



Protection of the Sea Legislation Amendment Bill 2010

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Protection of the Sea Legislation Amendment Bill 2010

Date introduced: 3 February 2010

House: House of Representatives

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Commencement: The formal provisions commence on Royal Assent. **Schedule 1** commences on the day after Royal Assent or 1 July 2010 (whichever occurs last), and **Schedule 2** commences the day after Royal Assent.

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

The Bill amends the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (the Prevention of Pollution from Ships Act) to give domestic effect to recent amendments to Annex VI of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL).¹

The Bill also amends the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (the Bunker Oil Act) to provide protection for persons or organisations who act reasonably and in good faith when assisting in a clean-up following a spill of oil from a ship.

Background

MARPOL—the modified International Convention for the Prevention of Pollution from Ships

MARPOL is one of a number of conventions adopted by the International Maritime Organization (IMO) to reduce pollution by ships. It entered into force internationally on

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1. IMO, 'International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL)' (hereafter 'Summary of MARPOL'), IMO website, viewed 5 February 2010, http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258
Note that there are also various Australian state laws that give effect to the Convention.

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2 October 1983² and in Australia on 14 January 1988.³ Australia's obligations under the Convention were given domestic effect (on behalf of the Commonwealth of Australia) by amendments to the Prevention of Pollution from Ships Act and the *Navigation Act 1912* (the Navigation Act).

MARPOL has six technical annexes which deal with the following aspects of maritime pollution:

- Annex I: Prevention of pollution by oil
- Annex II: Control of pollution by noxious liquid substances
- Annex III: Prevention of pollution by harmful substances in packaged form
- Annex IV: Prevention of pollution by sewage from ships
- Annex V: Prevention of pollution by garbage from ships
- Annex VI: Prevention of air pollution from ships

While about 150 countries have adopted some of the annexes, Australia has adopted all six.⁴

Annex VI: Prevention of Air Pollution from Ships

As previously mentioned, Annex VI deals with air pollution from ships. It was originally adopted by the IMO in September 1997.⁵ While it entered into force internationally on 19 May 2005,⁶ Annex VI did not enter into force in Australia until 10 November 2007.⁷

The IMO explains that the purposes of Annex VI are to:

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2. Ibid.
 3. Australian Maritime Safety Authority, 'Protection of the Sea—Conventions and legislation', viewed 6 February 2010, http://www.amsa.gov.au/marine_environment_protection/protection_of_pollution_from_ships/conventions_and_legislation.asp
 4. Annexes III–VI are optional.
 5. Ibid., and IMO, op. cit.
 6. Ibid.
 7. Schedule 1 to the *Maritime Legislation Amendment (Prevention of Air Pollution from Ships) Act 2007* (Act No. 24, 2007) amended the Prevention of Pollution from Ships Act and the Navigation Act to give domestic effect to Annex VI. While that Act received Royal Assent on 15 March 2007, Schedule 1 did not commence until 10 November 2007, which was the commencement date provided in the Proclamation made on 26 September 2007 under the *Maritime Legislation Amendment (Prevention of Air Pollution from Ships) Act 2007*. See Australian Government, 'Legislative Instrument F2007L03764', ComLaw website, viewed 6 February 2010, <http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/asmade/byid/8F1F780E8E705110CA25735B0008A641?OpenDocument>

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- set limits on sulphur oxide (SO_x) and nitrogen oxide (NO_x) emissions from ship exhausts and prohibit deliberate emissions of ozone depleting substances
- impose a global cap of 4.5 per cent m/m (mass) on the sulphur content of fuel oil
- call on IMO to monitor the worldwide average sulphur content of fuel once the Protocol comes into force
- allow special ‘SO_x Emission Control Areas’ to be established with more stringent control on sulphur emissions in those parts of the seas which are close to heavily populated areas⁸
- prohibit deliberate emissions of ozone depleting substances, which include halons and chlorofluorocarbons (CFCs)⁹
- set limits on emissions of nitrogen oxides (NO_x) from diesel engines, and¹⁰
- prohibit the incineration on board ship of certain products, such as contaminated packaging materials and polychlorinated biphenyls (PCBs).¹¹

Amendments to Annex VI (October 2008)

