



Maritime Legislation Amendment (Prevention of Air Pollution from Ships) Bill 2006

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Law and Bills Digest Section

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Maritime Legislation Amendment (Prevention of Air Pollution from Ships) Bill 2006

Date introduced: 6 December 2006

House: House of Representatives

Portfolio: Transport and Regional Services

Commencement: Sections 1 to 3 commence on Royal Assent. Schedule 1, dealing with Annexe VI of MARPOL, commences on proclamation, with the proviso that this must not be before Annexe VI enters into force in Australia. Schedule 2 mostly commences the day after Royal Assent.

Purpose

The main purpose of the Bill is to amend Commonwealth maritime pollution legislation to enable ratification of Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL).

Background

Australia is a Party to the International Convention for the Prevention of Pollution from Ships 1973/78, commonly known as the MARPOL Convention. The origins of MARPOL largely lie in the international reaction to the grounding of the Torrey Canyon oil tanker in the English Channel the late 1960s. That accident resulted in the spillage of 120,000 tons of crude oil into the sea, causing massive environmental damage. MARPOL was developed by the International Maritime Organisation (IMO), of which Australia is a founding member.

MARPOL includes 6 technical annexes, each dealing with a different form of marine pollution. The Maritime Legislation Amendment (Prevention of Pollution from Ships) Bill 2006 (the Bill) relates to Annex VI, which deals with air pollution. Annex VI, which was introduced through a 1997 Protocol to MARPOL, covers issues such as sulphur and nitrous oxide emissions from diesel engines, the release of volatile organic compounds (VOCs) from oil tanker cargoes, the use of ozone depleting substances (ODS) and standards for, and the operation of, onboard incinerators.

In early 2004, Annex VI was reviewed by the Joint Standing Committee on Treaties (JSCOT). In its [report](#), it recommended that Australia ratify Annex VI. The report also stated:

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The Committee understands that the shipping industry will be the main body affected by the proposed legislation and that there has been extensive consultation at all stages in the development of the regulations contained in Annex VI. An example of this communication is AMSA Marine Notices advising ship owners on the current position regarding Annex VI, the technical requirements and retrospective application.

4.33 The Committee understands that [the Commonwealth department of Environment and Heritage] was also consulted in relation to the Annex to ensure the provisions for [ozone depleting substances] were consistent with existing Australian regulations, and that extensive consultations with [the Department of Industry, Tourism and Resources] resulted in agreement on how to implement provisions for offshore fixed and floating drilling rigs and other platforms.

4.34 The Committee notes that 'industry firmly supports early international entry into force of the 1997 Protocol'. The Committee understands that no objections or concerns were raised by the Australian Transport Council (ATC), comprising Government and State and Territory Transport Ministers, when consultations took place in November 2002. The ATC agreed that the implementing legislation should be expressed to apply to all Australian jurisdictions, with a savings clause to preserve the operation of any existing or future complementary State/Territory legislation.

According to the [National Interest Analysis](#) issued by the Commonwealth for the purposes of the JSCOT review of Annex VI, key obligations of the 1997 Protocol include:

- Regular surveys and inspections of ships to verify compliance with the requirements of the 1997 Protocol. For ships of 400 gross tonnage or more, the surveys are specified in the 1997 Protocol; for ships below this size, the survey and inspection regime is left to the flag State to determine (Regulation 4).
- The issue of an International Air Pollution Prevention Certificate, after inspection, to any ship of 400 gross tonnage or more engaged in voyages to ports or offshore terminals under the jurisdiction of other Parties (Regulation 6).
- Marine diesel engines (other than emergency engines) with a power output of more than 130kW installed on ships built on or after 1 January 2000 and existing engines undergoing major conversion (which includes installing new engines in existing ships) must comply with specified emission standards for NO_x using the test procedure and test methods set out in the NO_x Technical Code. These NO_x requirements will apply retrospectively from 1 January 2000 once the Annex enters into force (Regulation 13).
- Fuel oil supplied to ships must have not more than 4.5% sulphur content except that in the case of ships operating in designated sulphur emission control areas a limit of 1.5% is specified (Regulation 14).
- Shipboard incinerators installed on or after 1 January 2000 must meet specified performance standards and must be operated by trained personnel. The incineration

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of certain substances, such as oil cargo residues and garbage containing more than traces of heavy metals, is prohibited (Regulation 16).

