



Ministry of Transport
TE MANATŪ WAKA

Maritime Transport Act 1994

Maritime Rules

PART 91 AMENDMENT NO.2 2007

Pursuant to section 36 of the Maritime Transport Act 1994 I, Harry James Duynhoven, Minister for Transport Safety, hereby make the following maritime rules.

Signed at Wellington

This *4th* day of *December* 2007

HARRY JAMES DUYNHOVEN

Minister for Transport Safety

A handwritten signature in black ink, appearing to read 'Harry James Duynhoven', written over a faint rectangular box.

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Part Objective

The objectives of the Part 91 Amendment No.2 2007 are to –

- except commercial rafts, which are covered by Part 80 – Marine Craft Used for Adventure Tourism, from the personal flotation device (PFD) provisions of rules 91.4(1) and (6); and
- introduce provisions –
 - allowing, in paddle craft applications, the use of existing serviceable PFDs that do not meet prescribed standards until 1 October 2014 (in the case of pleasure craft) and 1 October 2011 (in the case of craft that are not pleasure craft)
 - accepting a modified standard for the manufacture, testing and labelling of PFDs for use in paddle craft applications.

Rules subject to Regulations (Disallowance) Act 1989

Maritime rules are subject to the Regulations (Disallowance) Act 1989. Under that Act, the rules are required to be tabled in the House of Representatives.

The House of Representatives may, by resolution, disallow any rules.

The Regulations Review Committee is the select committee responsible for considering rules under the Regulations (Disallowance) Act 1989.

Extent of Consultation

On 4 October 2003, the Maritime Safety Authority published, in each of the daily newspapers in the four main centres of New Zealand, a notice inviting comments on the proposed amendments to Part 91. A notice was also published in the New Zealand Gazette on 2 October 2003. The Authority then made its invitation to comment and the draft amendment available to the public with electronic and hard copies being sent automatically to interested parties. The draft was also posted on, and available for downloading from, the MSA website. Comments were requested by 31 October 2003.

Thirty submissions were made on the draft amendment. All submissions and any oral comments were considered and a further draft amendment developed. This draft was published in a Maritime NZ discussion paper on commercial kayaking and canoeing on 21 May 2006. The paper was sent to interested and affected individuals and organisations, including all those who had submitted comments on the October 2003 proposed amendment. The paper was also made available on the Maritime NZ website and kayaking organisations were invited to post a copy of, or link to, the paper on their websites. Comments on the draft amendment were requested by 17 July 2006.

Twenty four written submissions were made on the discussion paper, eleven of which also commented on the draft amendment to Part 91. All submissions were considered and a third draft amendment developed. This draft was circulated on 21 November 2006 to all respondents to the two previous drafts as well as a range of other organisations and individuals and organisations with a known interest in kayaking.

Seven written submissions were made on the third draft amendment. All submissions were considered and the draft amendment finalised.

1 Entry into force

These amendment rules come into force on the 10th January 2008.

2 Rule 91.2 Definitions

Rule 91.2 is amended by inserting the following definitions in the appropriate places –

“ **Commercial raft** ” means a raft that is not a pleasure craft:

“ **Paddle craft** ” means powered only by a craft’s occupant(s) using a single or double bladed paddle as a lever without the aid of a fulcrum provided by rowlocks, thole pins, crutches or like arrangements, but does not include a raft manoeuvred solely by paddles:

“ **raft** ” –

(a) means an inflatable craft manoeuvred by –

(i) oars or paddles; or

(ii) a combination of oars and paddles; but

(b) does not include inflatable kayaks, white water sledges, tubes, or equipment used for river surfing:’

3 Rule 91.4 Personal flotation devices

(1) Rule 91.4(2) is amended by inserting the following paragraph –

“(f) a commercial raft.”

