tai Ping* grounded in Bluff harbour in October 2002 but response action prevented any oil or cargo spill. In April and July 2003 respectively, the oil tankers *Capella Voyager* and *Eastern Honor* grounded when entering Whangarei Harbour.
22. Transport Accident Investigation Commission and Maritime Safety Authority (now Maritime New Zealand) investigations into these occurrences revealed a pattern of failures in port safety governance and operational procedures. A wider examination of safety management practices by the Authority revealed systemic problems not confined to the ports where those incidents happened. The Authority identified a need for more rigour and consistency in port and harbour safety management.
23. The Authority's experience with these incidents made it apparent that the Director's statutory powers to act in the interests of maritime safety were of very limited use in relation to port marine management.
24. The Authority's report on the *Jody F Millennium* grounding recommended that the problems identified be redressed through a national port safety code, modelled on the United Kingdom Port Marine Safety Code, or maritime rules to the same effect.
25. In considering how that recommendation should be implemented, it became evident that existing legislation did not provide any statutory authority for developing, implementing or requiring compliance with a code of the type proposed.
26. If a code were to be introduced, it would therefore only be possible to do so as an administrative measure, with compliance being voluntary.

THE RESPONSE TO SAFETY MANAGEMENT PROBLEMS: NEW ZEALAND PORT AND HARBOUR MARINE SAFETY MANAGEMENT CODE

27. In close collaboration with industry, local government and relevant central government organisations, Maritime New Zealand developed the New Zealand Port and Harbour Marine Safety Code 2004 (the Code). While the Code is termed a safety code, port and harbour safety management is part and parcel of managing environmental risks from shipping.
28. The Code is supported by guidelines concerning port and harbour risk assessment and safety management systems, hydrographic surveys, aids to navigation, power line waterway crossings, environmental factors and aquaculture areas and marine farms. Maritime New Zealand chairs and services the National Advisory Committee, a consultative group representing those same organisations, to oversee the ongoing development and implementation of the Code and related measures.
29. The Code establishes processes through which all participants whose actions affect port marine safety are expected to take active measures to identify, assess and manage the risks within their control.

30. With its supporting guidelines, the Code introduces voluntary arrangements that complement the legal functions, duties and powers of the entities whose actions affect port and harbour safety.
31. Though the Code and guidelines have no legal force in their own right, they provide a coherent, nationally consistent initiative designed expressly to manage safety and environmental risks associated with shipping in New Zealand ports and harbours. In promoting best practice, the Code also promotes compliance with the statutory and regulatory requirements that it complements and reinforces.

THE CODE'S IMPLICATIONS FOR PARTICIPANTS

32. Subscribing to the Code involves a voluntary commitment from all concerned to provide the expertise and resources necessary for its successful implementation. The demands on participants vary according to the nature of their responsibilities under the Code and their capacity to meet those responsibilities.

MARITIME NEW ZEALAND

33. Maritime New Zealand has continuing responsibilities as the 'owner' of the Code. In particular, it needs to maintain a monitoring and compliance evaluation role. Central to that role is auditing the safety management systems that are at the heart of the Code, which will require the organisation to retain the capacity for this function.
34. The immediate priority for Maritime New Zealand is to maintain progress towards the safety outcomes that the Code is designed to achieve. If those outcomes can be achieved, the organisation should not find itself facing a repetition of the events that sparked the Code's development.

REGIONAL COUNCILS

35. Regional councils, as the bodies responsible for safe navigation in harbours within their districts, serve the public interest in so far as harbour users, the local community and the harbour environment are concerned.
36. The new emphasis on safe management of ships in ports and harbours under the Code has brought into sharp relief the responsibilities and potential costs of active regional council participation in this scheme. In particular, councils' responsibility under the Code for managing identified risks within their ports and harbours can place new or increased capability and funding demands on a council.
37. The impact on any given council is influenced by such factors as the volume of shipping activity, local risk levels, the council's existing marine management resources and its ability to fund additional costs. The latter is already a significant problem for at least one harbour-controlling council (the Marlborough District Council) and raises cost recovery issues which are discussed under the heading 'Funding of regional council harbour safety management costs'.
38. In keeping with the Code, all councils have undertaken risk assessments, which identify navigation risks in individual ports and harbours and recommend specific actions to mitigate them and/or validate existing measures where appropriate. These range from procedural changes through to introducing new technology. Certain recommendations could have major cost implications for the council in question. Despite the risk mitigations being voluntary, there has been concern that inaction could carry legal risks similar to those of not adopting the Code.

PORT FACILITY OPERATORS

39. The Code's central theme is to bring a risk-based approach to the management of operations that affect marine port safety. The Code expects port facility operators to develop a formal port safety management system (SMS) based on a formal port risk assessment, which is then passed to the relevant regional council for incorporation into its wider harbour risk assessment and safety management system.

40. Experience since the Code's inception in August 2004 suggests that the Code is setting the course for a more rigorous, consistent standard of marine safety management in ports and harbours. Implementation is, nevertheless, a work in progress. A continuing commitment to the Code is central to effective, sustained implementation.
41. Port operators have incurred costs in familiarising themselves with the Code and adjusting administrative and operational arrangements to reflect its expectations. Code implementation costs should be offset by the benefits of improved safety management and reduced risks of property and environmental damage.
42. Because the Code effectively represents industry best practice, liability insurers may well begin to factor in Code compliance when assessing a port facility operator's risk rating and the cost of insurance cover.

KEY ISSUES FOR PORT AND HARBOUR SAFETY MANAGEMENT

43. As previously indicated, development of the Code, and the events preceding it, have highlighted the very limited capacity of the Maritime Transport Act 1994 and Local Government Act 1974 to support measures for the effective management of port and harbour safety. This comes about because the legislation focuses on ships and their operation and contains no scheme for managing the safety of port marine activities in relation to shipping. The Code provides an administrative solution to the legislative gap.
44. The central question is whether the current legislative and administrative regime is sufficient to provide a durable, effective basis for the future management of port and harbour safety. Key issues feeding into that question are canvassed below in respect of each of the three components of the regime, namely the Maritime Transport Act, the Local Government Act 1974, and the Code.

Maritime Transport Act

45. The 'maritime system' of the Maritime Transport Act does not cover all parties whose actions within the port and harbour marine safety system can influence maritime safety outcomes. In particular, the Act provides no clear authority to oversee, monitor or regulate the provision of port marine services.
46. Consequently, the Act and maritime rules rarely apply to a port facility operator except, for example, as the operator of a ship, provider of harbour navigation aids or operator of an oil transfer site. Operators are not subject to any explicit statutory duty in relation to the effects of their operations on maritime safety. In contrast, the Act imposes a duty on ship operators to maintain safety management systems in keeping with maritime rules, along with matching requirements to provide training, supervision and resources to ensure continuous compliance.
47. The Act makes possible the audit and inspection of some port marine operations but does not provide for follow-up action.
48. The net result is that no statutory power exists, if the need arises, to require a port marine service provider to take measures to manage operational risks.

Local Government Act 1974

49. While a regional council or unitary authority acting as a regional council has the authority to regulate harbour safety through navigation bylaws and the powers available to harbourmasters, it is not obliged to do so.
50. In exercising its authority over navigation, a council determines for itself how best to go about the task. Neither the Local Government Act 1974 nor the Maritime Transport Act provides any guidance in this respect.
51. The way that councils have approached harbour control has therefore been very much a matter for their own judgement, which has resulted in differing levels of capability and variable harbour safety

outcomes. Funding considerations, discussed more specifically on pages 19 to 20, can have a bearing on the amount of resources that a council is able to devote to harbour control.

52. A loss of momentum is possible, regardless of existing confidence in the viability of an essentially voluntary/elective regime, because the current level of commitment to the Code cannot be guaranteed in the longer term.

The Code

53. The Code compensates for legislative shortcomings by drawing the key participants in the "port and harbour marine safety system" into a unified, national framework of voluntary safety measures. Its key elements of risk assessment, safety management, continuous compliance and auditing have much in common with the way in which the Maritime Transport Act and maritime rules regulate participants in the 'maritime system'.
54. A voluntary Code can serve its function only so long as participants remain willing and able to fulfil their responsibilities. As time passes, the present commitment to voluntary best practice measures might not be sustained in the longer term.
55. Should circumstances change, the absence of formal legislative support for these safety measures may re-emerge as an immediate, practical problem.
56. Questions over how to deal with non-compliance have arisen in relation to the UK Port Marine Safety Code (PMSC), on which the New Zealand Code is modelled. That Code has been in place since 2000. In its report on the grounding of the ferry *Dieppe* at the port of Newhaven in December 2005, the UK Marine Accident Investigation Bureau (MAIB) has observed that the voluntary nature of the PMSC makes it impossible for the UK Marine and Coastguard Agency (MCA) to confirm a port's compliance with the Code by audit. The MCA has recently been given approval for the drafting of legislation that includes measures to promote PMSC compliance.

QUESTIONS

- Do you agree with the analysis of key issues?
- Are there other important issues that have not been identified?
- Do you consider that these issues warrant action?

POSSIBLE RESPONSES TO KEY ISSUES

57. Stable, consistent and durable port and harbour safety outcomes could be pursued through means ranging from continued reliance on voluntary measures, the introduction of duties and powers that could be invoked if a port marine safety problem arises, through to converting the entire Code into a mandatory instrument.
58. Whatever approach was taken, arrangements would continue to involve Maritime New Zealand as the principal regulatory body and port facility operators in their capacity as commercial port marine service providers. Regional councils would continue in their capacity as the local harbour-controlling authority, subject to any alteration to the allocation of that function under a centralised harbour arrangement as discussed later in this document.

