



Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008

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Contents

Purpose.	2
Background.	2
Financial implications	4
Main provisions.	4

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008

Date introduced: 20 March 2008

House: House of Representatives

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Commencement: Royal Assent or the day when the International Convention on Civil Liability for Bunker Oil Pollution Damage comes (or enters) into force in Australia, whichever is the later. If the Convention does not enter into force, the provisions will not commence.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To establish the legislative regime necessary to implement the *International Convention on Civil Liability for Bunker Oil Pollution Damage* in Australia.

Background

The 2001 [International Convention on Civil Liability for Bunker Oil Pollution Damage](#) (the Bunker Oil Convention) establishes a liability and compensation regime for pollution damage caused by spills of bunker oil. Bunker oils are those used in the operation of the relevant ship, including fuel oil for its engines. This contrasts with oil carried as cargo.

The Bunker Oil Convention is one of a series of maritime pollution conventions created by the [International Maritime Organisation](#) (IMO) over recent decades. Spills from oil tankers, including of bunker oil, are covered by the 1992 International Convention on Civil Liability for Oil Pollution Damage.¹

1. This has been implemented in Australia.

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The Bunker Oil Convention applies to pollution damage caused by spills of bunker oil from ships (other than oil tankers) that are in the waters² of countries that are Parties to the Convention. The key features include:

- the shipowner is strictly liable for pollution damage caused by bunker oil on board or originating from the ship (Article 3);
- the shipowner is able to limit liability under any applicable State or international regime (Article 6);
- the registered owners of ships having a gross tonnage greater than 1,000 are required to maintain insurance to cover any potential liability (Article 7(1)); and
- claims for compensation for pollution damage may be brought directly against the insurer (Article 7(10)).

The Bunker Oil Convention was signed by Australia in 2002, but Australia has not ratified it as yet. As the Convention has achieved the requisite number of ratifications, it will come into force internationally on 21 November 2008. If Australia ratifies the Bunker Oil Convention on or before 21 August 2008, it will enter into force on 21 November. Otherwise the Bunker Oil Convention will enter into force 3 months after it is ratified by Australia.

The Bunker Oil Convention was tabled in Parliament in March 2006. It was subject to a relatively brief review process by the Joint Standing Committee on Treaties (JSCOT). The key part of the JSCOT [report](#) stated:³

There will be minor costs associated with ensuring compliance with the Bunkers Convention, in particular, Australian Customs Service will be responsible for verifying that ships are carrying the relevant certificates. However, similar inspection and certification procedures are already in place so the existing checks will be extended to cover the insurance certificate. Furthermore, ships entering Australian ports are already required by the Civil Liability Act to be insured to cover pollution damage.

Consultation was undertaken with stakeholders in three stages: first, during the development of proposals for a new convention and the preparation of technical briefs for the Australian delegation attending the Legal Committee sessions where the text of the Convention was being drafted; second, during the preparation of the brief on the final text for the Australian delegation attending the Diplomatic Conference; and

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2. Such waters extend out to the limit of a country's Exclusive Economic Zone (EEZ), which maybe up to 200 nautical miles from the relevant coastline, including that of any applicable islands.
 3. Report 75, Paragraphs 5.13-5.17, 5 June 2008. Chapter % of the report can be accessed at <http://www.aph.gov.au/house/committee/jsct/28march2006/report2/chapter5.pdf>

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third, after the Bunkers Convention was adopted, when determining whether Australia should adopt the Bunkers Convention.

Key groups within the shipping industry, including the Australian Shipowners Association, Shipping Australia Limited (which represents overseas shipowners operating in Australia) and the Association of Australian Ports and Marine Authorities all support adoption of the Bunkers Convention.

The Bunkers Convention will be implemented by a proposed Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill which is expected to be introduced into Parliament in 2006.

The Committee supports the establishment of a liability and compensation regime for oil pollution damage caused by oil spills other than from oil tankers.

Recommendation 4 - The Committee supports the *International Convention on Civil Liability for Bunker Oil Pollution Damage* and recommends that binding treaty action be taken [emphasis added].

The implementation of IMO maritime pollution conventions through Commonwealth legislation is a fairly routine matter. The provisions of the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008 (the Bill), including those creating some strict liability offences⁴ for both ships' masters and owners are generally in accordance with similar past legislation such as the *Maritime Legislation Amendment (Prevention of Air Pollution from Ships) Act 2007* and the *Protection of the Sea (Harmful Anti-fouling Systems) Act 2006*.

Financial implications

The Explanatory Memorandum states that there are no financial implications arising from the Bill.

Main provisions

Clause 4 is a fairly standard provision stating that while Commonwealth, State and Territory governments are bound by the Bill, they cannot be prosecuted for any offence under it. A ship that is owned or operated by a Commonwealth, State and Territory government will only be potentially subject to the liability regime if was being used for commercial purposes: **clause 9**.

4. The justification for strict liability in the case of this Bill is that knowledge of the requirements of, and compliance with, the legislation is with the defendant. Explanatory Memorandum, p. 11.

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Under clause 6, unless the contrary intention appears, the Bill (and thus relevant parts of the Convention) applies outside of Australian waters. So for example, Australian-registered ships operating in international or foreign waters could still be potentially subject to relevant requirements imposed by the Bill.

Part 2 of the Bill sets out the liability of shipowners for pollution caused by bunker oil. **Clause 11** states the relevant liability provisions of the Bunker Oil Convention⁵ have the force of (Commonwealth) law. Financial liability only applies where the pollution damage occurs in Australia or its exclusive economic zone (EEZ), or where preventative measures are taken outside the EEZ in order to combat pollution that threatens the EEZ.