In October 2008, Annex VI was revised to reduce harmful emissions from ships even further. The main changes can be summarised as follows:

- the cap of sulphur oxide (SO_x) emissions from ships will initially be reduced from 4.5 per cent to 3.5 per cent (from 1 January 2012) and subject to a feasibility review to be completed no later than 2018, the cap will be further reduced to 0.5 per cent (from 1 January 2020)

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8. Department of Infrastructure, Transport, Regional Development and Local Government, ‘Prevention of Pollution from Ships’, departmental website, 27 January 2010, viewed 5 February 2010, <http://www.infrastructure.gov.au/maritime/environment/pollution.aspx> The IMO explains that in SO_x Emission Control Areas, ‘the sulphur content of fuel oil used on board ships must not exceed 1.5% m/m. Alternatively, ships must fit an exhaust gas cleaning system or use any other technological method to limit SO_x emissions’. Currently only the Baltic Sea and the North Sea have been designated as Emission Control Areas. See IMO, ‘New rules to reduce emissions from ships enter into force’, IMO website, 18 May 2005, viewed 5 February 2010, http://www.imo.org/newsroom/mainframe.asp?topic_id=1018&doc_id=4884
 9. IMO, ‘New rules to reduce emissions from ships enter into force’, op. cit. Under Annex VI, new installations containing ozone-depleting substances are prohibited on all ships, but new installations containing hydro-chlorofluorocarbons (HCFCs) are permitted until 1 January 2020.
 10. A mandatory NO_x Technical Code, developed by IMO, defines how this is to be done.
 11. IMO, ‘Summary of MARPOL’, op. cit., under the heading ‘The Protocol of 1997 (Annex VI - Regulations for the Prevention of Air Pollution from Ships)’.

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- the limits applicable in Sulphur Emission Control Areas (SECAs) will be initially reduced from 1.5 per cent to 1 per cent (from 1 July 2010) and then further reduced to 0.1 per cent (from 1 January 2015)
- there will be progressive reductions in nitrogen oxide (NOx) emissions from marine engines, particularly those ‘Tier III’ engines operating in Emission Control Areas¹²
- emission control areas can be designated for SOx *and* particulate matter,¹³ or NOx (or all three types of emissions from ships), subject to a proposal from a state party to Annex VI, which would be considered for adoption by the IMO ‘if supported by a demonstrated need to prevent, reduce and control one or all three of those emissions from ships’, particularly for health reasons.¹⁴

These changes enter into force internationally on 1 July 2010.¹⁵ **Schedule 1** to the Bill gives domestic force to the amendments, with effect from either Royal Assent or 1 July 2010 (whichever occurs last).¹⁶

Protection for persons and organisations who provide assistance following an oil spill

The Bunker Oil Act gives domestic effect to Australia’s obligations as a party to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunker Oil Convention). That Convention was adopted by the IMO on 23 March 2001 and entered into force internationally on 21 November 2008.¹⁷ The Bunker Oil

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12. A ‘Tier III’ engine is an engine installed on ships constructed on or after 1 January 2016. See Regulation 13—Nitrogen Oxides (NOx) of Annex VI, particularly paragraphs 5.1 and 5.2.
 13. The term ‘particulate matter’ refers to a collection of particles that ‘can be suspended or will float in the air’. The particles are usually made up of a number of different substances, including: dust from soil or smoke; pollen grains, bacteria, fungal spores; dust from wheat, barley and other cereals; tiny pieces of skin from animals; and dust and fumes from chemical processes, welding, painting, gritblast cleaning and other industrial processes. See Department of Primary Industries, Parks, Water and Environment (Tasmania), ‘What is particulate matter?’, departmental website, viewed 9 February 2010, <http://www.environment.tas.gov.au/index.aspx?base=292>
 14. IMO, ‘Summary of MARPOL’, op. cit., under the heading ‘The 2008 amendments’. The revised text of Annex VI (Resolution MEPC.176(58)) is available electronically at IMO, ‘Amendments to the Annex of the Protocol of 1997 to amend the International Convention For The Prevention Of Pollution From Ships, 1973, as modified by the Protocol of 1978 relating thereto’ (‘Revised MARPOL Annex VI’), IMO website, 10 October 2008, viewed 5 February 2010, http://www.imo.org/includes/blastDataOnly.asp/data_id%3D23760/176%2858%29.pdf
 15. IMO, ‘Revised MARPOL Annex VI’, preamble, paragraph 3.
 16. Clause 2 to the Bill.
 17. IMO, ‘International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001’, IMO website, 2008, viewed 6 February 2010, http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=666
The actual text of the Convention is available at *Australian Treaty Series*, [2009] ATS 14,