(2) Part 91.4 is amended by inserting the following new subrules –

“(9) For the purposes of subrules (1) and (6), in the case of a paddle craft, a personal flotation device shall include a buoyancy aid not certified by a recognised authority, provided that buoyancy aid –

(a) meets type 406 of New Zealand Standard NZS 5823:2005 as demonstrated by prototype testing, except that the device is not required to –

(i) be tested for resistance to petroleum products; and

(ii) meet the colour requirements; and

(b) is manufactured in accordance with a quality system acceptable to the Director that ensures product conformity to that standard; and

(c) is legibly and indelibly marked in block letters not less than 6mm high “MARITIME PRODUCT CONFORMING TO THE REQUIREMENTS OF MARITIME RULES PART 91. RESTRICTED USE: PADDLE CRAFT APPLICATIONS ONLY”.

“(10) In the case of a paddle craft, a serviceable buoyancy aid not certified by a recognised authority and not meeting the

requirements of rule 91.4(9), may be used for the purposes of subrules (1) and (6) until –

- (a) 1 October 2014 in the case of a pleasure craft; and
- (b) 1 October 2011 in the case of a craft other than a pleasure craft.

Maritime Rules

PART 91

NAVIGATION SAFETY RULES

AMENDMENT NO.2 2007

Consultation Details

(This text does not form part of the rules contained in Part 91 – Navigation Safety Rules Amendment No. 2 2007. It provides details of the consultation undertaken before making the rules.)

Summary of consultation

The proposed Part 91 amendment rules dealing with specialist kayaking PFDs were publicly notified and circulated initially in October 2003. In May 2006 and in November 2006 further versions of the proposed amendment were circulated. The first draft was sent to some 400 organisations and individuals. The second draft, incorporated in a wider discussion paper on commercial kayaking was notified to those who commented on the October 2003 draft and other organisations and individuals known to have an interest in kayaking PFDs. The circulation of the third draft targeted those parties who made submissions on the second draft.

In all, 30 submissions were received on the first consultation draft. Eleven comments were received on the second draft, and seven received on the third.

First consultation draft October 2003

The first draft amendment sought to legitimise the continued use of specialist kayaking PFDs for an interim period: 21 March 2007 in the case of commercial applications; 21 March 2010 in the case of pleasure use. The policy of this draft was to provide a short term fix pending a long term solution for specialist devices. To cover kayaks of various types, as well as canoes, the amendment used the term “paddle craft”, differentiating this type of craft by being “powered solely by means of paddles” without the use of a fulcrum (such as rowlocks as in a row boat.)

The draft amendment also aimed to remove any doubt that the PFD carriage and wearing requirements in Part 91 do not apply to commercial river rafts. Such rafts were added to the Part 91 list of cases to which these requirements do not apply, leaving PFD requirements to be dealt with in the commercial river rafting rules in Part 80 – Marine Craft Used for Adventure Tourism.

The amendment was generally supported by recreational kayakers, organisations undertaking kayaking instruction and guiding and their representative organisations. Manufacturers of scale who make devices complying with the New Zealand standard did not support the amendment, while a manufacturer making specialist devices in small numbers without standards certification supported it. Retailers and importers of PFDs complying with

overseas standards suggested that these should be recognised directly for the purposes of carriage and wearing requirements of Part 91.

The submissions in some cases ranged over matters in Part 91 (river safety rules, and dive flags) outside the scope of the amendment. Some of these have been addressed in a separate 2007 amendment to Part 91. The proposal to accept certain standards compliant PFDs from other jurisdictions (USA, Australia, and Europe) is to be considered in a future rules amendment.

Comments on second consultation draft May 2006

The second consultation draft aimed to provide a long term solution for kayaking PFDs. It featured -

- a new category PFD restricted to kayaking use
- a requirement that such devices comply with the appropriate New Zealand standard
- unlike devices used in other applications, no requirement for such PFDs to be certified as manufactured under a quality system ensuring compliance with that standard.

The policy of this second draft amendment was to ensure the availability of the specialist devices favoured by kayakers for safety reasons while providing a level of assurance of their technical properties. In-house quality systems, the nature of the market (small and discriminating), and the incentives on manufacturers under maritime and consumer guarantees law were considered adequate substitutes for third party verification of product conformance.

