

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2009 No. 243**

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

*Protection of the Sea (Oil Pollution Compensation Funds) Act 1993*

*Protection of the Sea (Oil Pollution Compensation Fund) Amendment Regulations 2009 (No. 1)*

The *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (the Act) implements two treaties:

- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the 1992 Fund Convention); and
- the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the Supplementary Fund Protocol).

Subsection 47(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 amend the *Protection of the Sea (Oil Pollution Compensation Fund) Regulations 1994* (the Principal Regulations) consequential upon amendments made to the Act by the *Protection of the Sea Legislation Amendment Act 2008* (the 2008 Act) and also to ensure that the Principal Regulations are consistent with Regulations relating to the Supplementary Fund Protocol.

Details of the Regulations are set out in the Attachment.

The 1992 Fund Convention and the Supplementary Fund Protocol establish the second and third tiers of a three tier regime which provides compensation in case of pollution damage resulting from the escape or discharge of persistent oil (that is, crude oil and fuel oil) from an oil tanker.

The first tier of the scheme is established by the International Convention on Civil Liability for Oil Pollution Damage, 1992 (the Civil Liability Convention) which is implemented by the *Protection of the Sea (Civil Liability) Act 1981*. Under the first tier:

- tanker owners are strictly liable for pollution damage resulting from the discharge or escape of persistent oil from their vessels;
- tanker owners may limit their liability, the liability limit depending on the size of the tanker; and
- tankers carrying more than 2,000 tonnes of persistent oil in bulk as cargo must be insured to cover the liabilities of their owners for oil pollution.

The second tier of this scheme, which is governed by the 1992 Fund Convention, applies where the compensation available from the tanker owner is insufficient to pay full compensation costs.

The 1992 Fund Convention establishes the International Oil Pollution Compensation Fund 1992 (the 1992 Fund) to provide compensation for victims of pollution damage who are unable to obtain full compensation under the Civil Liability Convention. The 1992 Fund is financed by contributions levied on any public or private entity who has received more than 150,000 tonnes of persistent oil after sea transport per calendar year in countries to which the 1992 Fund Convention applies. The maximum aggregate amount of compensation payable in respect of one incident under the Civil Liability Convention and the 1992 Fund Convention is about AUD400 million.

The third tier of the scheme is governed by the Supplementary Fund Protocol. The Supplementary Fund Protocol establishes the International Oil Pollution Compensation Supplementary Fund (the Supplementary Fund) to provide compensation for victims who do not obtain full compensation under the first two tiers of the scheme. The maximum aggregate amount of compensation available under the three tiers combined is about AUD1,460 million.

The Supplementary Fund is financed in a similar way to the 1992 Fund, that is, by contributions levied on public or private entities in receipt of more than 150,000 tonnes of persistent oil after sea transport per year in countries to which the Supplementary Fund Protocol applies. An updated list of countries to which the Supplementary Fund Protocol applies can be found on a number of websites, including the websites of the International Maritime Organization and the International Oil Pollution Compensation Funds.

The Act was amended by Schedule 1 of the 2008 Act to implement the Supplementary Fund. Schedule 1 of the 2008 Act also made consequential amendments to the Act.

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 commence on the commencement of Schedule 1 of the 2008 Act. Schedule 1 of the 2008 Act is expressed to commence on a date to be proclaimed, being a date on or after the Supplementary Fund Protocol enters into force for Australia. The Supplementary Fund Protocol will enter into force for Australia on 13 October 2009, being three months after the date on which Australia's instrument of accession for the Supplementary Fund Protocol was deposited with the Secretary-General of the International Maritime Organization.

## ATTACHMENT

### DETAILS OF THE PROTECTION OF THE SEA (OIL POLLUTION COMPENSATION FUND) AMENDMENT REGULATIONS 2009 (NO. 1)

#### **Regulation 1 Name of Regulations**

Regulation 1 provides that the name of the Regulations is the *Protection of the Sea (Oil Pollution Compensation Fund) Amendment Regulations 2009 (No. 1)*.

#### **Regulation 2 Commencement**

Regulation 2 provides that the Regulations commence on the commencement of Schedule 1 to the *Protection of the Sea Legislation Amendment Act 2008*. That date is a date to be proclaimed.