OPTION ONE: STATUS QUO - RETAIN AN ENTIRELY VOLUNTARY APPROACH

59. The Code has 'buy in' from organisations with port and harbour safety roles, through the National Advisory Committee (NAC), which has played an important part in its development and implementation.
60. The NAC and its working groups have been instrumental in ensuring that the content of the Code and guidelines is relevant, workable and supported by strong technical advice and comprehensive operational data. The Committee provides a forum for testing ideas, problem solving, information sharing, technical support and keeping up to date with developments.
61. The Code has the full support of its practitioners and seemingly is on course to achieve its intended purpose. Legislative measures to formally rectify issues that the Code is addressing administratively may therefore not have any material impact on port and harbour safety management as long as this remains the case.

Advantages of the current approach

62. The importance of a "safety culture" is a consistent theme in contemporary transport safety thinking and is at the heart of the Code. That culture needs to grow within an organisation and this is best achieved through voluntary subscription to safety values. A good internal safety culture can influence safety performance in ways not achievable through external, regulatory levers and should provide a defence against future regression from good safety practice.
63. The NAC is in a good position to identify and help resolve problems with Code implementation, read the port and harbour safety climate and support its members' continuing commitment to the Code.
64. Legal measures to back up measures in the Code may discourage conspicuously unsafe behaviour but have little capacity to foster the intrinsically safe behaviours that characterise a genuine safety culture. Arguably, the commercial, liability and adverse publicity risks of an accident attributable to disregard for the Code may provide compliance incentives just as effective as formal obligations and the threat of intervention powers.
65. A voluntary, administrative approach provides the flexibility to change arrangements quickly. Expenses associated with participation in the Code are incurred voluntarily, avoiding compliance cost issues involved with regulatory measures.

Disadvantages

66. A safety system built entirely on voluntary compliance is reliant on the continuing goodwill and commitment of its participants. While support for the Code is consistent at present, that cannot be guaranteed for the future. As time passes, lessons from such events lose their immediacy, leading to a subtle, gradual erosion of risk perception.
67. If a voluntary approach proves insufficient to secure the intended safety outcomes and no formal back-up measures are available, the port and harbour safety management system could find itself in the same position as it was in 2002. Remedying the situation could involve duplication of the effort involved in developing the Code, not to mention the potential costs of any accident(s) attributable to a breakdown in the voluntary system.

QUESTIONS

- Can a Code without any formal statutory support be relied on for the effective long term management of port and harbour marine safety?
- If the measures in the Code remain entirely voluntary, what actions would participants take to mitigate the risk of failing to meet their responsibilities under the Code?

OPTION TWO: PROVIDE FOR FORMAL RECOGNITION OF THE CODE

68. If continued reliance on entirely voluntary measures is seen as compromising long term safety outcomes but a mandatory regime would be a step too far, there may be scope for an intermediate approach.
69. This might be achieved by providing explicitly in legislation for the establishment of a code of practice in respect of port and harbour safety. Legislation could, for example, provide for the Director of Maritime Safety to prepare a code of practice that would be subject to approval by the Minister of Transport.

Advantages

70. A code of practice approved under such arrangements could make it possible to move the arrangements in the Code onto a more formal basis without duplicating the effort that went into developing the Code. Maintaining the recommendatory status of the measures would not alter the current situation under which any costs incurred by participants in connection with the Code are elective.
71. As is the case for maritime rules, the process for establishing a code could be expected to include consultation with affected parties and public notification of the approved instrument.
72. Although any arrangements contained in a code would still not be binding, their elevation to the form of an approved, published statutory document could reasonably be expected to give them higher status than a code issued on a purely administrative basis by Maritime New Zealand.
73. If an approved Code were to be adopted, consideration might also be given to following the precedent of Section 20 of the Health and Safety in Employment Act 1992 (HSE Act) which provides for the establishment of approved codes of practice. While not altering the recommendatory nature of a code, Section 20(9) provides for a Court to have regard to a code of practice where the code is relevant to any provision of the Act with which a person has been charged with failing to comply. This would provide a compliance incentive.

Disadvantages

74. The introduction of formal consultative and approval procedures would involve costs and effort not required under current arrangements.
75. Consultation and approval requirements would make it more difficult and time consuming to amend and update measures contained in an approved code of practice.
76. Converting the existing Code to an approved code might result in a perception of loss of ownership by participants, potentially affecting their willingness to contribute to its upkeep.

QUESTIONS

- Would an approved code of practice be more likely than the existing Code to secure the effective long term management of port and harbour marine safety?
- If legislation were to provide for an approved code, what should be the basis for developing and establishing such a code?
- Would a provision based on Section 20(9) of the HSE Act have any value in the context of a port and harbour marine safety code?

OPTION THREE: INTRODUCE STATUTORY PROVISIONS TO SUPPLEMENT THE EXISTING CODE OR A FORMAL CODE OF PRACTICE

77. Key measures in the existing Code or any approved code under the "enhanced recognition" option discussed above could be underpinned through specific statutory duties on port marine service operators and harbour-controlling councils. Complementary changes to compliance and intervention measures in the Maritime Transport Act could make it possible for Maritime New Zealand to ensure compliance with such duties. Other possibilities could include bringing port marine service providers into the maritime document system and expanding maritime rule making powers to include the specification of requirements relating to port and harbour marine safety.
78. These supplementary measures are presented for consideration individually, not as a suite, but any formal support for the Code could be expected to draw on a selection of such measures.
79. In the Ministry's view, a suitably balanced mix of the functions, duties and powers discussed below, allied to a voluntary Code, could offer the best long-term approach to port and harbour safety management.
80. Respondents are invited to offer their views on what, if any, combination of these measures would be best able to support effective port and harbour safety delivery in future.

Regional council functions and duties and harbourmaster's role

81. Assuming that regional councils continue to be responsible for harbour control, that role could be prescribed as a statutory function of regional councils. This would reflect the importance of the harbour-controlling council to the overall port and harbour safety management structure of the Code. Local government or maritime legislation could specify the function.
82. The statutory function could be matched to a duty for regional councils to appoint a harbourmaster to exercise harbour control powers in areas where port marine operations occur. Powers vested in harbourmasters under the Local Government Act 1974, and to a lesser degree powers delegable to a harbourmasters under the Maritime Transport Act, are critical to a regional council's ability to exercise harbour control. The Code, in turn, relies on harbourmasters to exercise operational powers in relation to the safety of marine activities, including planning for marine emergency response. While the Code leverages the harbourmaster's local presence and authority, the harbourmaster's statutory role does not align precisely with the Code's expectations. This raises the question of whether there is a need to clarify the scope of the harbourmaster's authority in relation to marine safety management.
83. In order to ensure that regional councils continue to carry out their key functions under the Code – in particular the operation of a harbour safety management system based on ongoing assessment of risks – these matters could become the subject of statutory duties. Decisions on how to mitigate the assessed risks should be entirely for a council to make. Funding and cost issues can be expected to influence such decisions, hence effective harbour safety outcomes will be best served by a dependable funding system (as discussed on pages 19 to 20).

84. As an alternative to statutory duties in relation to safety management, maritime rule-making powers could be expanded to allow rules to prescribe requirements based on a formal port risk assessment, which forms part of the relevant regional council's wider harbour risk assessment and SMS. The power could lie in abeyance until such time as it became apparent that there was a need for intervention.

Advantages

85. Stipulating that harbour safety control is a function of regional councils, with attendant duties to appoint harbourmasters, carry out risk assessments and implement a safety management system, would provide certainty over the future performance of all councils' core responsibilities under the Code.
86. Specifying a harbour safety control function and related duties may provide a stronger basis for a regional council to recover the costs of activities that, under current arrangements, are entirely discretionary. Clarifying harbourmasters' regulatory role in relation to port marine safety would improve the matching between their legal authority and the practical demands under the Code.

Disadvantages

87. Specific functions and duties relating to harbour safety management would remove, or at least limit, a regional council's discretion to determine for itself the nature and priority of its activities.
88. The use of rules as an alternative to statutory duties would be less transparent and more involved, which could present difficulties in terms of enforceability for regional councils. The time necessary to make rules (typically around 18 months) would preclude their use to remedy an immediate problem.

QUESTIONS

- Should local harbour safety control become a prescribed function of regional councils?
- What, if any, supporting duties should accompany any such function?
- Would there be advantages to including any such function and duties in the Maritime Transport Act rather than in local government legislation?
- Does the legal authority of harbourmasters need clarification?
- Would providing for maritime rules to prescribe regional council obligations in respect of port and harbour safety management be preferable to the stipulation of specific statutory duties?

Impose safety duties on marine service providers

89. The Maritime Transport Act 1994 specifies general duties to comply with regulatory requirements, including the provision of staff training, supervision and resources. The duties apply principally to matters for which a licence, permit, certificate or other document is required. People, other than document holders, who undertake a maritime activity have a continuing duty to comply with requirements of the Act or maritime rules. In practice, few such requirements apply to non-document holders.
90. Bringing port facility operators into the document system on account of their marine service role could have disproportionate consequences for port operations as a whole. If, instead, a duty to operate safely applied to port facility operators in respect of marine services, an incentive for compliance with relevant safety measures could be established without the problems of applying the maritime documentary system.
91. The Railways Act 2005 and Part II of the Health and Safety in Employment (HSE) Act 1992 provide examples of duties to act in a manner conducive to safety.

