

## MEMORANDUM

**Date:** 4 March 2026  
**To:** Steve Rushbrook (Otago Regional Council)  
**From:** Michelle Mehlhopt | Tegan Wadworth (Wynn Williams)

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### Draft Navigation Safety Bylaw 2026 – legal question on definition of “unseaworthy”

1. The Otago Regional Council (**Council**) has received comments on the draft Navigation Safety Bylaw 2026 (**Bylaw**) which raise legal issues.
2. You have asked for our advice in respect of the definition of “unseaworthy”.

### Comment on definition of “unseaworthy”

3. Maritime New Zealand have made a comment stating that basing a seaworthiness standard on the “opinion of the harbourmaster” may create legal difficulties with enforcement.
4. The definition proposed in the Bylaw for “unseaworthy” is:

**‘Unseaworthy’** means, in the opinion of the Harbourmaster not being in a fit condition or readiness to navigate safely on the water.

### Executive summary

5. While “in the opinion of the Harbourmaster” could be interpreted as importing an element of subjective discretion of whether something is “unseaworthy” and lacks some certainty in terms of enforcing the definition, the level of discretion provided for does not result in the definition being invalid or not able to be enforced.
6. Whilst not necessary, we have considered whether other amendments could be made to the definition to improve the certainty and enforceability of the definition, including listing common circumstances that would result in a vessel not being in a fit condition or readiness to navigate safely on the water. However, we consider that there is limited utility in doing this.
7. Our detailed advice follows.

### Analysis of definition of “unseaworthy” in the Bylaw

8. While “in the opinion of the Harbourmaster” could be interpreted as importing an element of subjective discretion of whether something is “unseaworthy” and lacks some certainty in terms of enforcing the definition, we do not consider that it results in the definition being invalid or not able to be enforced.
9. The MTA requires that if a regional council appoints a harbourmaster that:
  - (4) If maritime rules do not prescribe qualifications for harbourmasters, the regional council must satisfy itself that a person appointed as harbourmaster is suitably qualified to perform the functions of harbourmaster in respect of the relevant port, harbour, or waters.
10. We are not aware that the maritime rules prescribe qualifications for harbourmasters.
11. While the proposed definition of “unseaworthy” could be seen to import an element of judgment by the Harbourmaster which could give rise to enforcement issues, the Harbourmaster forming that opinion is required to be suitably qualified to perform the functions of harbourmaster. This reduces the risk of an inconsistent application of the definition and uncertainty and issues with enforcement.
12. In addition, section 13 of the Bylaws Act 1910 provides that a bylaw is not invalid because of a discretionary power left to local authority:
  - (1) **No bylaw shall be invalid because it requires anything to be done** within a time or **in a manner to be directed or approved** in any particular case by the local authority making the

bylaw, or **by any officer or servant of the local authority**, or by any other person, **or because the bylaw leaves any matter or thing to be determined**, applied, dispensed with, ordered, or prohibited from time to time in any particular case by the local authority making the bylaw, or **by any officer or servant of the local authority**, or by any other person.

- (2) This section shall not apply to any case in which the discretion so left by the bylaw to the local authority, or to any officer, servant, or other person, is so great as to be unreasonable.

[our emphasis added]

13. Therefore, a bylaw can require something to be done, approved or determined by an officer of the Council, which would include the Harbourmaster, unless the discretion left to the officer is so great that it is unreasonable.
14. Whether a bylaw is unreasonable for purposes of the Bylaw Act 1910 is a mixed question of fact and law with regard to the scope of the bylaw and whether that scope is reasonable on evaluation of the relevant facts (i.e., the nature of the locality, the problem it seeks to address and the impact on the community).<sup>1</sup> It is a high threshold test in the sense that a bylaw will only be considered “unreasonable” where it is clearly irrational or illogical and could not have been imposed by any person acting reasonably.<sup>2</sup> The courts have also recognised that where Parliament gives the task of making rules on certain matters to local councils, the courts should give those councils some leeway. In other words, courts should be reluctant to interfere with or closely scrutinise decisions of those councils (unless they are so clearly irrational or illogical).<sup>3</sup>
15. In our view, the definition of “unseaworthy” proposed does not leave an unreasonable discretion to the Harbourmaster that it would meet the high threshold of unreasonableness and be considered invalid.

#### **Possible amendments to the definition of ‘unseaworthy’**

16. We have considered whether the Council could make amendments to the definition to increase the certainty of when a vessel would be unseaworthy. This could be by listing any common circumstances that would result in a vessel not being in a fit condition or readiness to navigate safely on the water. This would assist with providing certainty for enforcement of common circumstances when a vessel is unseaworthy as those circumstances would be specifically included in the definition and not require the Harbourmaster’s opinion. However, we do not consider that it is necessary to make such amendments to the definition and there is likely to be limited utility in doing this.
17. It may be the case that there are no common circumstances when a vessel is unseaworthy, or that there are but are not able to be described in a more clear and certain way as to make the definition workable. There is also risk associated with listing some circumstances and not others, especially where it is the more uncommon circumstances that are more likely to be more difficult in terms of enforcement.
18. If the Council does wish to list some circumstances when vessels would be considered unseaworthy, we consider the definition should still include a catch all that provides for a vessel to be considered unseaworthy in the opinion of the Harbourmaster. For example, including at the end of any list setting out when a vessel would be unseaworthy “or otherwise in the opinion of the Harbourmaster not being in a fit condition or readiness to navigate safely on the water.”

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<sup>1</sup> *Harrison v Auckland City Council* HC Auckland CIV-2007-404-1445, 21 April 2008 at [53]-[54], referring to *JB International Ltd v Auckland City Council* [2006] NZRMA 401.

<sup>2</sup> *Conley v Hamilton City Council* [2007] NZCA 543 at [45] and [52].

<sup>3</sup> *Harrison v Auckland City Council* HC Auckland CIV-2007-404-1445, 21 April 2008 at [61], referring to *Conley v Hamilton City Council* [2007] NZCA 543.

**Conclusion**

19. We trust that our advice assists. Please do let us know if you have any further questions.

**Wynn Williams**