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Convention entered into force in Australia on 16 June 2009, 'being three months after the date on which Australia's instrument of ratification for the Bunker Oil Convention was deposited with the Secretary-General of the International Maritime Organization'.¹⁸

The purpose of the Bunker Oil Convention is 'to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers'.¹⁹ It applies 'to damage caused on the territory, including the territorial sea, and in exclusive economic zones' of states parties to the Convention.²⁰

In summary, the Bunker Oil Act establishes a liability and compensation scheme where shipowners are strictly liable for pollution damage resulting from a spill of bunker oil from their ships.²¹ (Prior to the making of the Bunker Oil Act, shipowners were only liable if they were at fault.) Liability is based on the size of the ship, with ships more than 1000 gross tonnage being required to take out insurance to cover liability up to the limits set out in the Convention on Limitation for Maritime Claims. Insurance certificates will be issued

- Austlii website, viewed 6 February 2010, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/2009/14.html>
18. Explanatory Statement, Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Regulations 2009 (being Select Legislative Instrument no. 101 of 2009), viewed 6 February 2010, http://www.austlii.edu.au/au/legis/cth/num_reg_es/potslfbopdr2009n101o2009833.html A copy of the regulations is available at Australian Government, 'Legislative Instrument F2009L02140', Comlaw website, viewed 6 February 2010, <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200942550?OpenDocument>
19. IMO, 'International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001', op. cit.
20. Ibid.
21. As explained in the Bills Digest for the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008, 'bunker oils' are oils 'used in the operation of the relevant ship, including fuel oil for its engines' as opposed to oil carried as cargo. See A Martyn, *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008*, Bills Digest, no. 100, 2007–08, Parliamentary Library, Canberra, 2008, p. 2, viewed 6 February 2010, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd100.pdf> Note that the Bunker Oil Act does not apply to spills from oil tankers—they are covered by a separate (but similar) liability and compensation scheme set out in the International Convention on Civil Liability for Oil Pollution Damage, 1969 (as amended in 1992 and 2000). See IMO, 'International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969', IMO website, viewed 6 February 2010, http://www.imo.org/Conventions/contents.asp?doc_id=660&topic_id=256 That Convention was given domestic effect in Australia by the *Protection of the Sea (Civil Liability) Act 1981*, the *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* and related legislation. See http://www.austlii.edu.au/au/legis/cth/consol_act/potspcfa1993566/ and http://www.austlii.edu.au/au/legis/cth/consol_act/potsla1981357/ viewed 6 February 2010.

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by the Australian Maritime Safety Authority (AMSA) and will need to be carried by ships as proof of insurance.

Schedule 2 to the Bill amends the liability and compensation scheme currently set out in the Bunker Oil Act. That scheme applies to cases of pollution damage resulting from a spill of fuel oil from ships. The rationale for the amendments in Schedule 2 is set out in the Minister's second reading speech:

Another important aspect of this bill is to provide protection for persons or organisations who assist in the clean-up following a spill of fuel oil from a ship.

Recent experience demonstrates that even small oil spills can be very costly. For example, the clean-up and compensation costs following the spill of about 270 tonnes of fuel oil from the *Pacific Adventurer* off the south-east coast of Queensland in March 2009 exceeded A\$30 million.