92. The Railways Act, Section 7, imposes a general duty on "rail participants" to take all practicable steps to ensure rail activities for which they are responsible do not cause, or are not likely to cause death or serious injury. Like the Maritime Transport Act, the Railways Act establishes safety management requirements for participants, backed by powers to impose conditions on, suspend and revoke a license. Those provisions are separate from the general duty in Section 7.
93. Part II of the HSE Act imposes duties on employers in relation to hazard management in places of work, including duties to take all practicable steps to identify, eliminate, isolate or minimise hazards, with these duties extending to persons who control places of work. Like the general duty under Section 7 of the Railways Act, these duties stand alone and their effect is not linked to regulations, licensing or a document system.
94. Risk management is central to the Code. A duty to operate safely could extend to requiring marine service providers to have in place effective measures to identify, assess and manage risks under their control. If a code of practice, despite its non-binding status, was the accepted risk management standard, an operator that adhered to such a measure could be confident that it was fulfilling its statutory duty.
95. Compliance with a risk management obligation could, when necessary, be verified by Maritime New Zealand through the Director's audit and inspection powers.
96. Such arrangements would go further than the Maritime Transport Act does in relation to persons not required to hold a maritime document, but would stop short of exposing a port facility operator to the full range of that Act's controls over document holders' participation in the maritime system.

Advantages

97. A general duty for marine service providers to operate safely would place them on a similar footing to others whose actions affect the safety of ships, their crews and cargoes. Aligning the duty with a requirement to identify, assess and manage risks would add substance to the duty and allow for a linkage to the risk management measures already being implemented under the Code.

Disadvantages

98. There should be no evident disadvantages to this approach, provided the standard of care specified for the duty to operate safely is consistent with the standards that port marine service providers have subscribed to under the Code. Some uncertainty might exist over linking compliance with a statutory duty to standards maintained under a voluntary Code.

QUESTIONS

- Should port facility operators and other marine service providers be subject to a general duty to act safely in providing marine services under their control?
- How should that duty be framed and what standard of care should apply to it?
- Should port facility operators have a duty to have place effective measures to identify, assess and manage risks involved in port marine operations under their control?

Provide explicit powers for the Director of Maritime New Zealand in relation to port and harbour safety

99. Because a port marine service provider is not a maritime document holder, the disciplines available under the document system (i.e. suspending or revoking a document, or imposing conditions in respect of a document) are not available to encourage safe behaviour and regulatory compliance. The power of the Director of Maritime New Zealand to impose conditions on the operation of a ship or the use of a maritime product does not apply to port operations, even if they affect ship safety.

100. The only pre-emptive intervention available to the Director is the power to conduct safety audits and inspections of persons that carry out activities in respect of ships. Even then, the boundaries of this power are not clear so far as port operations are concerned. Also, as previously noted, the power is not matched to any power to act on a safety problem revealed by an audit or inspection. It would be helpful to make it clear that the Director's statutory audit and inspection power can apply to any aspect of port marine operations.
101. The absence of follow-up powers could be addressed by extending to port marine operations the Director's power under Section 55 of the Maritime Transport Act to impose operational conditions in the interests of maritime safety. That power could only be exercised where a problem had been identified that the Director believed on clear grounds was likely to endanger any person or property, or was hazardous to the health or safety of any person. Imposing conditions through this mechanism would provide ample scope to deal with any problem revealed by an audit or inspection, or as the result of a shipping incident involving port marine operations.
102. An alternative to imposing conditions might be to rely on less direct measures, such as public reporting audit findings and recommended remedial actions. This may provide as strong an incentive for good safety management as might the possible imposition of conditions. Reporting could perhaps be the first line of action, with conditions coming into play if recommended remedial action is not taken.

Advantages

103. Providing the Director with a clear power to audit and inspect port marine service providers would provide certainty to the exercise of that power in relation to port marine operations. Audits and inspections are of limited value without the capacity to act on problems that they identify. The power to impose conditions under Section 55 would equip the Director to take follow-up action on an identified problem if an audit recommendation was disregarded without good cause. The statutory criteria for action under Section 55 guard against an unreasonable exercise of the Director's power to impose conditions, as does the right of appeal under Section 424.

Disadvantages

104. There are no evident disadvantages to clarifying the Director's audit and inspection powers or, in view of the statutory safeguards against unreasonable exercise of the Director's powers under Section 55, in providing for the imposition of conditions in relation to a port marine operation.

QUESTIONS

- Should legislation provide expressly for audits and inspections of port marine operations?
- Would the ability to impose conditions on port marine operations under Section 55 be a suitable, proportionate mechanism for responding to safety problems identified by an audit?
- Could problems identified by an audit be addressed initially by publication of audit findings and recommendations, with the imposition of conditions reserved as an option if recommendations are disregarded without good cause?

Extend maritime rule-making powers to port and harbour marine safety

105. Maritime rules spell out the operating, performance and technical requirements that give meaning to maritime documents and to the general compliance duties that the Maritime Transport Act imposes. They also provide a frame of reference against which audit and inspection powers can be undertaken.
106. Currently, the Act provides few rule-making powers that relate to matters involving the safe conduct of port marine operations – exceptions being power to make rules regulating the conduct of ships and prescribing requirements for navigational aids.

107. The very limited capacity to make rules concerning port marine services could be overcome by expanding rule-making powers explicitly to include matters relating to the safe management and operation of such services.

Advantages

108. Rules could selectively target aspects of port marine safety management and operations that, despite the existence of the Code, were not being undertaken in accordance with best practice. Otherwise, the power would remain dormant.
109. Even if the rule-making power was not exercised, the knowledge that rules could be introduced if the situation justified such action could provide an incentive for voluntary compliance with the Code.

Disadvantages

110. The usefulness of rules is limited because port marine service providers are not participants in the maritime system, so the compliance incentive of the Director's control over document holders does not come into play. Penalties for rule breaches could provide a compliance incentive but relying on offence and penalty provisions is inconsistent with a systems-based approach to safety.
111. If rules applied to activities performed by regional councils, those activities would be performed pursuant to councils' statutory functions, duties and powers. Rules specify enforceable requirements but it may be impractical to invoke enforcement sanctions in relation to the exercise of a council's statutory authority.
112. Rule-making takes time (around 18 months), so is not the answer to any problem that requires prompt action. The same applies to rule amendments.

QUESTIONS

- Would there be any value in legislation providing for maritime rules to be made in respect of port marine operations?
- If so, what should be the scope of any such rule-making powers?

Require port marine service providers to hold a maritime document

113. Port marine service providers could be drawn into the maritime system by introducing a requirement that they must hold a maritime document in respect of the port service activities that they undertake. Entitlement to the document would need to be based around compliance with safety requirements specified in maritime rules and/or obligations specified in the Maritime Transport Act.

Advantages

114. Bringing port marine service providers into the maritime system could activate the full range of powers available under the Maritime Transport Act in respect of document holders. Compliance with requirements of the Act, maritime rules and the terms of the maritime document could be verified through audits and inspections. Powers to suspend, impose conditions on or revoke a document would provide sanctions against non-compliance.

Disadvantages

115. If a marine service provider was made a document holder, the document – and the operator's ability to exercise 'privileges' afforded by that document – would be subject to the full scope of powers under the Act to suspend, attach conditions to or revoke the document. This raises a question as to whether it is practical, reasonable or proportionate to apply the documentary system to port facility operators, which provide most port marine services. Port facility operations cover a much wider

scope than just marine operations, and a disruption to marine operations can have consequential effects on shore side operations.

116. Requiring port facility operators to hold a maritime document would expose them to suspension or withdrawal of their operating privileges. Such action would be appropriate to remove an individual person or ship from the maritime system but would be draconian for a port facility, as it would bring marine port operations to a halt. That would have immediate consequences for all port operations, affecting landside cargo operations, hauliers and port workers. It also calls into question the usefulness of introducing a requirement whose enforceability is likely to be compromised by its impact on third parties.
117. In view of the potentially disproportionate effects of enforcing a document requirement for port marine service providers, and the availability of more "light-handed" alternatives, it is suggested that bringing them into the maritime system would not be a viable option for improving port and harbour safety outcomes.

QUESTION

- Do you agree that port marine service providers should not be required to hold a maritime document?

OPTION FOUR: MAKE THE CODE MANDATORY

118. The uncertainties associated with a voluntary Code could be resolved by making it mandatory. This could be achieved by giving the Code the status of a maritime rule, whether by converting its contents into a rule or incorporating the Code by reference into a maritime rule for port and harbour marine safety. It would be necessary to amend the Maritime Transport Act's rule-making powers to allow that to happen. Matching amendments would be necessary to ensure that the compliance and enforcement powers in the Act could be exercised in respect of a mandatory Code. That could involve adopting many, if not all, of the possible legislative changes discussed in relation to Option 3.

Advantages

119. A mandatory Code would introduce an unqualified obligation for participants to discharge their responsibilities under the Code, removing any need to rely on voluntary compliance or a combination of new functions, duties and powers to back up voluntary measures. This would provide certainty as to participants' responsibilities, removing the risk of a decline in safety performance if commitment to voluntary measures should fall away.

Disadvantages

120. While making the Code mandatory may have the attraction of apparent simplicity, the financial and legal ramifications could be considerable.
121. Matters that can readily be included as recommended practice and guidance in a voluntary instrument would take on a new meaning if they became mandatory. For example, making mandatory the Code's provisions concerning hydrographical surveys and channel depth maintenance could place affected parties in a position where their legal duty conflicted with their ability to carry out these costly activities within their financial means. These matters aside, a mandatory Code could have the drawback of reduced flexibility and increased procedural complexity.
122. A further problem with attempting to bring the Code as a whole into the rules regime is that the purpose of a rule is to set out enforceable duties and obligations. If difficulties over cost and legal implications of certain measures in the Code were avoided by expressly making them advisory, there would be no point in that material being in a rule. The same applies to the large amount of advisory material already embodied in the Code and its related guidelines.

123. Separating advisory material from the elements of the Code that were to become rule requirements would require the Code to be broken down. That would increase the complexity and reduce the coherence of the measures contained in the Code.
124. Converting the Code into a mandatory instrument through the rules process would limit the flexibility to modify and update its requirements. Each change would have to follow the full cycle of consultation, process, regulatory impact assessment and approval requirements for transport rule-making, which normally takes some 18 months. In contrast, a voluntary Code could be updated as and when required to respond quickly to new developments.
125. For these reasons, while a mandatory Code would put to rest the uncertainties over future implementation of a voluntary Code, it would be a cumbersome, complex approach. Accordingly, it does not appear to be a practical means of achieving safety outcomes that could be achieved through less far-reaching measures discussed under Option Three.

