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## Protection of the Sea (Harmful Anti-fouling Systems) Bill 2006

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## Protection of the Sea (Harmful Anti-fouling Systems) Bill 2006

**Date introduced:** 22 June 2006

**House:** House of Representatives

**Portfolio:** Transport and Regional Services

**Commencement:** Sections 1 and 2 of the Bill commence on Royal assent. The operative parts of the Bill (sections 3 to 25) commence on Proclamation, providing that the proclaimed commencing date not before the day the International Convention on the Control of Harmful Anti-fouling Systems on Ships comes into force in Australia.<sup>1</sup>

### Purpose

To provide for the legislative implementation of the International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001.

### Background

International Convention on the Control of Harmful Anti-fouling Systems on Ships (AFS Convention)

As summarised by the [National Interest Analysis](#) for the [AFS Convention](#),<sup>2</sup> the purpose of the convention is:

to ban the use of organotin compounds which act as biocides in anti-fouling paints on ships, specifically tributyl tin (TBT) based anti-fouling paints. TBT acts as a biocide preventing the growth of algae, barnacles and other marine organisms on the ships' hull. This enables the ship to travel faster through the water and consume less fuel. For the last 20 years scientific investigations have shown that TBT-based paints pose a substantial risk of toxicity and other chronic impacts at both the species, habitat and ecosystem level. Effects of TBT-based paints have been reported on such ecologically and economically important marine organisms as oysters and molluscs as well as contaminating sediments in many port areas around the world. TBT is also highly toxic to a range of marine reef biota.<sup>3</sup>

The AFS Convention applies to all ships and fixed or floating platforms:<sup>4</sup>

- registered in a Party to the Convention,
- operating under the authority of a Party
- that are in a port, shipyard or offshore terminal to a Party.

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Thus the vessels of foreign non-Parties that are merely transiting Australian waters are not subject to the Convention.

Like many international maritime agreements, the AFS Convention does not apply to warships and other ships used only on government non-commercial service.<sup>5</sup> However, parties to the Convention are required to take 'reasonable and practical' steps to ensure such government ships act in a manner consistent with the Convention.<sup>6</sup> The Royal Australian Navy (RAN) ceased applying TBT anti-fouling paint in January 2005, and currently more than two thirds of the fleet are free of TBT. The RAN is working to ensure that all ships are encapsulated or repainted to ensure no TBT exposure by January 2008.<sup>7</sup>

There are two main prohibitions in the AFS Convention. Firstly, the application of harmful anti-fouling systems or compounds (HAFCs in the language of the Bill)<sup>8</sup> to relevant ships is prohibited as of 1 January 2003. Secondly, from 1 January 2008, no relevant ship may have a HAFC on their hulls or external surfaces, except if it coated with a barrier that prevents the HAFC from leaching. Floating or fixed platforms completed before 2003, and which have not been dry-docked since, are exempt from this last requirement. Article 4 of the AFS Convention requires Parties to take 'effective measures' to ensure all relevant vessels comply with the Convention.

Australia signed the AFS Convention in 2002, subject to ratification. According to the National Interest Analysis, the Australian Shipowners Association and Shipping Australia Limited, Association of Australian Ports and Marine Authorities, Australian Paint Manufacturers' Federation and environmental non-government organisations were all consulted in respect of the Convention.<sup>9</sup> Consultation with the States and Territories was undertaken through Premiers/Chief Ministers Departments and through the Australian Transport Council (ATC). The ATC recommended ratification of the Convention at its meeting on 8 November 2002.<sup>10</sup>

When the Joint Standing Committee on Treaties (JSCOT) considered the AFS convention in mid 2003, Government officials anticipated that the present Bill would be introduced later that year.<sup>11</sup> This was presumably based on the expectation at the time that the Convention would come into force in 2004 or 2005.<sup>12</sup> However, as of 30 June 2006, only 16 countries have ratified, representing 17.3% of the world's merchant shipping by tonnage.<sup>13</sup> As the AFS convention will commence only 12 months after ratification by 25 States representing 25% of the world's merchant shipping tonnage, entry into force will be no earlier than the later part of 2007.

