

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 101

Issued under the authority of the Minister for Infrastructure, Transport,
Regional Development and Local Government

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

*Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage)
Regulations 2009*

The *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (the Act) implements the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunker Oil Convention). The Bunker Oil Convention, which was adopted by the International Maritime Organization in March 2001, establishes a liability and compensation regime to apply in cases of pollution damage following the escape or discharge of bunker oil from a ship that is not an oil tanker. Bunker oil is fuel oil or lubricating oil used for the operation or propulsion of a ship.

The regime established by the Bunker Oil Convention provides that:

- shipowners are strictly liable for pollution damage resulting from the discharge or escape of bunker oil from their ships;
- shipowners may limit their liability, the liability limit depending on the size of the ship; and
- the owners of ships with a gross tonnage greater than 1,000 must be insured to cover their liabilities for bunker oil pollution.

Subsection 30(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Regulations prescribe certain details in order to implement the Bunker Oil Convention in Australia.

Paragraph 18(3)(b) of the Act provides that an application to the Australian Maritime Safety Authority for the issue of an insurance certificate that is required by the Act to be carried on board a ship must be accompanied by the fee (if any) prescribed by the regulations for the purposes of that paragraph.

Subsection 27(1) of the Act provides that the regulations may make provision for or in relation to giving effect to Article 10 of the Bunker Oil Convention. Article 10 obliges each country that is a Party to the Bunker Oil Convention to make appropriate arrangements so that a judgment awarding compensation for bunker oil pollution damage is recognised and can be enforced in another country that is a Party to the Bunker Oil Convention. The effect, in Australia's case, is that judgments awarding compensation that are given by a court in a foreign country that is a Party to the Bunker Oil Convention should be able to be enforced by an Australia court which has appropriate jurisdiction

and any judgments given by an Australian court should be able to be enforced by an appropriate court of such a foreign country.

The Regulations set the fees for the purposes of paragraph 18(3)(b) of the Act and give effect to Article 10 of the Bunker Oil Convention. Details of the Regulations are set out in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

No formal consultation was undertaken in relation to these Regulations as they are of a minor or machinery nature and do not substantially alter existing arrangements.

The Regulations commenced on the commencement of sections 3 to 30 (being the operative provisions) of the Act. Subsection 2(1) of the Act provides that those sections commence on the date on which the Bunker Oil Convention entered into force for Australia. That date is 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.

DETAILS OF THE PROTECTION OF THE SEA (CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE) REGULATIONS 2009**Part 1 Preliminary****Regulation 1 Name of Regulations**

Regulation 1 provides that the name of the Regulations is the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Regulations 2009*.

Regulation 2 Commencement

Regulation 2 provides that the Regulations commenced on the commencement of sections 3 to 30 of the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008*. That date is 16 June 2009, the date on which the Bunker Oil Convention entered into force for Australia.

Regulation 3 Definitions

Regulation 3 defines a number of terms for the purposes of the Regulations.

Part 2 Insurance certificates**Regulation 4 Application for certificate for a ship – prescribed fee**

Regulation 4 prescribes the fees payable to the Australian Maritime Safety Authority (AMSA) when an application is made for a certificate which must be carried by ships with a gross tonnage greater than 1,000 and to which the Bunker Oil Convention applies.

The fee is \$70 for the initial issue of a certificate or where, on renewal, there is a change to one or more of the following details of the ship:

- the insurance provider, or other provider of financial security, for the ship;
- the owner of the ship;
- the name of the ship; or
- the country in which the ship is registered.

The fee to accompany the application for renewal of a certificate is \$40 where there is no change of any of the above details.

The fees have been set at a level to cover the costs incurred by AMSA in assessing applications for, and issuing, insurance certificates.

Part 3 Registration and enforcement of judgments

Division 3.1 General

Regulation 5 General

Regulation 5 makes it clear that Part 3 of the Regulations, for purposes of section 27 of the Act, give effect to Article 10 of the Bunker Oil Convention. Regulation 5 also defines "registered" for purposes of Part 3 of the Regulations.