QUESTION

- Do you consider that a mandatory Code is a practical option for the future management of port and harbour marine safety?

FUNDING OF REGIONAL COUNCIL HARBOUR SAFETY MANAGEMENT COSTS

126. The demands placed on regional government by the harbour-control function relate mainly to shipping traffic in commercial ports. Additional operational and financial demands associated with the Code are directly connected to that traffic. The impact of these additional demands varies considerably, both in terms of the extra effort and expense involved and in terms of the individual council's ability to meet the costs involved.
127. The Local Government Act 1974 provides for councils to make bylaws to recover navigation safety-related costs, such as harbour-control expenses. Practice to date has been for councils to fund those costs from general rating rather than through user charges imposed through bylaws. The advent of the Code has generated questions over whether it is reasonable for ratepayers to bear the costs of harbour-control activities undertaken in the interests of commercial shipping safety.
128. For example, in the case of the Marlborough District Council, the Council has responsibility for waters with heavy ferry shipping traffic and high demands for harbour safety management in the Marlborough Sounds. With a small population and ratepayer base, finding additional income to upgrade harbour safety is a major concern to the Council. Bylaws imposing user charges to recover costs attributable to commercial operators would be the chosen option but the Council considers that the process is vulnerable to challenge and delay. This puts the Council in the difficult position of deferring risk mitigations identified as necessary under the Code until funding uncertainty is resolved or pressing ahead, with the risk that ratepayers would have to meet the costs if the bylaw option was frustrated. Given that no local authority has yet pursued this approach to harbour-control cost recovery, concerns over the viability of the bylaw option are untested.
129. While this issue would be bypassed under a centralised model for delivery of the harbour-control function, as discussed in pages 20 to 23, the performance of harbour control as a local government function, whether under existing or modified arrangements, clearly needs the support of effective funding arrangements.
130. Whoever is responsible for harbour safety management needs access to robust, clear-cut means to meet the reasonable costs of discharging that responsibility.

131. If bylaws do not offer local authorities the certainty of cost recovery models available to other bodies with regulatory functions, the situation should be rectified. That might be achieved by modifying the bylaw-making power to provide expressly for user charges on ship operators and marine service providers to cover the costs of harbour-control functions relating to the commercial sector. Even so, such a change would not avoid the procedural and consultative complexities of the bylaw process.
132. Alternatively, a regulatory mechanism might be considered. Such an approach would be complicated by the fact that each harbour-controlling council would have different costs and charging needs, and some might not need or want to recover any or all of their costs through charges (e.g. because costs are offset by port company dividend income). The calculation, administration and apportionment of a single user charge (like the marine safety charge that funds Maritime New Zealand services) would involve equity and administrative problems likely to make it impractical.
133. Rather than a single levy, a regulation-making power could provide for user charges on a port by port or regional basis that reflected costs and regulatory demands in each case. A possible model is Section 699A of the Local Government Act 1974, which provides for regulations to be made prescribing infringement offences and fees for breaches of navigation bylaws. Separate regulations apply in respect of each region. The arrangement would need to include measures specifying the purpose of charges, the functions and services they relate to, who or what the charges apply to and the basis for their calculation. This approach to cost recovery would leave a council with the option of continuing to fund harbour control from rates and/or port company dividends if that was its preference.
134. If councils' approach to harbour control costs varied from region to region, with only some recovering costs through user charges, port facility operators in those regions may consider that they are disadvantaged relative to operators in regions where no charges applied. On the other hand, if every council decided to recover its costs, ship operators would face a higher level of costs than they are currently exposed to; that could occur under the current bylaw system if councils were willing and able to make the requisite bylaws.

QUESTIONS

- Is the present bylaw mechanism for imposing navigation safety related charges a barrier to cost recovery?
- If so, what could be done to make cost recovery easier to achieve?
- Would regulations be a more effective cost recovery mechanism?
- Would it be a problem if harbour-control cost recovery practice varied between regions?
- Is there a cost recovery option that has not been considered in this discussion?

COULD CENTRALISED HARBOUR CONTROL IMPROVE HARBOUR SAFETY OUTCOMES THAN REGIONAL CONTROL?

135. Experience with implementing the Code has seen issues emerge over capability and funding constraints on local government's ability to perform functions that are pivotal to the Code. This has drawn attention to questions over the allocation of harbour-control functions and whether the current model is the best available for the long-term delivery of sound, cost effective harbour safety outcomes.

136. Some local authorities have argued that instead of relying on multiple local authorities to perform the function, harbour-control could be centralised with a single agency, as is the case for other aspects of maritime safety. Placing the function in the hands of a properly resourced central agency could provide the opportunity to:
- consolidate expertise and skills
 - draw on a deeper pool of qualified personnel
 - access a wider range of expertise and technical support
 - access economies of scale
 - improve coordination of harbour safety and general maritime safety controls
 - achieve more consistent performance standards
 - isolate harbour safety performance from local government resource constraints.
137. Any agency tasked with centralised harbour safety control would have to be at least as well equipped as a local authority to perform and pay the costs of local harbour control – and do so without compromising its ability to perform its existing functions.
138. Equally, centralising harbour safety could affect local government's capacity to perform marine functions that remained its responsibility. For example, the national marine oil spill response system at the tier 2 (regional) level, relies on harbourmasters' authority and councils' knowledge of coastal and harbour geography. Harbour safety resources are also used to manage access to public water space, interactions between competing water-borne activities, and control of activities regulated by regional coastal plans. These considerations would all need to be weighed against the possible benefits of any centralised model.
139. Even if harbour control were centralised, it is not suggested that the same would be practicable for general navigation control. Harbour control involves a relatively small number of locations and geographically confined areas that a central agency might feasibly manage but that is not so for general navigation safety. No central agency could realistically be expected to provide the collective national coverage that is achievable through local government delivery of local navigation control.
140. If centralised harbour safety control was seen as providing better, more assured long-term outcomes than current arrangements, what might be a suitable medium to deliver this function? Several possible approaches exist, ranging from adaptations to the existing organisational structure through to establishment of a separate, special-purpose body.
141. The Ministry stresses the merits of such a far-reaching change have yet to be demonstrated. The purpose of opening this subject up for discussion is to:
- recognise that centralised harbour control has been presented to government as a possible option for harbour safety delivery in future
 - identify the potential benefits and costs of a centralised model
 - consider how a centralised model might operate
 - obtain stakeholders' views on whether and why they consider a centralised model should be considered for harbour safety delivery.

MODEL I: EXTEND MARITIME NEW ZEALAND FUNCTIONS TO INCLUDE HARBOUR CONTROL

142. Perhaps the most obvious approach would be to extend the functions of Maritime New Zealand to include the regulation of harbour safety. The organisation is the primary maritime safety regulator and the architect of the Code. It has a nationwide presence, wide-ranging technical expertise, a large pool of well-trained personnel, close contact with all key participants in the maritime sector, and is responsible for maritime safety services (distress and safety radio communications and coastal aids to navigation) that intersect with similar harbour-based services.
143. Even so, to undertake active harbour safety management, the agency would need to employ additional, suitably qualified personnel and provide the administrative and operational resources necessary to support the function throughout the country. The provision of local safety services, such as harbour radio, traffic control and navigational aids would become the responsibility of the central agency.

- 144. A funding mechanism would be necessary to meet the full costs of the new function. Factors to consider in this regard include the relationship between harbour safety cost recovery measures and existing marine safety charges.
- 145. Unlike local authorities, which can apportion costs between the local community, through rates, and the commercial sector, through levies and charges, Maritime New Zealand would rely entirely on third party revenue unless the Crown were to provide funding support. This could mean that the commercial sector would face a net increase in costs if the impact of those charges exceeded the cost of charges imposed by local government.

MODEL II: ESTABLISH A STAND-ALONE PORT AND HARBOUR SAFETY MANAGEMENT UNIT

- 146. A more formalised, self-contained structure could be achieved by emulating the Aviation Security Service (Avsec) model of the Civil Aviation Act 1990, under which the Civil Aviation Authority (CAA) is required to establish and maintain an Aviation Security Service. In this way, operational functions of Avsec are separated from the regulatory functions of the CAA but without creating a separate legal entity.
- 147. Under this model, Maritime New Zealand would be required to establish and maintain a port and harbour safety service to perform harbour safety functions. A dedicated funding stream would have to be developed to meet the costs involved, whether through third party charges, Crown funding or a combination of the two.
- 148. The capability and resource issues raised in respect of direct Maritime New Zealand delivery of the harbour safety management function would apply to this model. Establishing a separate entity could also involve extra compliance and operating costs associated with administration, branding, accountability and governance, thus adding to the costs to be recovered through third party charges (in the absence of a Crown contribution), and thus the cost implications for the commercial sector.

MODEL III: ESTABLISH AN INDEPENDENT ENTITY TO PROVIDE AND MANAGE MARITIME SAFETY SERVICES

- 149. A further model from the aviation sector also lends itself to consideration, namely that used for air traffic management. Airways Corporation of New Zealand Limited (Airways New Zealand) is responsible for managing all domestic and international air traffic in New Zealand airspace. The Corporation provides air traffic control, navigation services and infrastructure and a nationwide communications system, with a national network of radar installations and navigation aids.
- 150. Though the Airways Corporation model has been identified as a possible model for harbour control, the Corporation's operations extend well beyond the localised focus of port and harbours and reflect the nationwide connectivity essential to the safe management of air traffic. Demand on the airways system is much higher than for shipping, involving over one million aircraft movements a year. In contrast, our ports handle some 2,500 international ship visits, 8,000 inter-island ferry movements and a smaller number of coastal shipping movements.
- 151. The model may have more merit as a vehicle for consolidating not only harbour safety services but also the maritime safety services that Maritime New Zealand provides, including search and rescue coordination. The cost, benefit and practical considerations of other centralised delivery options would apply equally to this model. A completely independent organisation could be more costly than the alternatives, involving the expense of establishing separate premises, dedicated support services and meeting accountability and compliance requirements.
- 152. An Airways Corporation-styled approach stretches the discussion well beyond just the potential for improved harbour safety outcomes. Harbour safety would become part of a wider discussion about whether such a far-reaching reorganisation of maritime safety service delivery was viable and would improve overall maritime safety outcomes.

