2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PROTECTION OF THE SEA (CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE) BILL 2008

PROTECTION OF THE SEA (CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE) (CONSEQUENTIAL AMENDMENTS) BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Infrastructure, Transport, Regional Development and Local Government the Honourable Anthony Albanese, MP)

PROTECTION OF THE SEA (CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE) BILL 2008

OUTLINE

The purpose of the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008 (the Bunker Oil Bill) is to implement in Australia the International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunker Oil Convention). The Bunker Oil Convention 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 heavy fuel oil used in the engines of ships. It is one of the most persistent forms of oil and therefore creates significant pollution impacts and is difficult to clean up.

The Bunker Oil Convention will enter into force internationally on 21 November 2008.

In accordance with the Bunker Oil Convention, the proposed Bill will provide that:

- shipowners are strictly liable for pollution damage resulting from the escape or discharge of bunker oil from their ships;
- shipowners can limit their liability, the liability limit depending on the size of the ship;
- ships with a gross tonnage greater than 1,000 will be required to be insured to cover the owners' liability for pollution damage resulting from the escape or discharge of bunker oil and will be required to carry evidence of that insurance; and
- persons suffering pollution damage will have a right of "direct action" against the insurer. That is, they can seek compensation directly from the shipowner's insurer rather than being required to submit the claim to the shipowner who, in some cases, may have no assets other than the ship.

PROTECTION OF THE SEA (CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE) (CONSEQUENTIAL AMENDMENTS) BILL 2008

OUTLINE

The purpose of the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) (Consequential Amendments) Bill 2008 (the Consequentials Bill) is to amend the *Admiralty Act 1988*, the *Protection of the Sea (Civil Liability) Act 1981* and the *Protection of the Sea (Powers of Intervention) Act 1981* consequential upon the enactment of the proposed *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008.*

Financial impact statement

There is no financial impact arising from either of these two Bills.

PROTECTION OF THE SEA (CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE) BILL 2008

NOTES ON CLAUSES

Part 1 – Preliminary

Clause 1: Short Title

Clause 1 is a formal provision specifying the short title of the proposed Act.

Clause 2: Commencement

Clause 2 sets out when the provisions contained in the Bunker Oil Bill will commence:

- Clauses 1 and 2 will commence on the date that the proposed Act receives Royal Assent.

- The remaining clauses will commence on the later of the date of Royal Assent or the date that the Bunker Oil Convention enters into force for Australia. The Bunker Oil Convention will enter into force internationally on 21 November 2008. If Australia ratifies the Bunker Oil Convention three months or more before 21 November 2008, the Convention will enter into force for Australia on that date. Otherwise, the Bunker Oil Convention will enter into force for Australia three months after it is ratified by Australia. These remaining clauses will not commence at all if Australia does not ratify the Bunker Oil Convention.

If Australia ratifies the Bunker Oil Convention, the Minister must announce by notice in the *Gazette* the date on which the Convention enters into force for Australia.

Clause 3: Definitions

Clause 3 defines a number of terms for purposes of the Bunker Oil Bill.

applied provisions is defined to mean the provisions of the Bunker Oil Convention that, under clause 11 have the force of law as part of the law of Australia. These are further elaborated on in the discussion on clause 11.

appropriate insurance certificate is defined to have the meaning given by clause 15. This is further elaborated on in the discussion on clause 15 .

Australia, when used in a geographical sense, is defined to include the external Territories. This overrides the definition of "Australia" in paragraph 17(a) of the *Acts Interpretation Act 1901* which provides that the term "Australia", when used in a geographical sense, includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory. Defining "Australia" in this Bill to include the external Territories ensures that the Bunker Oil Bill applies to all of Australia's Territories.

Authority is defined to mean the Australian Maritime Safety Authority whose main function under the Bunker Oil Bill will be the issue of insurance certificates (see clauses 18 and 19).

Bunker Oil Convention is defined to mean the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 and any future amendments to it if they enter into force for Australia. A Note advises that the text of the Convention is available at the Australian Treaties Library.