Day Two, Andy Fuller, PFD manufacturer

Andy Fuller supported the amendment, noting that while his company manufactures the majority of the PFDs used for kayaking in New Zealand, it would struggle to get safety standards approval, as manufacturing in New Zealand is high cost and margins are small. Quality is assured in his operation by personally sewing the last line of stitching on every PFD and checking each device.

It was noted that the market for specialist devices used kayaking shops that have good product knowledge, and which share a commitment to safety. This situation was contrasted with non-specialist devices sold in various outlets without specialist advice. Such devices may be standards certified but are not necessarily quality products. Examples were given of problems in New Zealand with products manufactured offshore in facilities with quality certification.

Sunspots Ltd, Donald Calder, kayak retailer, equipment hire, kayaking instruction

Donald Calder noted that the majority of New Zealand kayaking PFDs do not have standards of any kind and the manufacturers of these have very different design specifications depending on the niche market at which they are aimed. It was unlikely that the market will be large enough to support the testing of these products in the near future. It was suggested that most specialist devices far exceed the standards of the low end generic PFDs that are certified.

The law should provide for acceptance in New Zealand of devices complying with USA and CE standards. Facilitating the import of such devices would provide local manufacturers with competition, and choice for users.

Rasdex NZ Ltd, Eli and Rob Soothill, kayaking clothing and PFD manufacturer

The Soothills agreed that a standard for kayaking PFDs is necessary and desirable. They also agreed with the proposal to remove the requirement for production to be under a certified quality management standard.

However, the proposal was considered to fall short of enabling their company to proceed with any product development or manufacture largely due to the cost of testing to the New Zealand standard. Suggested modifications included limiting testing for specialist devices to flotation, weight (strength of seams, fabric and components) and UV (strength after exposure to sunlight).

The Soothills also suggested that the colour restrictions in the New Zealand standard (effectively limiting the fabric of specialist devices to safety-type colours) was out of step with user preferences and international standards.

CPIT, Gareth Wheeler School of Tourism, Travel and Recreation Appalachian State University, Outdoor Programs

Gareth Wheeler submitted that he had no problem with the proposal.

Bruce Leslie, kayaker (submission endorsed by Ian Gill-Fox, kayaker)

Bruce Leslie noted that PFDs for kayaking in New Zealand have progressed rapidly in design, construction and materials over the last five to ten years. This, it is submitted, would not have been possible if there had been a prescriptive standard, as the participation base is so small, and the cost of change prohibitive.

A form of modified wording of the amendment was proposed that would put responsibility on the user to determine the device's fitness for purpose and align the technical properties of the PFD to the New Zealand or equivalent overseas standard if tested to those standards by the manufacturer.

Waimarino Adventure Park and Waimarino Kayak Tours, Blair Anderson

The proposed amended rule, providing for devices to be serviceable and fit-for-purpose, is supported. As a large volume user of PFDs, the park's experience has been that the New Zealand standards certified devices from large volume manufacturers are inferior to the quality of the specialist devices made by small manufacturers.

A question was raised as to the acceptability of existing devices currently in service made by a manufacturer that will meet the requirements of the proposed amended rule.

Paul Tamuta, kayaker

The standard proposed is excellent and would benefit sea kayaking in New Zealand.

Ryan James MacDonald, kayaker

Ryan MacDonald applauded the proposed scheme for accepting non-standard PFDs. He submitted that in his experience many PFDs made by New Zealand companies are "amazing products" but the companies cannot afford formal certification.

NZOIA/SKOANZ, Matthew Cant

While recognising the good intent of the proposed amendment and welcoming the concession being made, Matthew Cant maintained that the meaning of the wording is unclear. He requested explanation of which national or international standards will meet the requirements of the proposed changes.