IS THERE SCOPE FOR AN INTERMEDIATE APPROACH?

- 153. Local authorities that maintain an active harbour management presence may be confident that they are and will remain in as strong a position to manage harbour safety as any other organisation. In

those cases, reassigning safety control may have no material effect on safety outcomes, even if centralised control promised worthwhile gains elsewhere. Equally, things can change in the long term. A council might later wish to relinquish harbour safety control because changing circumstances reduced its ability to achieve good safety outcomes.

154. To allow for such considerations, a centralised body's harbour-control functions and powers could be delegable to a local authority willing and able to continue in the role. This would ensure uniform allocation of primary jurisdiction without precluding delegation of the delivery role. If harbour safety management were to be handled through the Maritime Transport Act, this arrangement would be in tune with the Act's structure, which encourages the delegation or contracting out of functions and powers where this would be in the interests of efficiency and effectiveness.
155. A mix of central agency and delegated local authority safety delivery could involve funding and administrative complexity. For example, if one funding pool was used for all harbour-control costs, allocation and accountability measures would be necessary in respect of each delegation. If, instead, a local authority with delegated authority could fall back on rating to meet some of its costs, the cost burden may be skewed compared to areas where funding was generated by user charges.
156. If doubts over the security of harbour safety delivery are in practice localised, the preferable approach would be to identify measures that can address the localised problems without altering the entire architecture for harbour safety delivery.

QUESTIONS

- What are the factors that most affect local authorities' harbour management capability?
- How could constraints on local authorities' capability best be overcome?
- Should this be done within the current organisational model?
- Could better harbour safety outcomes be achieved under a different organisational model?
- Would harbour safety outcomes be improved if harbour safety management were no longer a local authority function? If so, how?
- What are the implications of a centralised system for the performance of tier 2 marine oil spill response and other marine functions that remain a regional council responsibility?
- What are the advantages and disadvantages of the three centralised harbour safety delivery models outlined above?
- Are there any potential model or models not mentioned above?
- If a central agency were responsible nationally for harbour safety management, would delegable functions, duties and powers adequately provide for local authorities willing and able to continue in a harbour safety management role?

GENERAL NAVIGATION SAFETY

157. With an estimated 350,000 recreational craft and about 1.3 million New Zealanders taking to the water every year, recreational boating can impose considerable demands on regional councils.
158. Seasonal peaks in boating activity, high traffic levels in confined areas, conflicts between different types of waterborne activities, and also between commercial and recreational vessels, are typical of the navigation safety matters that councils have to contend with. The process of managing local

navigation safety is complicated by the fact that boats are most of the time out of reach for compliance purposes. This may be because of the remoteness of areas where boating activity is happening, difficulties in identifying vessels, or simply because the time, effort and resources necessary for on-water enforcement are limited.

159. If navigation safety compliance is a problem for local authorities, the problem is compounded for Maritime New Zealand, which is neither funded nor equipped to undertake enforcement in the field. Maritime New Zealand has therefore concentrated on setting national navigation safety standards effected through Maritime Rules: Part 91 – Navigation Safety. Part 91 provides navigation safety standards that are operative in any area where regional council bylaws do not apply and is the baseline for nationally consistent navigation standards.
160. Maritime New Zealand has also taken the lead on navigation safety initiatives through amendments to maritime rules backed up by a heavy emphasis on education to promote public awareness and understanding of basic boating safety principles. These efforts, undertaken in collaboration with local government and boating safety groups, have coincided with a declining trend for recreational boating deaths.
161. Regional council navigation bylaws have been the primary vehicle for managing navigation safety at the local level and provide the means through which pivotal boating safety measures, such as carriage of lifejackets, are implemented and enforced within councils' jurisdictions. Some councils have extended navigation safety bylaws to all waters within their region. Others have opted to take responsibility for navigation safety within existing harbour limits or for a defined part of their region. This has allowed flexibility in terms of the level of commitment their ratepayers are asked to make for navigation safety in the region, even if it does mean that arrangements are not consistent from one region to the next.
162. The default agency for areas not covered by regional council bylaws has been Maritime New Zealand, which has exercised its jurisdiction through Part 91 of the maritime rules.

ISSUES FOR NAVIGATION SAFETY

163. There are problems with the current regime, particularly in terms of clarity, coherence and consistency of application and content.
164. The first difficulty is a lack of jurisdictional clarity, with different agencies responsible for navigation safety in different parts of the country – regional councils in some, Maritime New Zealand in others. In addition, regional councils can transfer responsibility for navigation safety to district councils or appropriate central government agencies. The result is confusion as to the identity of the regulator and who deals with concerns regarding compliance and safety issues.
165. A further issue is a lack of consistency in service delivery. While Maritime New Zealand has invested heavily in boating safety capability as part of its role as educator and lead agency for national safety initiatives, it is less well placed than a local authority to deal effectively with local safety issues.
166. Other issues are the need for area-specific navigation safety measures, such as reserved areas, and for a local enforcement presence for Part 91 rules. In areas where Maritime New Zealand has default responsibility for navigation safety, it has carried over existing controls but has limited ability to actively promote new measures. Though Maritime New Zealand has inspectors at the major ports, enforcement of Part 91 is just one of their many tasks, meaning that timely investigation of alleged breaches of Part 91 is not always possible. The problem has been partly alleviated by the three members of Maritime New Zealand's recreational boating team leading the enforcement role, with assistance from port inspectors, but that is still a secondary role for all concerned.
167. A further concern is duplication of secondary legislation, due to the need for bylaws to repeat much of Part 91 to allow consistent local application of those measures. When Part 91 is amended, bylaws also need amendment. Achieving consistency between Part 91 and bylaws is further complicated by the different processes and political settings for bylaws and rule-making.

168. These problems affect the clarity, transparency and "user-friendliness" of boating safety controls, which provide the backdrop to boating educational efforts. The more accessible the regulatory system is, the better placed it is to reinforce the behaviours promoted by boating safety education.

POSSIBLE APPROACH FOR IMPROVING THE COHERENCE OF NAVIGATION SAFETY CONTROL

169. Most issues listed in the preceding discussion might be avoided by a clear statement of regional councils' responsibility for general navigation safety, in the same way as suggested for regional councils' harbour safety management role.
170. To ensure consistency in applying regional council jurisdiction from one region to the next – while accommodating councils that would not wish to apply navigation bylaws to their entire region – regional councils might be made responsible for navigation safety in all inland waters (lakes and rivers) and internal waters (ports and harbours). Consistency in the extent of regulatory jurisdiction should be matched by consistency in the nature of the local controls applied. This could perhaps be achieved more tidily by providing for the Director of Maritime New Zealand to approve bylaws, rather than relying, as at present, on bylaws to replicate core standards from maritime rules for navigation safety.
171. Maritime rules would still prescribe navigation safety requirements for the territorial sea outside the areas of direct responsibility assigned to regional councils. Because boating activity happens all around the New Zealand coast, enforcement of navigation safety rules in coastal areas would still present challenges. Given Maritime New Zealand's limited ability to enforce navigation safety rules, harbourmasters and enforcement officers should continue to exercise their enforcement powers in respect of apparent breaches of navigation safety rules. It is recognised that resource considerations could influence the use of that ability.
172. This approach would have the following possible advantages:
- a simplified regime, with regional councils responsible for the regulation and control of navigation safety only in the areas prescribed
 - a clear statement of the regional council navigation statutory safety function, which could be formulated to support port and harbour marine safety measures
 - regional councils adopting local solutions for local issues through navigation bylaws
 - councils identified as the public contact point for local navigation safety concerns
 - national consistency of standards achieved by providing a central approval process for navigation bylaws
 - ensuring uniform national practice in the application of navigation bylaws by limiting navigation bylaws to inland and internal waters only – leaving maritime rules to cover waters outside these areas
 - flexibility to enforce maritime rules for safe navigation if necessary to deal with situations that arise within a council's region but outside areas for which the council is directly responsible
 - administrative flexibility retained by preserving the ability to transfer functions to district councils and central government agencies where the parties agree.
173. Council staff could be given the authority to issue infringement notices for breaches of navigation safety rules. This would add the deterrent element missing from the enforcement powers, which on their own are limited. Council staff could then call on the rules to deal with safety incidents in places within a council's region but beyond areas where its bylaws apply. Access to such powers may be particularly useful in areas where there is an occasional need for safety intervention, but no real need for local bylaws.

QUESTIONS

- Is there support for statutory confirmation of regional council responsibility for navigation safety?
- Would confining such responsibility to enclosed and inland waters be realistic?
- Should maritime rules, enforceable by regional councils, regulate navigation in areas beyond a council's area of direct responsibility?
- Would the ability to issue infringement notices in respect of breaches of maritime rules be a reasonable and useful extension of local enforcement powers?
- Should the Director of Maritime New Zealand approve the content of a navigation safety bylaw to ensure consistency with relevant maritime rules?
- Could questions of certainty, clarity and consistency be resolved through measures other than those discussed?