### **Australian domestic policy regarding harmful anti-fouling paints**

The use of HFACs (TBT) anti-fouling paints on ships less than 25m in length has effectively been banned via State and Territory legislation since the mid 1990s. In 2003, the Commonwealth phased-out the use of TBT paints in Australia.<sup>14</sup>

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## Financial implications

The Explanatory Memorandum states there will be no financial impacts from this Bill.

## Main provisions

**New section 7** provides that the Act binds the Commonwealth, State and Territory governments, but they cannot be prosecuted for any offence under the Act. However, this protection does not extend to government employees or agents, and thus they could be prosecuted. However, as the AFS Convention and the Bill do not apply to warships and other ships being used by a government for non-commercial purposes, there are probably very few situations in where at least a government employee might be prosecuted for a serious offence.

**New sections 8 and 9** contain the major offence provisions. There are both fault ('ordinary offence' in the language of the Bill) and strict liability versions of offences in both sections.

**New subsection 8(1)** provides that if a person engages in negligent<sup>15</sup> conduct resulting in a HFAC being applied to the external part of a ship, they are guilty of an offence carrying a maximum penalty of 2,000 penalty units (\$220,000).<sup>16</sup> The ship must be an Australian ship, or if a foreign ship, the offence must have occurred in a port, shipyard or offshore terminal (collectively termed 'shipping facilities' in the Bill) within the outer limits of Australia's Exclusive Economic Zone (EEZ).

The strict liability version of the offence, which applies only to the master and/or owner of the ship concerned, carries a maximum penalty of 500 penalty units (\$55,000). The rationale for making both the master and owner potentially liable without having to prove fault is set out on page 4 for the Explanatory Memorandum. Of particular interest is the comment:

In the maritime industry, the master and owner all have some involvement to varying degrees in various aspects of a ships' operation. The master alone will not always be responsible for, or know specific details about, an aspect of a ship – for example what type of paint was used the last time the ship was dry docked and repainted. Similarly, the owner may not be fully aware of specific operational aspects on a ship, and, depending on the nature of the contractual relationship between the owner and the operator, responsibility for many operational aspects can, and do change between contracts

The dichotomy of actions and responsibilities between the master and the owner has often been used to avoid prosecutions altogether. Where an offending ship is foreign owned, there is unlikely to be any jurisdictional presence of the owner, which will jeopardise any prosecution against an owner. The arrest of the master may encourage an owner to submit to the jurisdiction in exchange for dropping a prosecution against the master in order to allow the ship to sail.

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If the conduct in question under **new section 8** is an offence under State or Territory law, there is no offence under the Act: **new subsection 8(4)**.

**New section 9** creates offences for Australian and foreign ships bearing a HFAC entering into or remaining in a shipping facility on or after 1 January 2008.<sup>17</sup> The offence provisions apply to both ships' masters and owners where they either 'take' or 'permit' the ship to enter the relevant shipping facility or 'allow' the ship to remain at the facility.

The maximum penalties for the fault versions of the offences (**new subsections 9(1)-(4)**) are 2,000 penalty units (\$220,000) for entering a facility, and 1,000 penalty units (\$110,000) *per day* for remaining in the facility. Note that under the principles of section 5.6 of the *Criminal Code Act 1995*, the master or owner must have intended the ship enter into, or remain at, the shipping facility rather than merely being reckless or negligent about this.

For the strict liability version of the offences (**new subsections 9(5)-(8)**), the maximum penalties are 500 penalty units (\$55,000) for entering a facility, and 400 penalty units (\$44,000) *per day* for remaining in the facility.

**New subsection 9(10)** provides that no offence occurs where a ship enters or remains in a facility for the purpose of securing the safety of the ship or for the purpose of seeking urgent medical attention for a person on board the ship. If the ship is under the control of a person exercising powers under Australian law, such as a Customs, police or Australian Maritime Safety Authority (AMSA) officer, likewise no offence is committed.

As is the case under **new section 8**, if the conduct in question is an offence under State or Territory law, there is no offence under the Bill.