Division 3.2 Jurisdiction

Regulation 6 Jurisdiction of Federal Court and State and Territory Supreme Courts

Regulation 6 confers jurisdiction on the following courts for matters arising under Part 3 of the Regulations:

- the Federal Court of Australia;
- the Supreme Court of each State;
- the Supreme Court of the Australian Capital Territory;
- the Supreme Court of the Northern Territory.

The above courts are collectively defined as "Court" in the definition of that term in regulation 3.

Division 3.3 How to apply to register judgment

Regulation 7 Application to register judgment

Regulation 7 permits a judgment creditor to apply to a Court to have any parts of a foreign judgment relating to compensation for bunker oil pollution damage registered in the Court. Such an application may be made at any time within six years of the date of the judgment or the finalisation of any appeals relating to the judgment.

Regulation 8 Application must be supported by affidavit

Regulation 8 requires an application for registration of a foreign judgment to be supported by an affidavit to which is attached a copy of the judgment certified by the original court. If the judgment is not in English, an authenticated or certified translation must also be attached.

The information that must be contained in such an affidavit is set out in subregulation 8(3). This includes statements relating to the following matters:

- whether compensation payments and costs awarded by the original court have been satisfied;
- whether the judgment creditor can enforce the judgment of the original court in the country in which that court is situated;
- whether the judgment is no longer subject to ordinary forms of review;
- whether the original court had jurisdiction to entertain actions for compensation under the Bunker Oil Convention; and

- whether the pollution incident occurred after both Australia and the country in which the original court is situated became countries to which the Bunker Oil Convention applies.

Any amounts referred to in the affidavit that are in a foreign currency must be converted to Australian currency using the exchange rate determined by the Reserve Bank of Australia for the date on which the judgment of the original court was made.

Division 3.4 Enforcement of judgment

Regulation 9 Requirement to register judgment

Regulation 9 sets out conditions that are required to be met to enable a Court to make an order to register a foreign judgment. These conditions are that:

- the judgment was given by a court that had appropriate jurisdiction;
- the judgment related to a pollution incident that occurred after both Australia and the country in which the original court is situated became countries to which the Bunker Oil Convention applies;
- the judgment is enforceable in the country in which the original court is situated;
- the judgment is no longer subject to ordinary forms of review in the country in which the original court is situated; and
- the application to make the order is in accordance with regulations 7 and 8 of the Regulations.

An order to register a foreign judgment must specify a period within which the judgment debtor may apply to have the order set aside and state when the order takes effect.

Regulation 10 Judgment must be registered only for matters relating to compensation for pollution damage

Regulation 10 provides that an order for a judgment may be registered only in so far as the judgment relates to compensation for bunker oil pollution damage.

Regulation 11 Amount for which judgment may be registered

Regulation 11 provides that the amount for which a judgment may be registered is the total of the four following components:

- unpaid compensation for bunker oil pollution damage;
- unpaid costs awarded by the original court to the judgment creditor;
- amount of interest payable to the judgment creditor under the law of the country in which the original court is situated; and
- amount of reasonable costs of registration by the Court, including the costs of obtaining a certified copy of the judgment from the original court.

Regulation 12 Conversion to Australian currency

Regulation 12 provides that the amount for which a judgment may be registered must be expressed in Australian currency and, if converted from a foreign currency, must use exchange rates determined by the Reserve Bank of Australia.

Regulation 13 Security for costs

Regulation 13 provides that a Court, in addition to making an order for the registration of a foreign judgment, may also make an order requiring the judgment creditor to give security for costs of the application to have the judgment registered and for costs of any proceedings that may be brought to set aside the order to register the judgment.

Regulation 14 Notice of registered judgment

Regulation 14 requires a Court that has made an order to register a foreign judgment to give the judgment debtor notice of the order. Such a notice must contain:

- details of the registered judgment and the order to register it;
- the name and address of the judgment creditor or anybody acting on his or her behalf;
- the rights of the judgment debtor to apply to have the order to register the order set aside; and
- the period within which such an application must be made and the judgment debtor's right to seek an extension of that period.