FUNDING ARRANGEMENTS FOR RECREATIONAL BOATING CONTROLS

174. Removing discretion to limit the scope of the navigation safety function would impose additional burdens on some regional councils. Three councils (Taranaki, Otago, Westland) confine their responsibility to commercial ports. Four (Northland, Hawke's Bay, Wellington, Marlborough) exclude rivers or a specified geographic area from their bylaw coverage. The collective merits of improving the operation of local regulatory arrangements should outweigh the additional burden on this minority of councils, which have the ability to raise funding to meet any extra costs.
175. Regulation and control of navigation safety at a regional level can be funded by a mix of regional ratepayer contributions and fees charged for services as prescribed under navigation bylaws under Section 684B(h) of the Local Government Act 1974.
176. The bylaw empowerment provision is sufficiently broad (see especially the reference in Section 684B(h)(ii) to any function, duty, power or service carried out in respect of navigation). The process for making such bylaws is now governed by Sections 155 to 165 of the Local Government Act 2002. This includes putting any proposed bylaw through the special consultative procedure prescribed by Section 83 of the Local Government Act 2002.
177. The establishment of a specific, statutory, local harbour and navigation control function would add to the force of Section 684B(h).
178. Despite the apparent adequacy of the bylaw-making power, implementation of charges to recover costs relating to the recreational sector is handicapped by practical limitations. Collection of charges relies on the ability to identify the individual vessels subject to charges. However, legislation does not provide for registration or licensing, which could facilitate the identification of vessels for cost recovery purposes. If such a system existed, the wide dispersion of boats and the irregular patterns of boating activity would make it difficult to achieve consistent compliance levels. Additionally, establishment, administration and compliance costs may prove disproportionate to the costs recovered. Boating-related costs are instead met through rating. Given that recreational boating is a popular activity in many New Zealand communities, it is not unreasonable for rates to cover boating-related costs.
179. A licensing or registration system that served as a cost-recovery mechanism would also need to provide meaningful, measurable safety benefits. No such benefits have yet been demonstrated, as recently affirmed by the Pleasure Boat Safety Forum. The Forum rejected licensing and registration as useful safety options and noted that boat registration might have helped avoid only three percent of fatalities in the past five years, with the possibility that skipper licensing could have affected the outcome in up to 12 percent of fatal accidents.

QUESTIONS

- Would the establishment of a statutory navigation safety function expose regional councils to costs that they do not face at present?
- Are the practical difficulties of cost recovery from recreational boat users a constraint on the ability of councils to exercise local navigation safety control?
- Is there scope for a mechanism other than licensing or registration to assist cost recovery from recreational boat users?
- How likely would councils be to use a more accessible funding mechanism?
- Is rating a fair and reasonable alternative to user charging to cover recreational navigation safety costs?

SHOULD ALL NAVIGATION SAFETY CONTROLS BE CONSOLIDATED IN ONE STATUTE?

180. There are merits in consolidating all navigation safety measures in the Maritime Transport Act. Obligations imposed on local government in respect of the port and harbour safety system would become part of wider arrangements to ensure that all key participants in the system manage the elements of risk within their control. The advantages of a consolidated regime include better harmonisation of roles and responsibilities, regulatory process and compliance and enforcement mechanisms.
181. This would be consistent with the aim of achieving greater clarity and certainty in the relationship between national and local jurisdiction over matters relating to navigation safety. It would also be consistent with the Local Government Act 2002's move away from detailed, prescriptive local authority powers to powers of general competence – powers that also encompass duties performed, rights exercised and functions performed under other enactments.
182. Embodying both local and national controls in the same legislation could make it easier for regional council staff to be more closely involved in implementing national level controls. Some of the most fundamental duties and sanctions of the Maritime Transport Act (eg the safety duties of the master of a vessel, the ability to detain unsafe craft, and the sanction against dangerous operation of a vessel) already apply to both recreational and commercial craft. The usefulness of these measures for local navigation safety purposes might increase if local controls were invoked under the same Act. Safety awareness messages would be easier to convey, which could lead to less educational and administrative effort while improving public comprehension of safety requirements.
183. Creating a relatively discrete set of functions and duties in the Maritime Transport Act for elements of the Port and Harbour Safety Marine Code may be a simpler, tidier proposition than integrating the full suite of navigation safety measures contained in Parts 39A and 43 of the Local Government Act. However, such an approach would do little to overcome the practical problems of inherent navigation safety measures spread across two statutes. Nor would it assist efforts to remove from local government legislation prescriptive measures concerning particular activities.
184. The inclusion of bylaw-making powers could be an uncomfortable fit with the scheme of the Maritime Transport Act, as might the inclusion of enforcement powers invested in someone other than the Director of Maritime New Zealand. Adding new provisions to the Act would increase the size and complexity of an already large and much-amended statute.
185. Even so, anomalies might be minimised and complexity reduced if a concise and flexible code were created that provides all the statutory functions, duties and powers necessary for effective harbour and navigation safety management. Rather than including bylaw-making powers in the Maritime Transport Act, it might be possible, for example, to allow regional councils to make bylaws under the Local Government Act 2002 that are necessary to perform functions and duties in relation to navigation safety. The navigation bylaw-making powers in the Local Government Act 1974 are unusually prescriptive by current standards.
186. Aside from awkwardness surrounding bylaw-making and the powers not exercisable by the Director, Part 39A contains several provisions that would not seem appropriate for the Maritime Transport Act. These include provisions relating to Crown harbours and the power for councils to carry out harbour works, while others, such as powers of entry, might be replaced by equivalent powers in the Maritime Transport Act. Regional council powers in respect of wrecks would need to be coordinated with the Director's equivalent powers.

QUESTIONS

- Is the idea of consolidating navigation safety controls in one statute feasible in practice and supportable in principle?
- Would the benefits of consolidation outweigh the potential disadvantages of introducing into the Maritime Transport Act provisions that relate to functions, duties and powers belonging to organisations and officials other than Maritime New Zealand and the Director of Maritime New Zealand?
- Would consolidation of navigation safety controls be assisted by simplifying existing measures to their essential elements and reducing the level of prescription?
- Would it be preferable to retain separate legislation subject to modifications to improve the coordination and clarity of the legislation?

GLOSSARY

Airways New Zealand – Airways Corporation of New Zealand Limited

Avsec – The Aviation Security Service

Harbour management – The collective activities required to maintain the port and harbour in a safe and suitable condition for navigation by ordinary users of the port.

HSE Act – Health and Safety in Employment Act, 1992.

Internal waters – The internal waters of New Zealand include any areas of the sea that are on the landward side of the baseline of the territorial sea of New Zealand.

Marine services – The provision of commercial or other services within the port or harbour, including the use of tugs and workboats in a harbour, and the provision of moorings and procedures for berthing

MTA – The Maritime Transport Act, 1994

MDC – Marlborough District Council

NZTS – New Zealand Transport Strategy

Part 91 – Maritime Rules: Part 91 - Navigation Safety, 2003

Regional council – includes a unitary authority that has the responsibilities, duties and powers of a regional council

SMS – Safety Management System

The Code – The New Zealand Port and Harbour Safety Code, 2004

The Director – The Director of Maritime New Zealand

APPENDIX 1: LEGISLATIVE BACKGROUND

LOCAL HARBOUR AND NAVIGATION CONTROL

187. Under the Harbours Act 1950, harbour boards were responsible for the commercial operation and local regulatory control of harbours in New Zealand. With the advent of port reform, port companies established under the Port Companies Act 1988 took over the commercial port assets and undertakings of harbour boards. Harbour boards retained their regulatory functions briefly but local government reform in 1989 abolished the boards and transferred their functions to local authorities, mostly regional councils. The Resource Management Act 1991 removed land use and environmental controls from the Harbours Act.
188. The cumulative effect of these legislative initiatives was to confine the Harbours Act jurisdiction to the regulation of activities relating to navigation in harbours, lakes and rivers, harbour pilotage, ships' cargo equipment and dock safety.
189. In the case of dock safety, the Health and Safety in Employment Act 1992 provided a more cogent setting for safety regulation, while the Maritime Transport Act 1994 introduced a new national framework for regulating maritime safety and marine pollution from ships.
190. The Harbours Act was repealed by the Local Government Amendment Act (No 2) 1999, bringing together regional councils' residual functions, duties and powers under the Harbours Act to Parts 39A and 43 of the Local Government Act 1974. Regional councils (and unitary councils undertaking the functions of a regional council) took on the function of regulation and control of navigation safety. The Amendment Act also provided for the delegation or transfer of a council's functions, duties and powers to another public authority, such as a local authority, iwi authority, government department or statutory authority.
191. Under the Local Government Amendment Act, the scope of navigation safety jurisdiction ceased to be determined by harbour limits established by Order in Council. Instead, each council could itself determine the scope of jurisdiction through its navigation bylaws, which may apply generally within its region or to any specified part or parts of its region. The seaward boundary of a region is the outer limit of the territorial sea. This gives councils wider jurisdiction than did harbour limits, which could be defined only for areas within New Zealand's internal waters (effectively harbours and bays).
192. Dock safety was left to be handled through the Health and Safety in Employment Act. At the same time, the Maritime Transport Amendment Act 1999 provided for maritime pilotage to be regulated under that Act in future and for national standards for navigation to be set under the Act.
193. The main effect of the change to pilotage arrangements was to centralise pilotage regulation, as opposed to leaving it to be regulated locally by individual regional councils. Regional council involvement is maintained now through powers delegated to harbourmasters (or other council appointees) under the Maritime Transport Act and maritime rules. Compulsory pilotage areas are now specified by maritime rules rather than by warrant of the Governor-General notified in the *New Zealand Gazette*.
194. The Local Government Act 2002 repealed Section 37S of the 1974 Act, which specified that regulation and control of navigation safety was a regional council function, but it did not modify the duties and powers installed by the Local Government Amendment Act 1999. Along with other functions formerly specified in the 1974, regulation and control of navigation safety has been subsumed into a general, outcome-based statement of the purpose of local government.