Aoraki School of Outdoor Education, Ian Loggie

Ian Loggie considered the proposed scheme for dealing with kayaking PFDs to be a well thought out solution. He agreed with the analysis accompanying the draft that concluded that “[w]hile there may be some small increased risk arising from the absence of standards certification, the safety benefits are greater”.

Tai Poutini Polytechnic, Outdoor Recreation Department, Don Campbell

Don Campbell agreed that many of the best paddle sports PFDs available do not have any standard because the standards process restricts design innovation and is costly, adding to the price of an already premium product.

In a commercial setting, an operator should be able to prove that the PFDs they are using on any given day are fit for purpose and in good (serviceable) condition. This is best achieved by regularly testing the PFDs for sun damage and stitch integrity.

While the amendment seems appropriate with regard to “meeting standards” and “having certification”, Don Campbell considered there is still some question about the appropriateness of elements of the New Zealand standard for paddle craft. Tests for kerosene soak, and 50km impact were considered irrelevant, while testing for secure fit by stepping into a pool with arms raised did not simulate the rigours of kayaking use. Recreational paddlers should be free to choose the type of PFD to use.

Comments on third consultation draft December 2006

The third consultation draft introduced the following new elements–

- a requirement that kayaking PFDs are to be labelled to indicate to the user the device’s application to kayaking only
- the manufacture of devices must be under a quality system acceptable to the Director of Maritime NZ
- prototypes to be tested against the New Zealand standard but tests for resistance to heat and petroleum products are not required
- New Zealand standard colour requirements need not be met.

The policy of this draft is to require testing against the New Zealand standard except tests judged to have no relevance to kayaking. The new quality system requirement is to provide a greater measure of assurance of the technical properties of devices short of an ISO-type third party certified quality management system.

Bruce Leslie, kayaker

Bruce Leslie considered that the result is more prescriptive than he would like to see.

Brian Neville, sea kayak operator, Lake Taupo

Brian Neville registered that he was happy with the proposed amendment, enabling his sea kayaking business to continue to use the New Zealand made devices of his choice, which have, in his view, proven over eleven years to be comfortable, hard wearing, adjustable quickly for size and to have the required buoyancy.

Day Two, Andy Fuller, PFD manufacturer

Andy Fuller declared his satisfaction with the amendment. He also noted the acceptability of the quality system requirements having discussed the details of how this would work with Maritime NZ staff.

Rasdex NZ Ltd, Eli and Rob Soothill, kayaking clothing and PFD manufacturer

Eli and Rob Soothill gave the third draft amendment a mixed reception. They suggested, as submitted in their previous submission, that testing should be limited to flotation, impact,

and UV and requested justification for retaining other tests. In any event, prototype testing, in their view, should be limited to the smallest size of any model. The in-house quality system requirement was not favoured. Rather they supported the argument accompanying the second draft amendment that the market is sufficiently small and discriminating and has the incentives already in place to ensure quality.

The Soothills supported not applying the New Zealand standard colour specification. They also supported the proposed labelling requirement.

Maritime NZ: Limiting testing to the smallest sized device in a product line would generally be acceptable for certain tests, such as buoyancy, provided the size falls within a single overall weight range. It would not be acceptable to test only a child's size device within a single product line.

In modifying the application of the New Zealand standard, we have favoured explicitly not applying those tests that are judged not relevant to kayaking PFDs. This is a more conservative approach to that proposed (restricting testing to flotation, impact and UV), and we consider that the other elements of the standard should be retained in order to safeguard technical properties of devices, such as in-water performance testing and testing the strength of fastening devices, which are relevant to all PFDs. For the same reason, we favour provision for the Director to verify the adequacy of the quality management system in place of relying solely on the market and on the general provisions in maritime and consumer guarantees law for quality assurance.

Hydraulics, Dave Richtie, buoyancy aid manufacturer

Generally, Dave Richtie supported the amendment, on the understanding that the intention is to ensure the PFD is able to float a certain weight and will stay on the wearer (if correctly fitted), and that the quality system requirement is able to be met by the ISO 9000/2001 quality management standard.