It is therefore essential that persons or organisations not be deterred from providing assistance because they think they may become liable if their actions inadvertently lead to increased pollution.²²

Position of significant interest groups/press commentary

There has been only very limited commentary on the Bill or its contents. In 2009, Shipping Australia Limited stated that implementing the amendments to Annex VI 'will present a challenge to the oil refining industry to increase its refining capacities to deliver the substantial increase in demand for distillate fuel'.²³ However, it acknowledged that this would not become a major issue until 2015 'when the sulphur content of bunkers used in Emission Control Areas will reduce to 0.1 per cent'.²⁴ This acknowledgment gives support to a statement made by the Minister for Infrastructure, Transport, Regional Development and Local Government, Anthony Albanese MP, in his second reading speech for the Bill. The Minister said that the proposed initial reduction in sulphur fuel content to 3.5 per cent from 1 January 2012 (until 1 January 2015) will have 'little practical impact' on vessel operations in Australia because 'the average sulphur level in

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22. A Albanese MP (Minister for Infrastructure, Transport, Regional Development and Local Government), 'Second reading speech: Protection of the Sea Legislation Amendment Bill 2010', House of Representatives, *Debates*, 3 February 2010, p. 6, viewed 5 February 2010, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-02-03/0025/hansard_frag.pdf;fileType=application%2Fpdf
 23. Shipping Australia Limited, 'Major policy issues: Raising coastal costs will drive cargo to roads', *Shipping Australia*, March 2009, p. 52, viewed 3 February 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FMTLT6%22>
 24. *Ibid.*

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world-wide fuel oil deliveries and the sulphur levels in fuel refined in Australia currently fall below the 3.5% cap'.²⁵

Shipping Australia Limited also noted concern that 'the competitiveness of short sea shipping may be affected due to increase in costs, which may result in a modal shift from shipping to road and rail, which will cause an increase in CO₂ emissions'.²⁶ In this regard, it should be noted that elsewhere in the article, Shipping Australia quoted a finding of the Stern Report to the effect that while shipping currently carries 90 per cent of the world's trade, 'it contributes only 1.4 per cent of mankind's CO₂ emissions'.²⁷

Committee consideration

On 4 February 2010, the Selection of Bills Committee resolved to recommend that the Bill not be referred to a committee.²⁸

Financial implications

The Bill has no financial impact.²⁹

Main provisions

Schedule 1—Prevention of air pollution

All of the items in **Schedule 1** amend the Prevention of Pollution from Ships Act, particularly Part IIID, which deals with prevention of air pollution. Therefore all references to section numbers appearing immediately below are to existing or proposed sections of that Act.

25. A Albanese MP, 'Second reading speech', op. cit., p. 5.

26. Shipping Australia Limited, 'Major policy issues: Raising coastal costs will drive cargo to roads', op. cit.

27. Ibid. The Stern review was conducted by Sir Nicholas Stern, Head of the Government Economic Service and Adviser to the Government on the economics of climate change and development. Lord Stern was formerly World Bank Chief Economist too. A copy of the report is available at HM Treasury (UK Government), 'Stern Review on the Economics of Climate Change', HM Treasury website, 30 October 2006, viewed 6 February 2010, http://www.hm-treasury.gov.uk/sternreview_index.htm Note that the methodology used by the Stern review was the subject of an assessment by the Productivity Commission (Australian Government) in 2008. See Productivity Commission, 'The Stern Review: an assessment of its methodology', Staff Working Paper, 24 January 2008, viewed 6 February 2010, <http://www.pc.gov.au/research/staffworkingpaper/sternreview>

28. Selection of Bills Committee, *Report No. 1 of 2010*, 4 February 2010. See Senate, *Debates*, 4 February 2010, pp. 67–68.

29. Explanatory Memorandum, Protection of the Sea Legislation Amendment Bill 2010, p. 1.

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Items 1 and 2 of Schedule 1 amend subsection 26FEF(1) to repeal the definition of ‘fuel oil’ and insert the definition of ‘gas fuel’. The term ‘gas fuel’ is defined to include liquefied natural gas, compressed natural gas and liquefied petroleum gas.

Items 3–9 amend section 26FEG to give effect to the amendments to Annex VI to MARPOL mentioned above. Section 26FEG currently sets out two offences that are committed if a person uses fuel oil with a sulphur content of more than 4.5 per cent m/m.