Civil Liability Convention is defined to have the same meaning as in the Bunker Oil Convention. Article 1 of the Bunker Oil Convention provides that "Civil Liability Convention" means the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended. The Civil Liability Convention is implemented in Australia by the *Protection of the Sea (Civil Liability) Act 1981*.

coastal sea, in relation to Australia or an external Territory, is defined to have the same meaning as in subsection 15B(4) of the *Acts Interpretation Act 1901*. "Coastal sea" means the territorial sea (that is, the sea between the baselines (generally low water mark) and an imaginary line 12 nautical miles from the baselines) and any parts of the sea on the landward side of the baselines that is not within the limits of a State or Territory.

domestic voyage ship has the meaning given by subclause 10(3), that is, it is a trading ship engaged on a voyage other than an overseas voyage or an inter-State voyage or a fishing boat engaged on a voyage other than an international voyage.

enforcement officer is defined to include three categories of persons:

- officers of Customs within the meaning of the *Customs Act 1901;*
- surveyors appointed under the *Navigation Act 1912*; and
- other persons included in a class of persons prescribed for purposes of paragraph (c) of the definition.

Enforcement officers would be appointed under the third category to perform functions under the Bunker Oil Bill at ports only where there are no officers of Customs or surveyors available. Typically, such a person would hold a relevant position such as a harbour master.

exclusive economic zone is defined to have the same meaning as in the *Seas and Submerged Lands Act 1973*. The exclusive economic zone is the area of the sea beyond the territorial sea up to 200 nautical miles from the low water mark. However, the outer limit is less than 200 nautical miles from the low water mark where this would otherwise overlap with the exclusive economic zone of another country.

government ship is defined to mean a ship owned or operated by the Commonwealth, a State or Territory or a foreign country or by an authority of the Commonwealth, a State or Territory or a foreign country.

gross tonnage is defined to have the same meaning as in the Bunker Oil Convention, that is, it means gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex 1 of the International Convention on Tonnage Measurement of Ships, 1969. This is the internationally agreed method of measuring the gross tonnage of ships. The gross tonnage of a ship is a measure of the volume of the enclosed spaces of the ship including cargo spaces, engine room and crew quarters.

incident is defined to have the same meaning as in the Bunker Oil Convention, that is, it means any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage.

offshore facility is defined to have the same meaning as in the Bunker Oil Convention. While the term is not defined in the Bunker Oil Convention, the ordinary meaning of that term will apply. That is, an offshore facility is a facility that is used in the exploration, exploitation and associated offshore processing of sea-bed mineral resources.

person is defined to have the same meaning as in the Bunker Oil Convention, that is, it means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions. This extends the normal meaning of "person" to include partnerships and unincorporated associations.

pollution damage is defined to have the same meaning as in the Bunker Oil Convention, that is, it means:

- loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and
- the costs of preventive measures and further loss or damage caused by preventive measures.

preventive measures is defined to have the same meaning as in the Bunker Oil Convention, that is, it means any reasonable measures taken by any person after an incident has occurred to prevent or minimise pollution damage.

registered owner is defined to have the same meaning as in the Bunker Oil Convention, that is, it means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "registered owner" shall mean such company.

Secretary-General is defined to have the same meaning as in the Bunker Oil Convention, that is, it means the Secretary-General of the International Maritime Organization (IMO).

ship is defined to have the same meaning as in the Bunker Oil Convention, that is, it means any seagoing vessel and seaborne craft, of any type whatsoever.

Clause 4: Crown to be bound

Clause 4 provides that the Crown is bound by the proposed Act but the Crown is not liable to be prosecuted for an offence under the Act.

Clause 5: Extension to external territories

Clause 5 extends the application of the Bunker Oil Bill to all of Australia's external Territories.

Clause 6

Clause 6 extends the application of the Bunker Oil Bill to acts, omissions, matters and things outside Australia. This is applicable, for example, to the requirement in clause 17 for Australian ships over 1,000 gross tons to carry an insurance certificate on board at all times.

Part 2 – Liability under Bunker Oil Convention

Division 1 – Application of Part

Clause 7: Application of Part

Clause 7 provides that Part 2 of the Bunker Oil Bill applies to pollution damage in Australia or in the exclusive economic zone of Australia. By applying Part 2 to Australia, this clause applies it to the land and waters of all Australian States and Territories which means that compensation under the Bunker Oil Bill will be payable for pollution damage, wherever it occurs in Australia.

As indicated in the Note to this clause, by virtue of section 15B of the *Acts Interpretation Act 1901*, Part 2 applies in relation to the coastal sea of Australia and its external Territories. Section 15B of that Act defines the coastal sea of a State or external Territory to include the adjacent territorial sea and any waters on the landward side of the territorial sea not within the limits of a State or Territory.