#### **Regulation 3 Amendment of *Protection of the Sea (Oil Pollution Compensation Fund) Regulations 1994***

Regulation 3 provides that Schedule 1 amends the *Protection of the Sea (Oil Pollution Compensation Fund) Regulations 1994*.

#### **Schedule 1 Amendments**

##### **Item [1] Regulation 1**

Item 1 changes the name of the Principal Regulations from the *Protection of the Sea (Oil Pollution Compensation Fund) Regulations 1994* to the *Protection of the Sea (1992 Fund) Regulations 1994*. This is intended to make it clear that the Principal Regulations relate only to the 1992 Fund Convention and not to the Supplementary Fund Protocol.

##### **Item [2] Subregulation 3 (1), definition of *Act*.**

This amendment is consequential upon the change of the name of the Act by the 2008 Act from the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* to the *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993*.

##### **Item [3] Subregulation 3 (1), definition of *compensation for pollution damage***

This item corrects a minor drafting error.

##### **Item [4] Subregulation 3 (1), definition of *court***

This item replaces the existing definition of *court* with a new definition of *Court*. The main effect of the revised definition is that "Court", spelt with an upper-case "C", refers only to Australian Courts which have been given jurisdiction for purposes of the Principal Regulations while "court" spelt with a lower-case "c" refers to all other courts, including courts in a foreign country.

#### **Item [5] Regulation 4, heading**

Regulation 4 gives jurisdiction to Australian Courts for purposes of the Principal Regulations. This item replaces the heading to regulation 4 with the new heading "Jurisdiction of Courts". The only change is the spelling of "Courts" with an upper-case "C".

#### **Item [6] Paragraph 6 (3) (b)**

Paragraph 6(3)(b) of the Principal Regulations provided that a foreign judgment must not be registered in an Australian court unless the incident that it applies to occurred after both Australia and the country in the which the original court is situated became "Contracting States". The intention is that the judgment should not be registered until after the 1992 Fund Convention has entered into force both for Australia and the country in which the original court is situated. There is a possibility that the previous wording could be misinterpreted.

One interpretation of the term "Contracting State" is that it applies to a country which has deposited its instrument of accession for the 1992 Fund Convention with the Secretary-General of the International Maritime Organization. In accordance with Article 30 of the 1992 Fund Convention, the Convention will not enter into force for such a country until 12 months after the deposit of the instrument of accession. Until the expiry of this 12 month period, the 1992 Fund Convention will not apply.

To avoid any possible misinterpretation, item [6] amends paragraph 6(3)(b) to replace "Contracting States" with "countries to which the 1992 Convention applies".

#### **Item [7] Subparagraph 10 (1) (b) (vi)**

Subparagraph 10(1)(b)(vi) of the Principal Regulations provided that an affidavit which accompanies an application for registration of a foreign judgment must include a statement that the original judgment in the foreign country was given in relation to an incident that occurred after both Australia and the country in the which the original court is situated became "Contracting States".

For the same reasons as apply to the amendment to paragraph 6(3)(b), item [7] amends subparagraph 10(1)(b)(vi) to replace "Contracting States" with "countries to which the 1992 Convention applies".

#### **Item [8] Regulation 17, heading**

Item [8] amends the heading to regulation 17 of the Principal Regulations to replace "court" with "Court" to reflect the fact that regulation 17 refers only to Australian Courts which have jurisdiction for purposes of the Principal Regulations. The wording is also changed to reflect the fact that regulation 17 refers to the setting aside of registered judgments rather than to the actual registration of such judgments.

### **Item [9] Part 3, heading**

Item [9] replaces the heading to Part 3 of the Principal Regulations – "Miscellaneous" – with "Contributions and late payment penalties" so as to reflect the contents of the regulation in that Part.

### **Item [10] Regulation 21, heading**

Item [10] replaces the heading to regulation 21 of the Principal Regulations to better reflect the contents of regulation 21.

### **Item [11] Regulation 21**

Item [11] amends regulation 21 to reflect current drafting practice without changing the meaning of the regulation.