The first offence (**existing section 26FEG(1)**) carries a maximum penalty of 2000 penalty units (that is, \$220 000 for a natural person).³⁰ It is committed by a person if:

- the person engages in conduct
- the conduct results in fuel oil with a sulphur content of more than 4.5 per cent being used on board a ship
- the person is reckless or negligent as to causing that result, and
- the fuel oil is used while the ship is in a particular area.³¹

The second offence (**existing subsection 26FEG(2)**) carries a maximum penalty of 500 penalty units (that is, \$55 000 for a natural person).³² It is committed by the master and the owner of a ship if:

- fuel oil with a sulphur content of more than 4.5 per cent m/m is used on board the ship, and
- the fuel oil is used while the ship is in a particular area.³³

Items 3 and 6 replace the current references in section 26FEG to fuel oil having a sulphur content of more than ‘4.5 per cent m/m’ with a more generic ‘prescribed limit’.³⁴ **Items 5**

30. The term ‘penalty unit’ is defined in relation to a natural person in subsection 4AA(1) of the *Crimes Act 1914* as \$110 (unless a contrary intention is expressed in an Act). Section 4B of that Act provides that if a body corporate is convicted of an offence, the penalty that may be imposed on the body corporate cannot exceed five times the maximum penalty that would apply to a natural person.

31. The particular areas are currently: (a) in the sea near a state, the Jervis Bay Territory or an external territory and no law of that state or territory gives effect to Paragraph 1 of Regulation 14 of Annex VI; (b) Australia’s exclusive economic zone; or (c) (if the ship is an Australian ship), beyond Australia’s exclusive economic zone, but not within a sulphur oxide (SOx) emission control area. Paragraph 1 of Regulation 14 (which is entitled ‘Sulphur Oxides (SOx) and Particulate Matter’) states:

The sulphur content of any fuel oil used on board ships shall not exceed the following limits:

- .1 4.50% m/m prior to 1 January 2012;
- .2 3.50% m/m on and after 1 January 2012; and
- .3 0.50% m/m on and after 1 January 2020.

32. See footnote 30.

33. Ibid.

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and **8** also amend **existing section 26FEG** by removing the specific reference to ‘SOx’ emission control areas, thus leaving only a general reference to ‘emission control areas’ (which may or may not involve SOx or some other type of emission). The cumulative effect of the amendments made by **items 3, 5, 6 and 8** is that the offences in section 26FEG will be committed by a master and shipowner if fuel oil with a sulphur content of more than the prescribed amount is used on board an Australian ship that is beyond Australia’s exclusive economic zone but not within a general (that is, a non-SOx-specific) emission control area.

Item 9 inserts **proposed subsections 26FEG(5) and (6)** setting out the exceptions to each of these offences. The offence in question does not apply if the person (or master and shipowner):

- took all reasonable steps to obtain fuel oil with a sulphur content of not more than the prescribed limit, and
- has (in accordance with the regulations) notified a prescribed officer (and, in the case where the ship’s next port of call is in a foreign country, the government of that foreign country), that the person ‘has been unable to obtain fuel oil with a sulphur content of not more than that limit’.

The defendant bears the onus of proving the matters set out in **proposed subsections 26FEG(5) and (6)**.³⁵

Item 22 amends **existing subsections 26FEK(1) and (2)**. Currently, the section provides that where an amendment is made (in accordance with Annex VI) designating an area as an ‘SOx emission control area’, then certain provisions in Part IIID do not apply for 12 months immediately after the amendment concerned enters into force. **Item 22** removes the specific reference to ‘SOx’, with the result that certain provisions in Part IIID will not apply for 12 months after an area is designated as an ‘emission control area’.

Items 23–34 update some of the terminology used in existing Division 3 of Part IIID to reflect the 2008 amendments to Annex VI. Division 3 of Part IIID is currently titled ‘Fuel oil quality requirements’, but following the amendment in **item 23**, it will be titled ‘Fuel oil availability and quality requirements’. **Items 25, 26, 28, 30 and 32** replace current

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34. Section 33 of the Prevention of Pollution Act (which is not affected by the current Bill) gives the Governor-General a discretionary power to make regulations, not inconsistent with that Act, prescribing matters required or permitted by that Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to that Act. Any regulation prescribing the limit on the sulphur content of fuel oil would be subject to parliamentary disallowance under Part 5 of the *Legislative Instruments Act 2003*—noting, of course, that the limit set out in the regulation would presumably match the rate set out in Annex VI and there would thus be little role for parliamentary scrutiny.
35. See subsection 13.3(3) of the Criminal Code.