NATIONAL MARITIME SAFETY CONTROL

195. The Maritime Transport Act 1994, successor to the Shipping and Seamen Act 1952, establishes a national framework to maintain and promote maritime safety. The Act's safety regime is oriented heavily but not exclusively towards the regulation of commercial activities within the 'maritime system'. Participation in the system is controlled through documents (licences, permits, certificates and other documents) issued under the Act. A document may be required in respect of any person, ship, cargo, maritime procedure, or maritime product intended to be installed in, fitted or supplied to a ship.
196. The Act imposes compliance duties on maritime document holders ('participants'). A participant must ensure that an activity or function for which a document has been granted is carried out safely and in accordance with safety standards and practices. Maritime rules made under the Act prescribe those standards and practices.
197. A defining feature of the maritime system as implemented is its reliance on audited safe management requirements to manage ship operating risks and maintain compliance with regulatory requirements specified in rules.
198. Compliance is promoted through the Director of Maritime New Zealand's powers to:
 - impose conditions on, suspend and revoke maritime documents
 - conduct audits and inspections of anyone who operates, maintains, or services, or does any other act in respect of any ship
 - detain, seize and impose on conditions on the operation of ships and maritime products
 - investigate, accidents, incidents and mishaps
 - bring offence proceedings.
199. Though safety measures under the Maritime Transport Act are structured around regulation of participants in the maritime system, a general compliance duty, some enforcement powers, offence provisions and maritime rules apply to persons ("non-participants") that are not required to hold a maritime document. A non-participant who operates a ship is responsible for a maritime product, or is engaged in some other maritime activity (undefined in the Act), must comply with any relevant provision of the Act and maritime rules. Few maritime rules in practice apply to non-participants, the exception being rules governing safe navigation.
200. The Director of Maritime New Zealand may exercise audit and inspection, detention and seizure, investigation and prosecution powers in respect of a non-participant.

APPENDIX 2: SUMMARY OF LOCAL GOVERNMENT'S NAVIGATION SAFETY ROLE

201. The Local Government Act 1974 Act gives regional councils access to powers in relation to navigation safety, but without any corresponding function or duties. Instead, in the exercise of the relevant statutory powers (or indeed any decision not to exercise them), a council would look to the purpose and role of local authorities under the Local Government Act 2002.
202. A local authority's role is to give effect to the purpose of promoting the social, economic, environmental, and cultural well-being of communities of its district or region and of performing duties and exercising rights conferred on it by any statute. Section 12 of the 2002 Act gives local authorities a power of "general competence", which affords full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction, together with full rights, powers and privileges.
203. A local authority must, in making a decision, seek to identify all reasonably practicable options for achieving the objective of a decision. It must assess each option for:
- benefits and costs in terms of the social, economic, environmental, and cultural well-being of the district or region
 - the extent to which community outcomes would be promoted
 - the impact on present and future capacity to fulfil any statutory responsibility and
 - any other matters that the authority considers relevant.
204. Within this general framework, a council can decide what, if any, resources and energies it wishes to invest in relation to the powers that the Local Government Act 1974 affords it in respect of navigation safety. Given the breadth of the purpose of local government and the role of a local authority under the 2002 Act, a council has considerable scope to undertake activities not mentioned in the 1974 legislation, provided that its decisions conform to the requirements of the 2002 Act.
205. Regardless, a regional council or other local authority exercising the powers of a regional council is under no statutory obligation to undertake any activity specifically in relation to navigation. If a council does decide to exercise authority over navigation, it is not obliged to intervene or commit resources in respect of any particular activity that another agency, such as Maritime New Zealand, considers should be given a high priority.
206. Since residual navigation-related functions were passed over to local government, councils' approaches to the exercise of their navigation-related powers have varied. Factors influencing their approach include:
- the number of commercial ports and marine facilities in a region
 - the level of commercial shipping activity
 - the level of recreational boating activity
 - risk perceptions
 - community expectations
 - funding and cost recovery constraints
 - competing demands and priorities for other community activities
 - ownership and access to nautical expertise and
 - absence of a duty to exercise navigation powers.
207. In light of such considerations, some regional councils have elected not to exercise their navigation safety jurisdiction beyond the harbour limits in place when the Harbours Act was repealed, or have taken over responsibility only for a defined part of their region.
208. Though a council may also limit demands on its resources by transferring responsibilities to another willing public authority, the use of this power has been sparing, with perhaps the most significant instance being the transfer of waterways control in the Queenstown Lakes District from the Otago Regional Council to the Queenstown Lakes District Council.

SPECIFIC LOCAL GOVERNMENT POWERS IN RESPECT OF NAVIGATION SAFETY

209. The Local Government Act 1974, Part 39A empowers a regional council to undertake specific activities relevant to navigation safety, namely:
- erect and maintain navigation aids
 - remove obstructions and impediments to navigation
 - carry out and maintain works to improve navigation
 - remove any wreck that is a hazard to navigation.
210. Additionally, Part 43 of the 1974 Act empowers regional councils to make bylaws relating to the safety of navigation and related activities. The scope of the bylaw-making power extends to:
- general regulation and control of the use and management of ships
 - regulation of the placement and maintenance of moorings and maritime facilities
 - regulation and control and prevention of nuisances from the speed, use, anchoring, mooring and management of ships and seaplanes
 - towing of persons and things
 - reserving and regulating areas for use by any specified kind of ship or seaplane
 - controls relating to boat races and similar events
 - regulating anchorages
 - ship traffic separation and management schemes
 - the carriage and use of personal flotation devices on pleasure craft
 - marking and identification of personal water craft
 - fixing fees and charges in respect of navigation-related council activities
 - exemptions from and suspension of bylaws.
211. A council is free under the Act to decide how widely, in geographic terms, navigation bylaws or any particular bylaw should apply within its region.
212. For the purpose of Parts 39A and 43, a regional council may appoint harbourmasters and enforcement officers who, for the purpose of ensuring navigation safety, have general powers to give directions relating to:
- when and how a ship may enter, lie, navigate in or leave waters in a region
 - the mooring, securing, placing, removing, unmooring or unsecuring of ships
 - the manner of cargo loading, discharge, securing or handling of cargo.
213. A harbourmaster or enforcement officer may also, for the purpose of ensuring navigation safety or enforcing navigation bylaws:
- direct a ship's master to moor, unmoor anchor, weigh anchor or move the ship
 - cause a ship to be moored or unmoored
 - remove hazards to navigation
 - regulate and control the traffic and navigation, and provide specially for the direct and personal control of that traffic, on any day or occasion of unusual or extraordinary traffic.
214. Enforcement powers afforded to harbourmasters and enforcement officers by the Act comprise powers to, in the interests of navigation safety:
- require the person in charge of a ship or seaplane to stop, and to give his or her name and address
 - require a person found committing an offence against navigation bylaws to give his or her name and address
 - require the owner of a ship or seaplane involved in an alleged offence to provide any information they may possess that might lead to identification of the offender.
215. These powers may also be exercised by a harbourmaster, a person authorised by a council or a member of the Police acting on the request of the harbourmaster or authorised person, who has received a complaint that there has been a breach of navigation bylaws.
216. A harbourmaster or regional council enforcement officer may exercise these same powers on the grounds of a reasonable belief that a person has committed a breach of maritime rules involving

navigation safety. This power is not, however, supported by authority to issue an infringement offence notice.

217. A harbourmaster or enforcement officer is also empowered to issue an infringement notice in respect of bylaw breaches that are named as infringement offences by regulations under the Local Government Act 1974.

DELEGATED POWERS UNDER MARITIME TRANSPORT ACT AND MARITIME RULES

218. Part 90 of the Maritime Rules – Maritime Pilotage provides for the involvement of regional councils in respect of local training and local knowledge of applicants for pilots' licences and for pilotage exemptions. This is effected through delegation of the Director of Maritime New Zealand's power of examination under the Maritime Transport Act, typically through a delegation to the regional harbourmaster.
219. Additionally, in approving any course of local pilotage training, the Director must take into account any recommendations made by the chief executive of the relevant regional council (based on nautical advice to that chief executive), the port company and any other owner of significant port assets.
220. The Director is able to delegate the power under the Maritime Transport Act 1994 to direct that a pilot be taken on board a ship in circumstances where it is in the interests of navigation safety or marine environmental protection to require a pilot to be taken on board. That power is delegated to regional council harbourmasters.

APPENDIX 3: NATIONAL LEVEL ARRANGEMENTS FOR REGULATING MARITIME SAFETY

221. The Maritime Transport Act 1994 established a national framework to maintain and promote maritime safety. The Act's safety regime is oriented heavily but not exclusively towards the regulation of commercial activities within the 'maritime system'.

REGULATION OF PARTICIPATION IN THE MARITIME SYSTEM

222. Participation in what the Act terms the maritime system for commercial ships is controlled by Maritime New Zealand through licences, permits, certificates or other maritime documents issued to or in respect of any person, ship, cargo, maritime procedure, or maritime product (anything that is or is intended to be part of, fitted to, installed in or supplied to a ship).

223. Entry into, operation within and exit from the maritime system is managed through the:

- issue of maritime documents and recognition of documents as maritime documents
- acceptance of documents issued under maritime conventions
- suspension of documents
- imposition of conditions on documents
- revocation of documents.

224. The Act imposes duties on all 'participants' (every person who does anything for which a maritime document is required) to:

- have the relevant document
- comply with the Act, regulations, maritime rules and conditions of documents
- ensure that the things for which a document has been granted are done safely and in accordance with safety standards and practices.

225. The Act imposes further duties on any participant to:

- if required by maritime rules, have a management system to ensure compliance with safety standards and the conditions of their maritime document
- provide training and supervision for employees that do anything to which the document relates, so as to maintain compliance with safety standards and conditions of the document and to promote safety
- provide sufficient resources to ensure compliance.