- Fuel oil supplied to ships must meet minimum quality standards and the sulphur content documented by the supplier by means of a bunker delivery note. This document is to be kept on board a ship and retained for three years after delivery of the oil (Regulation 18).

According to the evidence given to the JSCOT review of Annexe VI, it was expected that legislation to implement Annex VI would be introduced sometime in 2004. No reason is provided in the Second Reading Speech or Explanatory Memorandum for the Bill as to the failure to introduce legislation in order to enable ratification by the time Annex VI came into force internationally in May 2005. In view of this, it is worth noting the comment of the National Interest Analysis:

If Australia does not become a Party to the 1997 Protocol, there is a risk that the level of environmental protection in Australia will fall short of internationally adopted standards, and that may encourage more polluting ships to operate in Australian waters as other countries tighten their regulation of emissions.

Financial implications

The Explanatory Memorandum states that there will be some extra administrative impacts both on the Australian Maritime Safety Authority (AMSA) and fuel oil suppliers, but these are likely modest and have minimal financial impact.

Main provisions

Schedule 1 – Prevention of air pollution from ships

Amendments to the *Navigation Act 1912*

Item 3 inserts a **new Division 12D** into Part IV of the *Navigation Act 1912*. This deals with the air pollution prevention certification and related survey requirements that apply to ships.

New Division 12D will not apply to ships that are subject to State or Territory laws that give effect to the relevant parts of Annexe VI.

Australian ships of 400 gross tonnes or more must have an air pollution prevention certificate issued by AMSA or a survey authority – failure to do so is an offence.¹ The maximum penalty is 100 penalty units (\$11 000) for an individual and 500 penalty units (\$55 000) for a corporation. As is quite usual with Commonwealth maritime pollution

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legislation, the offences are ones of strict liability and both the ships' master and owner may be liable to be prosecuted. The Explanatory Memorandum comments that the offences:

impose collective responsibility on both the shipowner and the master of the ship because of the shared responsibility of the shipowner and the master of the ship, and the difficulty in ascertaining who is most directly responsible for the offence. While the master of the ship has immediate responsibility for the ship, he or she is subject to the direction of the shipowner.

The high penalties have been developed to discourage shipping operators from attempting to avoid compliance with the proposed Act as a cost saving measure. The maximum penalty is proportionate to discourage non-compliance and takes into consideration the levels of cost savings that such shipping operators may achieve and the perceived likelihood of non-compliant ships being identified and prosecuted. These provisions are consistent with other penalty provisions in similar maritime legislation.

It is appropriate to use strict liability for the relevant offences because the defendant is the best placed person to provide evidence on whether any culpability should be attached to the physical offence. The elements of the offence that deal with the intention of the master of the ship or shipowner and whether or not the act was committed as a result of intention or negligence or was the result of an honest and reasonable mistake will be specifically and exclusively within the defendant's knowledge, making it easier and less costly for the defendant to disprove an unjust charge than for the prosecutor to make out the fault elements of a just charge. In these circumstances it would be difficult and costly for the prosecutor to attempt to prove the fault elements for many of the maritime offences in this Bill, and so the effectiveness of the regulatory regime established by the Bill may be undermined if the offences were not offences of strict liability.²

If AMSA considers a foreign ship is not constructed in accordance with Annex VI³, it may give written directions to the master or owner that it not to enter any port, or use any off-shore terminal, or to enter or use such facilities subject to specified conditions: **new section 267ZZF**. AMSA may only give a direction to the extent 'that it appears to it necessary or expedient to protect the environment'. Failure to obey a properly served direction is an offence, for which both the master and owner are liable. The maximum penalty is 100 penalty units for an individual and 500 for a corporation for the strict liability offence. However, if the owner or master is reckless as to whether there is failure to comply with the offence, the maximum penalty climbs to 500 penalty units (\$55 000) for an individual and 2500 (\$275 000) penalty units for a corporation.

Amendments to the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*

Item 7 inserts a **new Part IIID** into the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. The new division deals with fuel oil quality requirements.

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New section 26FEG prohibits the use of fuel oil on a ship that has a sulphur content of no more than 4.5 per cent. Contravention of this requirement within Australian waters or on an Australian ship beyond the Exclusive Economic Zone (EEZ) is an offence. Again there is a strict liability offence and an ordinary (ie fault-based) offence – the latter requires a person to be reckless or negligent in their conduct which results in high-sulphur fuel being used on board the ship. In such cases, the maximum penalty is 2,000 penalty units (\$220 000) for an individual and 10,000 units (\$1 100 000) for a corporation.