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references in sections 26FEN–26FEP to ‘Regulation 18(1)’ of Annex VI with a reference to ‘paragraph 3 of Regulation 18’.³⁶

Item 27 amends **existing subsection 26FEO(1)** to restrict the application of the provision to a person who delivers fuel oil other than gas fuel (see **item 2** above). Currently, section 26FEO contains two offences that are committed if:

- (a) a person delivers fuel oil to a ship
- (b) the ship has a gross tonnage of 400 or more
- (c) the delivery happens while the ship is in a particular geographic location, and
- (d) the person does not provide to the master of the ship, in accordance with the regulations:
 - (i) a completed bunker delivery note in the approved form for the fuel oil delivered, and/or
 - (ii) a representative sample of the fuel oil that is sealed and signed in accordance with the regulations.

Each offence carries a maximum penalty of 200 penalty units (that is, \$22 000 for a natural person).³⁷

Item 35 inserts **proposed section 26FES** to create an offence that is committed if:

- a person delivers gas fuel to a ship
- the ship has a gross tonnage of 400 or more
- the delivery happens while the ship is in a particular geographic location, and
- the person does not provide to the master of the ship, ‘in connection with that delivery, documentation specifying the sulphur content for the gas fuel delivered’.

The documentation will ‘enable the master to be informed about whether the gas fuel meets the requirements to use fuel with a sulphur content no more than the prescribed limit’.³⁸ The offence is a strict liability offence and carries a maximum penalty of 200 penalty units (that is, \$22 000 for a natural person).³⁹

36. Paragraph 3 of Regulation 18 (which deals with Fuel Oil Availability and Quality) sets out the technical requirements that must be met by fuel oil for combustion purposes delivered to and used on board ships to which Annex VI applies.

37. See footnote 30.

38. Explanatory Memorandum, *op. cit.*, p. 7.

39. See footnote 30.

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Item 36 inserts **proposed Division 4** into Part IIID to set out provisions relating to the carrying of an ‘ozone depleting substances record book’ by Australian ships. **Proposed section 26FET** applies to an Australian ship that:

- has a gross tonnage of 400 or more
- has at least one rechargeable system containing ozone depleting substances, and
- is engaged on an ‘overseas voyage’.⁴⁰

The ship must carry an ozone depleting substances record book ‘as required by the regulations’.⁴¹ The record book must be in accordance with the appropriate prescribed form and make provision for the necessary signatures.⁴²

It is an offence for the master and the owner of ship to fail to carry the record book.⁴³

It is also an offence for the master of the ship:

- to fail to enter details of a prescribed operation or a prescribed occurrence into the record book, if either of those events is carried out or occurs,⁴⁴ or
- to fail to sign the page of a completed record book entry ‘as soon as practicable in the circumstances’.⁴⁵

40. The term ‘*overseas voyage*’ is defined in **proposed subsection 26FET(9)** to have the same meaning as in the Navigation Act. There it is defined in section 6 to mean a voyage in the course of which the ship travels between:

- (a) a port in Australia and a port outside Australia
- (b) a port in Australia and a place in the waters of the sea above the continental shelf of a country other than Australia
- (c) a port outside Australia and a place in the waters of the sea above the continental shelf of Australia
- (d) a place in the waters of the sea above the continental shelf of Australia and a place in the waters of the sea above the continental shelf of a country other than Australia
- (e) ports outside Australia, or
- (f) places beyond the continental shelf of Australia
whether or not the ship travels between 2 or more ports in Australia in the course of the voyage.

However, in the case of an Australian fishing vessel that begins and ends a voyage at a port in Queensland (which need not be the same port), the voyage is not taken to be an ‘overseas voyage’ merely because the vessel calls at a port or ports in Papua New Guinea as an incidental part of the fishing operations done in that voyage (**proposed subsection 26FET(9)**).

41. **Proposed subsection 26FET(2)**.

42. **Proposed subsection 26FET(3)**.

43. **Proposed subsection 26FET(4)**. The maximum penalty (for a natural person) is 200 penalty units.