Note that as is commonly the Australian practice in relation to implementation of certain IMO maritime pollution conventions, States and Territory Governments may give effect to the relevant conventions through their own laws. In such cases, the provisions Bill will not apply: **clause 10**. However, there are restrictions on when this ‘ousting’ of Commonwealth law will occur – for example the Bill would continue to apply where the relevant ship(s) involved in the pollution incident was engaged in an international voyage: **subclause 10(2)**.

Part 3 requires that certain ships carry insurance certificates relating to liability for pollution damage. Ships under 1,000t gross tonnage, and government ships used for non-commercial purposes, are exempt from this. Certificates may be issued by both the Australian Maritime Safety Authority (AMSA) or an authority of a foreign country, depending on the circumstances.

Clauses 16-17 set out the offence provisions applying to the ships’ master and owner if the relevant ship does not have the appropriate insurance certificate.⁶ For ease of reference, a table in **clause 15** sets out the type of certificate that is required, depending on where the ship is registered, and who owns or operates it.

For foreign-registered ships, the offence provisions seem only to relate to when the ship enters or leaves an Australian port or offshore facility. Thus they would not apply to a foreign ship that is merely transiting Australian waters. The offence is one of strict liability (ie no ‘fault’ has to be proved), and carries a maximum penalty of 500 penalty units (\$55 000). However, if the ship owner is a corporation, the maximum penalty for a prosecution would be five times that, or \$275 000. The fact that the offence is one of strict liability and

5. Articles 3, 5, 6, 8 and paragraph 8 of Article 10.

6. Certificates can be held in electronic form by the country that issues them, as long these records are accessible by all Parties to the Bunker Oil Convention.

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applies to both ships' masters and owners is common practice in recent Commonwealth maritime pollution legislation of this type. The Explanatory Memorandum comments:⁷

It is appropriate that an offence for breach of clause 16 be a strict liability offence for consistency with the equivalent offence in the *Protection of the Sea (Civil Liability) Act 1981*. The offence is directed only at the registered owner or master of a ship. Such a person can be expected to be fully aware of the requirements of the legislation (and of the Bunker Oil Convention) and the need to have an insurance certificate on board a ship.

The collective liability of the registered owner and master for an offence against clause 16 is appropriate for a number of reasons. Firstly, although the master has immediate responsibility for ensuring that appropriate certificates are carried on board a ship, it is the registered owner's responsibility to ensure that the ship is insured to cover the owner's liabilities under the applied provisions of the Bunker Oil Convention. It may be the case that the registered owner has not arranged for the appropriate insurance cover nor obtained an insurance certificate. In such a case, although it is the master who has committed the actual act that breached the law by, for example, bringing a ship without a certificate into a port, the owner is equally culpable.

Secondly, 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. This mechanism allows the prosecution of a defendant who may have greater culpability and who would otherwise escape liability.

It is also well established in shipping law that offence provisions should apply collectively to the master and the owner. There is precedent in both State and Commonwealth legislation. This is the basis for the comment in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* that provides that "collective responsibility is well established in shipping law [where] it has been traditional for offence provisions to apply to master and owner".

Clause 17 is similar to **clause 16** but applies to Australian registered ships. However, the offence may occur at any 'time the ship is in operation'.

Clauses 18-19 are administrative provisions that deal with the issuing of insurance certificates to ships registered either in Australia or a country that is not a Party to the Bunker Oil Convention. Notably, AMSA must be satisfied that the registered owner (or the operator, if it is a ship leased and operated by the Commonwealth, or a State or Territory Government) has financial insurance cover at least up to the limits of liability applying to ships the Bunker Oil Convention. Insurance certificates applying to non-

7. Explanatory Memorandum, pp. 11-12.

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government ships may be subsequently cancelled by AMSA if it is satisfied that the registered owner no longer has the appropriate financial cover: **clause 22**. Such a cancellation, as well as any refusal to issue a certificate in the first place, is reviewable by the Administrative Appeals Tribunal: **clause 24**.

Clauses 20-21 deal with powers of ‘enforcement officers’. These are customs officers, surveyors appointed under the *Navigation Act 1912*, or persons included in a class of persons prescribed by regulations: **clause 3**. Enforcement officers can require the ships’ master or other person in charge to produce the appropriate insurance certificate: **clause 20**. A failure to comply with the requirement is a strict liability offence, carrying a penalty of 20 penalty units (\$2 200).⁸

Clause 21 enables an enforcement officer to detain a ship attempting to leave an Australian port if they have reasonable grounds to believe that the ship does not have the relevant insurance certificate. Should a ship be detained, and then leaves (or attempts to leave) before being released from detention, both the ships’ master and owner commit a strict liability offence, carrying a maximum penalty of 2,000 penalty units (\$220,000), or \$1,100,000 if the owner is a corporation.

Part 4 deals with miscellaneous matters. Notably, **clauses 28 and 29** deal with the situation in which the owner of a ship that comes within the jurisdiction of the Bill is a partnership or unincorporated association. Under these clauses, each member of the partnership, or each member of the association’s management committee, may be liable for an offence as owner of the relevant ship, but only where they can be proven to have known, or reasonably ought to have known, that the partnership or association was the registered owner.

8. No offence occurs if the certificate is in electronic form (see comment above in footnote 6).

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