Regulation 15 When order to register judgment takes effect

Regulation 15 specifies that an order to register a foreign judgment takes effect at the end of the period specified in the order or at the end of any further period determined by the Court (within which either period an application to have the order set aside may be made). However, if an application to set aside an order is unsuccessful, the order will take effect immediately after that application has been determined.

Regulation 16 Effect of order to register judgment

Regulation 16 provides that an order to register a foreign judgment has effect as a judgment of the Court in which it is registered as if it had been entered in that Court on the date of registration. Interest on the amount for which the judgment is registered accrues from the date of registration of the judgment in the same manner as if it was a judgment of the Court in which it is registered.

Division 3.5 How to set aside registered judgment

Regulation 17 Application for order to set aside registered judgment

Regulation 17 allows a judgment debtor to apply to a Court to have an order to register a foreign judgment set aside. Such an application must be made before the end of the period specified in the order or the end of any extended period granted by a Court.

Regulation 18 Order on application to set aside registered judgment

Regulation 18 sets out circumstances which would allow a Court to set aside an order to register a foreign judgment. These circumstances are:

- the rights under the judgment are not vested in the person who made the application for registration, that is, that person is not the judgment creditor;
- the person against whom the judgment was ordered to be registered is not the person who is subject to the obligations under the judgment, that is, that person is not the judgment debtor;
- at the date of the application to have the judgment registered:

- the amount had been paid in full or in part;
- the judgment was not enforceable in the country in which the original court was situated; or
- the judgment was subject to ordinary forms of review in that country;
- that, as well as relating to compensation for pollution damage, the order relates to matters other than pollution damage;
- the judgment was obtained by fraud;
- the judgment debtor was not given reasonable notice of the proceedings in the original court or a fair opportunity to defend them;
- the matter in dispute in the original court was the subject of a judgment in another court, whether Australian or otherwise, before the date of the judgment of the original court; or
- the judgment had not been registered in accordance with these Regulations.

Regulation 19 Stay of execution of order for registered judgment

Regulation 19 provides that a Court may order a stay of execution in relation to the registration of a foreign judgment instead of setting it aside if the Court finds that the only reason the order may be set aside is that the judgment was not enforceable under the law of the country in which the original court is situated or the judgment was still subject to ordinary forms of review.

Division 3.6 Other applications to the Court

Regulation 20 Further applications to register judgment

Regulation 20 provides that, unless the Court has ordered otherwise, a judgment creditor may make a further application to register a foreign judgment where an application to register the judgment has not been granted or an order to register the judgment has been set aside.

Regulation 21 Circumstance in which judgment amount has been paid in part

Regulation 21 provides that, if the only reason a Court has set aside an order to register a foreign judgment is because part of the total amount payable under the judgment has in fact been paid, then the Court must, on further application to register the judgment, make an order registering the judgment for the balance payable.

Regulation 22 Circumstance in which judgment provisions relate to compensation for pollution damage and other matters

Regulation 22 provides that, if the only reason a Court has set aside an order to register a foreign judgment is that, as well as relating to compensation for pollution damage, the order relates to matters other than pollution damage, then the Court must, on further application to register the judgment, make an order registering the judgment for the provisions of the judgment that relate only to compensation for pollution damage.

Regulation 23 Issue of Court documents

Regulation 23 makes provisions to facilitate the registration of an Australian judgment in a foreign court.

Regulation 23 applies where:

- a judgment has been entered in an Australian court for a claim for compensation for pollution damage;
- the person in whose favour the judgment has been entered decides to enforce the judgment in a court in another country to which the Bunker Oil Pollution Convention applies; and
- that person has applied to the Australian court for the issue of relevant documents.

The Registrar or other proper officer of the Australian court must issue the relevant documents to the person who must pay to any court fees charged for the issue of court documents.