44. **Proposed subsection 26FET(6)**. The maximum penalty is 200 penalty units.

45. **Proposed subsection 26FET(7)**. The maximum penalty is 200 penalty units.

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The entry in the record book must be made in English. If the entry relates to a prescribed operation, the entry must be signed by the person in charge of the operation.⁴⁶

A person who makes a false or misleading entry in an ozone depleting substances record book commits an offence which carries a maximum penalty of 200 penalty units.⁴⁷

The ozone depleting substances record book must be retained by the master and the owner of a ship for a period of one year after the day on which the last entry in the book is made.⁴⁸ The ozone depleting substances record book must also be readily available for inspection by an inspection at all reasonable times during that period.⁴⁹

Schedule 2—Responder immunity

Schedule 2 amends the Bunker Oil Act. The amendments are designed to protect persons (or corporations) from civil liability (that is, being sued for damages) if the persons provide assistance as a result of fuel oil spills and inadvertently create an increase in pollution damage.⁵⁰

Items 1 and 2 of Schedule 2 amend section 3 of the Bunker Oil Act, which is the definitions section in that Act. **Item 1** inserts a definition for the term ‘*constitutional corporation*’ (being a corporation to which paragraph 51(xx) of the Australian Constitution applies). **Item 2** inserts a definition for the term ‘shipowner’ (which is defined to have the same meaning as in the Bunker Oil Convention). There it is defined in paragraph 3 of Article 1 to mean ‘the owner, including the registered owner, bareboat charterer, manager and operator of the ship’.⁵¹

Item 3 inserts **proposed section 24A**, dealing with responder immunity. **Proposed subsection 24A(1)** provides that ‘no civil action, suit or proceedings lies against a person in relation to anything done, or omitted to be done, reasonably and in good faith by the person in relation to preventing or minimising pollution damage’ occurring in Australia, its external territories and coastal seas or Australia’s exclusive economic zone.

However, there are two main exceptions to this rule. The rule does not apply:

- in relation to the ship owner or shipowners concerned (**proposed subsection 24A(2)**), and

46. **Proposed subsection 26FET(8)**. This is not an offence provision.

47. **Proposed section 26FEU**.

48. **Proposed paragraph 26FEV(1)(a)**. This is an offence carrying a maximum penalty of 200 penalty units.

49. **Proposed paragraph 26FEV(1)(b)**. This is an offence carrying a maximum penalty of 200 penalty units.

50. Explanatory Memorandum, op. cit., p. 1.

51. *Australian Treaty Series*, [2009] ATS 14, op. cit.

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- in relation to anything done, or omitted to be done:
 - with intent to cause damage, or
 - recklessly and with knowledge that damage would probably result (**proposed subsection 24A(3)**).

In relation to the first exception, the wording of **proposed subsection 24A(2)** might benefit from clarification (that is, some rewriting). It is not entirely clear, for example, whether the shipowner mentioned in this exception is the owner of the ship which initially caused the pollution damage, or if it also applies to shipowners who themselves (or their crews) did anything (or omitted to do anything) reasonably and in good faith to prevent or minimise pollution damage occurring in Australian waters. Obviously, the proposed section is aimed at excluding the shipowner(s) whose ships created the initial pollution damage from the immunity contained in **proposed subsection 24A(1)**, but this could be made clearer in **proposed subsection 24A(2)**.

Proposed subsection 24A(4) states that responder immunity in proposed subsection 24A(1) applies in relation to anything done (or omitted to be done) in any of the following situations:

- by a constitutional corporation (or directors, officers, employees or agents of the corporation acting in such a capacity)
- outside Australia⁵²
- in the course of, or in relation to trade and commerce:
 - between Australia and places outside Australia
 - among the states, or
 - within a territory, between a state and a territory, or between two territories, or
- by the Commonwealth or an authority of the Commonwealth.

Item 4 of Schedule 2 provides that **proposed section 24A** applies in relation to anything done (or omitted to be done) on or after Royal Assent.

52. **Proposed paragraph 24A(4)(b)** states that the term ‘*outside Australia*’ includes Australia’s territorial sea and exclusive economic zone.

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