Part 2 also applies to preventive measures, wherever taken, to prevent or minimise pollution damage occurring in Australia or Australia's exclusive economic zone. This means that Part 2 could apply to preventive measures taken on the high seas or in the exclusive economic zone or territorial waters of another country that is close to Australia, even if the Bunker Oil Convention does not apply to that other country.

Clause 8: Overlap with Civil Liability Convention

Clause 8 provides that Part 2 does not apply to pollution damage within the meaning of the Civil Liability Convention. The Civil Liability Convention applies to pollution damage resulting from the escape or discharge of oil from a ship that is an oil tanker. The Civil Liability Convention is implemented in Australia by the *Protection of the Sea (Civil Liability) Act 1981*. The exclusion of the application of Part 2 of that Act applies whether or not compensation is payable under that Act.

Clause 9: Government ships

Clause 9 provides that Part 2 of the Bunker Oil Bill applies to a government ship (as defined in clause 3) only if the ship is being used for commercial purposes.

Clause 10: Concurrent State or Territory laws

The purpose of clause 10 is to allow a State or Territory, if it wishes to do so, to make laws relating to liability under the Bunker Oil Convention without those laws being overridden by the provisions of Part 2.

Subclause 10(1) lists the Articles of the Bunker Oil Convention in relation to which such State laws may be made. Those Articles are the same Articles which, by virtue of clause 11, have the force of law as part of the law of the Commonwealth. Such State or Territory laws can be made only in relation to "domestic voyage ships", that is, ships that are trading ships engaged on voyages other than overseas voyages or inter-State voyages or fishing boats engaged on voyages other than international voyages (subclause 10(3)).

Subclause 10(2) provides that the Bunker Oil Bill will prevail over State or Territory laws with respect to an incident which involves one or more domestic voyage ships and one or more ships that are not domestic voyage ships. This is to remove any doubt about whether Commonwealth or State/Territory law will apply in such situations.

Subclause 10(4) provides that, for purposes of clause 10, three terms have the same meaning as in the *Navigation Act 1912*. Those terms and their meanings are:

- ***Australian fishing vessel*** means a fishing vessel that is registered, or entitled to be registered, in Australia or in relation to which an instrument under subsection 4(2) of the *Fisheries Management Act 1991* is in force.
- ***inter-State voyage***, in relation to a ship, means a voyage (other than an overseas voyage) in the course of which the ship travels between:

  (a) a port in a State and a port in another State;

  (b) a port in a State and a port in a Territory; or

  (c) a port in a Territory and a port in another Territory;

  whether or not the ship travels between 2 or more ports in any one State or Territory in the course of the voyage.
- ***trading ship*** means a ship that is used, or, being a ship in the course of construction, is intended to be used, for, or in connection with, any business or commercial activity and, without limiting the generality of the foregoing, includes a ship that is used, or, being a ship in the course of construction, is intended to be used, wholly or principally for:

  (a) the carriage of passengers or cargo for hire or reward; or

  (b) the provision of services to ships or shipping, whether for reward or otherwise;

but does not include a Commonwealth ship, a fishing vessel, a fishing fleet support vessel, an offshore industry mobile unit, an offshore industry vessel to which this Act applies, an inland waterways vessel or a pleasure craft.

Subclause 14(5) provides that, for purposes of clause 14, ***overseas voyage*** has the same meaning as in the *Navigation Act 1912*, that is:

- ***overseas voyage***, in relation to a ship, means 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, this definition of "overseas voyage" is modified by subclause 10(5) in respect of fishing vessels that are engaged in regular voyages from a Queensland port. Such vessels will not be considered to have been engaged in an overseas voyage if the voyage begins and ends at a Queensland port and, as an incidental part of the fishing operations, the vessel calls at a port or ports in Papua New Guinea. The effect is that any Queensland legislation providing for liability under the Bunker Oil Convention would apply to such fishing vessels.

Division 2 – Liability for pollution damage

Clause 11: Liability for pollution damage

Clause 11 provides that, for purposes of Part 2 of the Bunker Oil Bill, Articles 3, 5 and 6, paragraph 10 of Article 7, and Article 8, of the Bunker Oil Convention have the force of law as part of the law of the Commonwealth.

Article 3 of the Bunker Oil Convention relates to the liability of the shipowner. The shipowner at the time of an incident is liable for any pollution damage caused by any bunker oil on board or originating from the ship. There are only limited circumstances in which liability for pollution damage will not attach to the shipowner:

(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or

(c) the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

A shipowner may be exonerated from liability to a person who has suffered loss or damage if the shipowner can prove that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person.