Annexe VI provides that special rules apply in sulphur oxide [SO_x] emission control areas. In these areas, the sulphur content of fuel oil used onboard ships must not exceed 1.5 per cent. Alternatively, ships must fit an exhaust gas cleaning system or use any other technological method to limit SO_x emissions. To date, only the Baltic sea and North sea areas have been designated as SO_x Emission Control Areas. **New section 26FEH** creates offences for Australian ships breaching SO_x emission control area rules. There are ordinary and strict liability offences as is the case for **new section 26FEG**, and the penalties are the same also. There are the usual defences for emergencies or unavoidable damage to the ship or its equipment: **new subsections 26FEH(6)-(8)**. In cases where new SO_x Emission Control Areas are declared under Annexe VI procedures, the relevant offence provisions created by the Bill do not apply until 12 months after the declaration of the new area comes into force: **new section 26FEK**.

New sections 26FEL-26 FER (Division 3 of new Part IIID) deal with fuel oil quality requirements.

Persons supplying fuel oil to ships within Australian waters (including ports and the like) must be registered on a register to be created by AMSA: contravention of this carries a penalty of 200 (\$22 000) penalty units for a person or 1000 (\$110 000) units for a corporation: **new section 26FEL**.

New section 26FEN prohibits the use of fuel oil on a ship that does not meet Annexe VI standards. Contravention of this requirement within Australian waters, or on an Australian ship beyond the EEZ renders both the ship master and owner to a strict liability offence with a maximum penalty of 500 penalty units (\$55 000) for an individual and 2500 (\$275 000) penalty units for a corporation.

Persons delivering fuel oil to ships of at least 400 gross tonnes within Australian waters, must also provide the ships' master with a 'bunker delivery note' and oil sample in accordance with the regulations. Failure to do either is a strict liability offence with a maximum penalty of 200 penalty units (\$22 000) for an individual and 1000 (\$110 000) penalty units for a corporation: **new section 26FEO**. It appears that bunker delivery notes will contain a declaration that the fuel meets Annexe VI standards. In such cases, if the fuel does not meet the standard, the supplier commits a strict liability offence with a maximum penalty of 500 penalty units (\$55 000) for an individual and 2500 (\$275 000) penalty units for a corporation: **new section 26FEP**.

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New sections 26FEQ and **26FER** contain provisions requiring the retention of bunker delivery notes and fuel oil samples for certain periods. Contravention of these are strict liability offences.

Schedule 2 – Other amendments

Amendments to the *Navigations Act 1912*

Items 1-4 substitute references to ‘pilot’ with ‘licensed pilot’ in the provisions of the Act that deal with compulsory pilotage. Existing Division 1 of Part IIIA already deal with the licensing of pilots. Items 1-4 appear to be aimed at removing any ambiguities that compulsory pilotage must be done by licensed pilots.

Items 5-8 makes changes such that the provisions of the Act⁴ dealing with MARPOL Annex I (oil pollution) will not apply to ships covered by State or Territory law giving effect to Annex I.

Amendments to the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*

These amendments seem to be mostly minor or technical in nature.

Concluding comments

The provisions of the Bill include the creation of strict liability offences with shipowners and ships’ masters liable for significant financial penalties for these offences. However, these are in line with recent Acts that have implemented international maritime anti-pollution agreements – see for example *the Protection of the Sea (Harmful Anti-fouling Systems) Act 2006*.

As noted in the background section of this Digest, the evidence before the JSCOT inquiry into the proposed ratification of Annex VI suggested that stakeholders supported ratification. This said, neither the Explanatory Memorandum nor second reading speech for the Bill contains any details about whether relevant stakeholders have been consulted on the specifics of the Bill, particularly the offence provisions.

Endnotes

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1. Although **new subsection 267ZZC(3)** notes that in some cases, an offence will only occur if the ship puts to sea after certain events or dates.
 2. Explanatory Memorandum, p. 3.

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3. The direction is still valid even if AMSA is wrong in its opinion: **new subsection 267ZZF(4)**.
4. Division 12 of Part VI.

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