**Part 3 (new sections 10-15)** deal with anti-fouling certificates and declarations for Australian ships. Such certificates are issued if the relevant survey authority determines that the ship in question complies with anti-fouling requirements. Under **new section 13** not having a current certificate for an Australian vessel of 400 tonnes or more departing from a shipping facility on an international voyage after 1 January 2008 may be an offence, either under a fault version of an offence or a strict liability version. Similar offences apply for failing to have a valid anti-fouling declaration: **new section 15**. Declarations are required for ships at least 24 metres in length but under 400 tonnes engaged on international voyages.<sup>18</sup>

Where something occurs that affects, or might affect, the ship's compliance with the anti-fouling requirements, **new section 14** requires the master and owner of an Australian ship which has a certificate to submit a report to AMSA. The report must be given within seven days of the relevant event, otherwise the master and owner are each guilty of a (strict liability) offence carrying a maximum penalty of 100 penalty units *per day* until the report is given.

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Where conduct under Part 3 is an offence under State or Territory law, there is no offence under the Act.

**Part 4 (new sections 16-19)** deal with inspection powers.

Any ‘appropriately qualified’ person may be appointed as an inspector by AMSA. Surveyors under the *Navigation Act 1912* and Australian Federal Police officers are automatically deemed to be inspectors.

**New section 17** provides inspectors with various powers with respect to an Australian or foreign ship in a shipping facility. Those powers may be exercised to determine:

- whether the vessel complies with the Bill;
- whether the vessel complies with the AFS Convention; and
- whether a foreign law designed to implement the AFS Convention is being complied with in respect to the vessel.

Essentially, the inspector may board and inspect any part the machinery, hull, hold or compartment, as well any documents or records relating to the ship or its cargo. The inspector may take samples of substances on the ship and copies of records or documents. The inspector may compel the ships’ master to facilitate the inspection by allowing access to the vessel and its records and documents etc. They may also require a person to answer questions.

Any failure to comply with an inspector’s requirement carries a maximum penalty of 80 penalty units (\$8 800): **new subsection 17(5)**. There are no grounds in the Bill for refusing to comply with a requirement. Thus self-incrimination (in the case a ships master) or acting under orders (say a crew member being instructed by the master not to produce certain documents) cannot excuse non-compliance.<sup>19</sup> Nor is there any requirement on the part of the inspectors to warn that non-compliance is an offence. Whilst in practice inspectors may give such a warning, there seems no obvious reason why a requirement to do so couldn’t be inserted in the Bill.

In exercising his or her powers, an inspector must not act in a ‘manner that is inconsistent with the AFS Convention’: **new subsection 17(4)**. Article 11 of the AFS deals with inspections. The relevant part states:

- (1) A ship to which this Convention applies may, in any port, shipyard, or offshore terminal of a Party, be inspected by officers authorized by that Party for the purpose of determining whether the ship is in compliance with this Convention. Unless there are clear grounds for believing that a ship is in violation of this Convention, any such inspection shall be limited to:

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(a) verifying that, where required, there is onboard a valid International Anti-fouling System Certificate or a Declaration on Anti-fouling System; and/or

(b) a brief sampling of the ship's anti-fouling system that does not affect the integrity, structure, or operation of the anti-fouling system taking into account guidelines developed by the Organization. However, the time required to process the results of such sampling shall not be used as a basis for preventing the movement and departure of the ship.

(2) If there are clear grounds to believe that the ship is in violation of this Convention, a thorough inspection may be carried out taking into account guidelines developed by the Organization.

If evidence of a breach of the Bill obtained in a way violated that **new subsection 17(4)**, it would run the risk of being excluded by the court any subsequent prosecution.<sup>20</sup>

Under **new section 18**, AMSA may detain a ship in a shipping facility if it believes, on reasonable grounds, that an offence has been committed in respect of the ship. However, the ship must be released if certain events occur, notably if suitable security is provided that, in AMSA's opinion, is equivalent to the maximum amount of all penalties, other amounts of money, costs and expenses that could have been payable if convictions had been recorded in respect of relevant offences.