Alternative wording for the label on specialist PFDs was proposed, along the lines of "this product is designed for paddle sports use and may not conform to recreational boating (power boating) needs or regulations". This was considered cleaner and took into account that buoyancy aids are not maritime devices.

Maritime NZ: The amended wording proposed in this submission for marking devices is not supported. The words are considered unclear and, in some cases, could be inaccurate: a device that conforms to this amended requirement (and is not tested for exposure to petroleum products) will not conform to the requirements applicable to power boating.

We consider that reference to "maritime product" is appropriate as it creates a link to the Director's power of inspection under section 54 of the Maritime Transport Act 1994.

Christchurch Boys' High School, Eddie Murphy, physical education teacher

Eddie Murphy commented on regulation of PFD standards in general, expressing a deeply held objection to both the state pre-empting the decisions of kayakers as autonomous adventurers, and the belief, implicit in the proposed amendment and Part 91 in general, that PFDs can make people safe in an inherently hazardous environment. He suggested that this implies that when accidents occur to kayakers that use PFDs meeting the requirements of Part 91, the liability will rest with the Minister and Maritime NZ.

Maritime NZ: This submission provides an interesting perspective, but its free-ranging comments have not influenced our thinking on the basic approach.

Hutchwilco, Bernard Orme, PFD manufacturer

Bernard Orme registered Hutchwilco's grave concerns that a perfectly workable and equitable (level playing field) framework provided for within the New Zealand standard is being jeopardized by a proposal that will allow some manufacturers to operate according to a

different set of rules. It is submitted that the proposal is unfair, not in the public interest and technically flawed in that -

- complying with the testing and auditing requirements of the standard are not onerous or cost prohibitive, if a company is serious about participating responsibly in the market in terms of product development, material performance, manufacturing quality and market support
- there is ample scope provided in the New Zealand standard for manufacturers to be innovative
- the standard already provides for non-safety colours to be used in manufacture, therefore there does not need to be any special provision for this
- product testing and manufacturing processes must only be allowed to be conducted by recognised product certification bodies, which have the appropriate experience and support
- the Director of Maritime New Zealand cannot be involved with the audit of manufacturing processes, as the organisation does not have the appropriate experience and support
- the reasons for having the heat test apply equally to kayaking PFDs so must not be removed
- it sets a dangerous precedent, entitling every other market sector (water skiers, wakeboarders, fisherman etc.) to put forward their own arguments to be treated differently
- further dilution of the value of the standard would not be in the interests of the public.

Maritime NZ: In response to each of the points (in order), we note the following –

- *costs direct and indirect of testing and auditing can be significant for small businesses*
- *the evidence available to us is that most innovation is coming from the niche manufacturers. Most kayakers involved in deep recreational applications choose devices from these manufacturers. This is clear evidence of the value that users place on the technical features/properties of these devices, which generally command a price premium over the PFDs produced by large manufacturers*
- *on our reading of the New Zealand standard, safety colour restrictions do apply to type 406 devices (see section 406.10)*
- *there is no question that prototype testing must be carried out in suitably qualified facilities*
- *the role of the Director in auditing PFD manufacturing processes is in line with general audit practice, which does not require intimate knowledge of the technical aspects of the subject processes. This is consistent with the approach of Hutchwilco's own certifying body, BVQI.*
- *we accept that kayaking PFDs may be exposed to high temperatures during transport and storage and that it is appropriate to retain the heat test (verifying that a device shows no signs of damage after exposure to temperatures of 60 ± 2 ° C for 168 -0+5 hours)*
- *the call to amend Part 91 came from the kayaking community as soon as the implications of Part 91 for specialist PFD use were appreciated. In the four years that Part 91 has been in place, no such calls have come from other groups*
- *the change does not apply sections of NZ 5823 that are judged not relevant to kayaking. The process for developing the existing standard appears in hindsight to have failed to fully represent the views of the kayaking sector. This being the case, the rule amendment effectively creates, in the interests of kayaker safety, a new standard for that sector.*