226. Maritime rules made by the Minister of Transport prescribe the detailed standards and requirements that apply to participants in the maritime system. These encompass rules relating to:

- the persons, things or activities by or in respect of which a maritime document must be held
- the design, construction, equipment, crewing and operation of ships
- navigation
- standards, specifications and qualifications for persons engaged in maritime activities
- requirements for maritime products (such as safety equipment) and navigation aids.

227. Regulations specify which breaches of rules constitute an offence.

228. A defining feature of the safety system implemented under the Act is its reliance on audited safety management requirements to manage ship operating risks and maintain compliance with regulatory requirements specified in rules made under the Act.

229. Compliance with the Act and rules is monitored and enforced through the Director of Maritime New Zealand's powers to:

- impose conditions on, suspend and revoke maritime documents
- conduct audits and inspections
- detain, seize and impose on conditions on the operation of ships and maritime products
- investigate, accidents, incidents and mishaps
- bring proceedings for an offence against the Act or regulations.

REGULATION OF 'NON-PARTICIPANTS'

230. Though the Maritime Transport Act is structured around regulation of participants in the maritime system, a general compliance duty, some enforcement powers, offence provisions and maritime rules apply to persons that are not required to hold a maritime document.
231. Every person, other than a participant, who must comply with the relevant provisions of the Act and rules.
- operates any ship
 - is responsible for any maritime product
 - is otherwise engaged in any maritime activity.
232. The Director of Maritime New Zealand may:
- conduct audits and inspections of anyone who operates, maintains, or services, or does any other act in respect of any ship
 - detain, seize and/or impose conditions on the operation of ships and maritime products
 - investigate, accidents, incidents and mishaps
 - bring proceedings for an offence against the Act or regulations.
233. Relatively few maritime rules apply to non-participants in the maritime system – the exceptions being the collision prevention rules, which apply to all ships, and the navigation safety rules, which contain the requirements for the safe navigation of recreational craft operating in areas not subject to regional council navigation bylaws.

APPENDIX 4: RELATIONSHIP BETWEEN NATIONAL AND LOCAL CONTROLS

234. Throughout the legislative changes affecting harbour-control measures, events have been driven mainly by decisions taken in related but somewhat different policy contexts. Consequently, the present arrangements have been arrived at episodically, often reactively, rather than as the product of a unified policy design.
235. One consistent theme, however, has been that local government is best placed to administer and enforce measures pitched at local-level needs, with central government being best equipped to administer core safety measures that demand uniform, national implementation. Though national controls focus mainly on commercial shipping, some measures apply also to recreational craft.
236. The Maritime Transport Act's jurisdiction therefore covers boating safety, as well as the navigation and operation of commercial ships, and overlaps with regional councils' navigation safety jurisdiction under the Local Government Act 1974.
237. Where the national and local regimes happen to overlap, mechanisms have been provided in each statute in order to achieve compatibility and preserve the primacy of national controls over local controls.

LOCAL GOVERNMENT ACT 1974

238. The Act provides that:
- bylaws may not impose licensing requirements in respect of aspects of commercial shipping operations that are already regulated by a maritime rule made under the Maritime Transport Act
 - the content of any bylaw concerning a ship traffic separation or management scheme must have the approval of the Director of Maritime New Zealand
 - bylaws relating to the carriage and use of personal flotation devices must not be inconsistent with equivalent maritime rules
 - a regional council must consult the Director before making a navigation bylaw concerning a matter for which a maritime rule may be made
 - harbourmasters must have such qualifications as may be required by maritime rules (though no such rules have yet been made).
239. To assist with enforcing national navigation safety controls, the Act provides that:
- a harbourmaster or enforcement officer who believes on reasonable grounds that a person has committed a breach of maritime rules involving navigation safety may exercise powers to stop the vessel involved and identify the person responsible for the alleged offence (as previously noted, this power is not supported by authority to issue an infringement offence notice).

THE MARITIME TRANSPORT ACT 1994

240. The Act provides that:
- so far as any bylaw is inconsistent with or repugnant to a maritime rule in force in the same locality, the bylaw must be construed subject to the rule
 - instructions given by the Director of Maritime New Zealand in respect of a hazardous ship or structure prevail over any conflicting instructions given by a harbourmaster or other person under the Local Government Act or bylaws.
241. These mechanisms have been sufficient to maintain a workable fit between local and central government roles and a generally adequate overall coverage of navigation safety. Even so, the interaction of national and local requirements administered under different statutes can be complex and give rise to uncertainty. This is perhaps unsurprising given that the same interaction occurs at every one of the regions and districts where a local authority council exercises control over navigation safety.

242. While the safeguards outlined above provide the means to reconcile national and local measures where a council does exercise its powers, the legislation does not explicitly address situations where a council elects *not* to exercise its powers, or does so only for a defined area within its region.
243. Consequently, the Maritime Transport Act and maritime rules become the 'default' mechanism for local control of navigation in the area or areas concerned, despite Maritime New Zealand rarely being in a position to enforce such rules in the field and not being funded to do so.
244. The absence of an explicit duty on a regional council to undertake local navigation functions is also pertinent in the context of the New Zealand Port and Harbour Marine Safety Code, which is predicated on councils continuing to undertake those functions.

APPENDIX 5

PORT AND HARBOUR AND NAVIGATION SAFETY MANAGEMENT DISCUSSION DOCUMENT RESPONSE TEMPLATE

The template below is suggested for your feedback and comments on the discussion document.

Please send to:

Roger Brown, Ministry of Transport
Postal address: PO Box 3175, WELLINGTON 6140

Email to: portandharbour@transport.govt.nz

Or, for more information contact: 04 439 9367

The closing date for submissions is 19 December 2007.

QUESTIONS SOUGHT FOR COMMENT – SUBMISSION TEMPLATE

Name of Submitter	
Contact details (Address, phone, email)	
Are you submitting as an individual or on behalf of an organisation?	Individual /On behalf of an organisation
Organisation you represent (if on behalf of an organisation)	
Official Information Act 1982 disclosure: Your submission may be subject to disclosure under the Official Information Act 1982. Persons making submissions that include commercially or otherwise sensitive material that they wish the Ministry to withhold under the Act should clearly identify the relevant information and the applicable grounds under which the Ministry could withhold the information.	
Is this information commercially or otherwise sensitive?	OK to disclose/Sensitive material - please do not disclose
Do you wish your comments to be disclosed publicly?	OK to disclose /Please do not disclose
If you are an individual, do you wish your identity to be disclosed?	OK to disclose /Please do not disclose

ISSUE	DO YOU AGREE?	WHY /WHY NOT? COMMENTS
Analysis of key issues for port and harbour safety management		
Possible responses to key issues		
Option 1: Status Quo – retain a voluntary approach		
Option 2: Provide for formal recognition of the Code		
Option 3: Introduce statutory provisions to support existing Code or a formal code		
Specify regional council harbour safety control function and duties		
Include functions and duties in Maritime Transport Act		
Clarify legal authority of harbourmasters		
Specify regional council obligations in maritime rules rather than in statute		
Impose a general safety duty on marine service providers		
Impose a duty on port facility operators identify, assess and manage risk		
Provide explicit powers for the Director in respect of port and harbour safety		
Provide express audit and inspection powers		
Provide for imposition of conditions on port marine operations		
Publication of audit findings and recommendations		
Provide for maritime rules in respect of port marine operations		
Option 4: Make the Code mandatory		

ISSUE	DO YOU AGREE?	WHY/WHY NOT? COMMENTS
Funding of regional council harbour safety management costs		
Is the present bylaw mechanism for navigation safety related charges a barrier to cost recovery?		
Can cost recovery be made easier to achieve?		
Could regulations provide a more effective cost recovery mechanism?		
Would it be a problem if harbour-control cost recovery practices varied between regions?		
Is there another cost recovery option?		
Centralisation of harbour-control		
Could centralised harbour control provide better safety outcomes than regional control?		
<i>If harbour control was centralised, would any of the following be a useful model:</i>		
Extend Maritime New Zealand functions to include harbour control?		
Establish a stand-alone port and harbour management unit?		
Establish an independent entity to provide and manage maritime safety services?		
Are there other possible models?		
Would centralisation of harbour safety control affect regional councils' capability to perform other marine functions in their region?		
Should centralised functions be delegable to councils willing and able to perform them?		

ISSUE	DO YOU AGREE?	WHY/WHY NOT? COMMENTS
General Navigation Safety		
Should regional councils have express navigation safety responsibilities?		
Should the responsibilities be limited to lakes, rivers and internal waters such as ports and harbours?		
Should maritime rules enforceable by regional councils regulate navigation in areas beyond councils' area of direct responsibility?		
Would the ability to issue infringement notices for breaches of maritime rules be a reasonable and useful extension of regional enforcement powers?		
Should the Director of Maritime New Zealand approve the content of navigation safety bylaws for consistency with relevant maritime rules?		
Could questions of certainty, clarity and consistency be resolved through measures other than those discussed?		
Would a statutory navigation safety function expose regional councils to costs that they do not face at present?		

ISSUE	DO YOU AGREE?	WHY/WHY NOT? COMMENTS
Is there scope for a mechanism other than licensing or registration to assist cost recovery from recreational boat users?		
How likely would councils be to use a more accessible funding mechanism?		
Is rating a fair and reasonable alternative to user charging to cover recreational navigation safety costs?		
Is the consolidation of navigation safety controls in one statute feasible in practice and supportable in principle?		
Would the benefits of consolidation outweigh the potential disadvantages of introducing into the Maritime Transport Act provisions relating to functions, duties and powers of organisations and officials other than Maritime New Zealand and the Director of Maritime New Zealand?		
Would consolidation of navigation safety controls be assisted by simplifying existing measures to their essential elements and reducing the level of prescription?		
Would it be preferable to retain separate legislation subject to modifications to improve its coordination and clarity?		

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