If a ship leaves a shipping facility while it is still under detention, the master and owner are each guilty of a strict liability offence - maximum penalty of 1,000 penalty units: **new subsection 18(4)**.<sup>21</sup>

**New section 19** provides for the payment of reasonable compensation to the owner of a ship if the ship is 'unduly detained or delayed'. This is a standard provision for Commonwealth legislation dealing with inspection of shipping.

**New section 21** provides for the primacy of the flag State<sup>22</sup> in prosecuting contraventions of the AFS Convention and is consistent with Article 228 of the United Nations Convention on the Law of the Sea (UNCLOS). In cases where Australia mounts a prosecution for an offence against the Act involving a foreign ship, should the flag state of that ship commence proceedings in respect of 'corresponding charges' with six months of the Australian proceedings, Australia must suspend its prosecution. Once the foreign proceedings are concluded, the Australian proceedings must be terminated. However, this restriction on Australia proceedings does not apply if the proceedings:

relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels.<sup>23</sup>

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## Concluding comments

The use of environmentally-harmful tributyl tin (TBT) based anti-fouling paint compounds on ships has largely been phased out with respect to Australian ships. When it comes into force, the AFS Convention and Protection of the Sea (Harmful Anti-fouling Systems) Bill 2006 will reinforce this position by effectively prohibiting almost all ships and floating platforms with such compounds from Australian ports, shipyards and offshore terminals. However, the AFS Convention, and thus the main provisions of the Bill, are unlikely to come into force until at least late 2007.

## Endnotes

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1. However, if these provisions are not proclaimed to commence with six months of the Convention coming into force, they will come into force on the first day after the six months expires. In this case, the commencement date must be announced in the *Gazette*.
2. The National Interest Analysis is a document prepared by the Government to assist the consideration of the relevant Convention by the Parliamentary Joint Standing Committee on Treaties (JSCOT).
3. National Interest Analysis – AFS Convention, paragraph 5.
4. For convenience, these are collectively referred to as ‘ships’ in this Digest.
5. The definition of ships in the Bill excludes such government ships.
6. Article 3(2).
7. Personal communication, Department of Defence, 28 July 2006.
8. In the language of the AFS convention, these HAFs are described as ‘organotin compounds which act as biocides in anti-fouling systems’.
9. *op cit.* paragraphs 25-28.
10. *ibid.*, paragraph 25. Also, personal communication, Department of Transport and Regional Services, 26 July 2006.
11. [Transcript of Evidence](#), public hearing 24 March 2004, p. 34.
12. National Interest Analysis, paragraph 3.
13. See [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=247](http://www.imo.org/Conventions/mainframe.asp?topic_id=247) accessed on 25 July 2006.

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14. Senator Judith Troeth, ‘Industry and government agree to phase out TBT marine anti-fouling paints’ [Media Release](#) 23 April 2003.
15. A person is negligent with respect to a physical element of an offence if his or her conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; *and* such a high risk that the physical element exists or will exist that the conduct merits criminal punishment for the offence. See *Criminal Code Act 1995* Section 5.5.
16. Under subsection 4B(3) of the *Crimes Act 1914*, if the guilty part is a corporation, the maximum fine is five times that applying to a natural person. Hence for a **new subsection 8(1)** offence, the maximum fine for a corporation is \$1.1 million. The subsection 4B(3) principle applies to all pecuniary penalties in the Bill.
17. As previously mentioned, this does not apply to pre-2003 ‘exempt platforms’.
18. The details of declarations will be prescribed by regulations or marine orders.
19. The ‘mistake of fact’ defence under section 9.2 is available.
20. For example, see section 138 of the *Evidence Act 1995* (Cmth). The relevant prosecuting authority may also decline to prosecute if key evidence was unlawfully obtained.
21. Due to the operation of section 11.1 of the *Criminal Code 1995*, attempting to leave the shipping facility would also be an offence.
22. The ‘flag State’ is the country in which the ship is registered.
23. Article 228(1) UNCLOS.

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