### **Items [12] and [13] Paragraph 21 (a) (ii) and Paragraph 21 (b) (ii)**

Both paragraphs 21(a)(ii) and 21(b)(ii) referred to the 1992 Fund and to the place where the 1992 Fund is "kept". This wording was based on the incorrect assumption that the 1992 Fund is a fund which is kept in a bank or other financial institution. However, the 1992 Fund is a body corporate and it is therefore more correct to refer to the place where the 1992 Fund is "located".

Items [12] and [13] amend paragraphs 21(a)(ii) and 21(b)(ii), respectively, to replace "kept" with "located".

### **Item [14] After regulation 21**

Item [14] inserts a new Part heading to include existing regulations 22 to 24 of the Principal Regulations.

### **Item [15] Subregulation 22 (1)**

Subregulation 22(1) of the Principal Regulations applies to persons who receive after sea transport more than 150,000 tonnes of persistent oil in a calendar year. Such persons must keep records for each calendar year to enable them to make an annual return setting out the quantity of persistent oil received in the preceding calendar year.

Item [15] substitutes subregulation 22(1) to clarify the meaning of that subregulation and to add a penalty provision so that failure to keep records is an offence with a maximum penalty of 10 penalty units for an individual and 50 penalty units for a body corporate.

### **Item [16] Subregulation 23 (1)**

Subregulation 23(1) of the Principal Regulations requires persons who receive more than 150,000 tonnes of persistent oil by sea in a calendar year to provide to the Australian Maritime Safety Authority (AMSA) a return by 1 April of the following year stating the quantity of persistent oil received.

Item [16] replaces the reference in subregulation 23(1) to "regulation 22" with "article 10 of the 1992 Convention" so that the wording is consistent with the wording used in subregulation 22(1). This is a drafting change which does not affect the meaning of subregulation 23(1).

**Item [17] Subregulation 23 (2)**

Item [17] amends subregulation 23(2) of the Principal Regulations to replace "A return" with "The return". This is a drafting change which does not affect the meaning of subregulation 23(2).

**Item [18] Paragraph 23 (2) (c)**

Paragraph 23(2)(c) of the Principal Regulations provided that returns required by subregulation 23(1) to be provided to AMSA must show the "telex or fax number" of the person making the return.

Item [18] amends paragraph 23(2)(c) to refer to more modern means of communication by replacing "telex or fax number" with "telephone number, fax number or email address".

**Item [19] Subregulation 23 (4)**

Item [19] substitutes subregulation 23(4) of the Principal Regulations to:

- replace the reference to "regulation 22" with "article 10 of the 1992 Convention" so that the wording is consistent with the wording used in subregulation 22(1); and
- divide subregulation 23(4) into two paragraphs.

These are drafting changes which do not affect the meaning of subregulation 23(4).

**Item [20] Regulation 23, note**

Item [20] omits the note following regulation 23 of the Principal Regulations to reflect current drafting practice where it is not considered necessary to include a note setting out the meaning of specified provisions of the *Criminal Code*.

**Item [21] Subregulation 24 (1)**

Subregulation 24(1) of the Principal Regulations authorises AMSA to require a person to produce to AMSA documents or copies of documents where such documents are relevant to ascertaining the liability of a person to make contributions to the 1992 Fund.

Item [21] substitutes subregulation 24(1) to make its meaning clearer. This is a drafting change which does not affect the meaning of subregulation 24(1).

**Item [22] Subregulation 24 (2)**

Subregulation 24(2) of the Principal Regulations obliges a person to comply with a notice from AMSA under subregulation 24(1) to produce documents. Item [22] amends subregulation 24(2) to require a person to comply with such a notice within 30 days of receiving it.

**Item [23] Regulation 24, note**

Item [22] omits the note following regulation 24 of the Principal Regulations to reflect current drafting practice where it is not considered necessary to include a note setting out the meaning of specified provisions of the *Criminal Code*.

**Item [24] Further amendments**

Item 24 replaces a number of references in the Principal Regulations to "court" with "Court" where the Court being referred to is a Court that has been given jurisdiction for purposes of the Principal Regulations. In addition, the reference to "a court" in regulation 20 is changed to "an Australian court".