Article 5 of the Bunker Oil Convention provides that when an incident involving two or more ships results in pollution damage, the shipowners of all the ships concerned shall be jointly and severally liable for all such damage which is not reasonably separable.

Article 6 of the Bunker Oil Convention provides that a shipowner and the insurer may limit liability under "any applicable national or international regime". In Australia, the applicable regime is the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC Convention), as amended. The LLMC Convention is implemented by the *Limitation of Liability for Maritime Claims Act 1989*.

Under the LLMC Convention, the shipowner's liability limit is calculated according to the size of the ship. The liability limits set out in the LLMC Convention in respect of claims for pollution damage are as follows:

- one million Special Drawing Rights (SDR) for a ship with a gross tonnage not exceeding 2,000;
- for a ship with a gross tonnage in excess of 2,000, the following additional amount:
  - for each ton from 2,001 to 30,000 tons, 400 SDR;
  - for each ton from 30,001 to 70,000 tons, 300 SDR; and
  - for each ton in excess of 70,000 tons, 200 SDR.

The SDR is an artificial currency unit. The value of the SDR is determined daily and is calculated by the International Monetary Fund (IMF) on the basis of a weighted basket of four currencies which are currently the US dollar, Euro, Japanese yen, and UK pound. The basket composition and the weightings of the currencies within the basket are revised by the IMF every five years. The value of one SDR as at 18 March 2008 was approximately AUD1.77.

Paragraph 10 of Article 7 of the Bunker Oil Convention provides claimants with a right of "direct action". That is, persons suffering pollution damage may seek compensation directly from the shipowner's insurer rather than being required to submit the claim to the shipowner who, in some cases, may have no assets other than the ship.

In paying compensation to a claimant, an insurer may invoke the same defences that are available to the shipowner other than bankruptcy or winding up of the shipowner.

Article 8 of the Bunker Oil Convention sets time limits for bringing action for compensation. Rights to compensation will be extinguished unless such action is brought within three years of when pollution damage occurred.

Note 1 to clause 11 advises that the applied provisions deal with the liability of shipowners for pollution damage and the making of claims for pollution damage.

Note 2 to clause 11 advises that the *Admiralty Act 1988* confers jurisdiction on courts to hear and determine claims under the applied provisions. Amendments to the *Admiralty Act 1988* to confer such jurisdiction are included in the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) (Consequential Amendments) Bill 2008.

Part 3 – Insurance certificates relating to liability for pollution damage

Division 1 – Introduction

Clause 12: Application of Part

Clause 12 provides that Part 3 of the Bunker Oil Bill applies only to ships with a gross tonnage greater than 1,000 where such ships are not:

- ships to which Part III of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1981* applies (Part III of that Act applies to ships that are oil tankers); or
- government ships that are not being used for commercial purposes.

Clause 13: Unregistered ships

Clause 13 provides that Part 3 of the Bunker Oil Bill applies to an unregistered ship as if it was registered in the country whose flag the ship is entitled to fly.

Clause 14: Concurrent State or Territory laws

The purpose of clause 14 is to allow a State or Territory to make laws relating to the issue of insurance certificates where such laws give effect to paragraphs 1, 2 and 4 of Article 7 of the Bunker Oil Convention without those laws being overridden by the provisions of Part 3.

Paragraph 1 of Article 7 requires the registered owner of a ship registered in a country that is a Party to the Bunkers Convention and which has a gross tonnage in excess of 1,000 to maintain insurance to cover the registered owner's liability under the Bunker Oil Convention. Paragraph 2 of Article 7 requires countries which are a Party to the Bunker Oil Convention to issue certificates of insurance to ships over 1,000 gross tons which are appropriately insured. Paragraph 4 of Article 7 relates to the language of the insurance certificate, the effect of which is to require certificates issued in Australia to be in English.

Clause 15: Appropriate insurance certificate

Clause 15 has a table which is used to work out what is an appropriate insurance certificate for purposes of the Bunker Oil Bill. Depending on the circumstances, an appropriate insurance certificate may be issued by Australia under clause 18 or 19, by a State or Territory of Australia under a law referred to in clause 14, or by a foreign country.

Division 2 – Ships must carry insurance certificates

Clause 16: Ships must carry insurance certificates when entering or leaving ports in Australia etc

Clause 16 provides that the master or registered owner of a ship commits an offence of strict liability if a ship to which Part 3 of the Bunker Oil Bill applies enters or leaves a port in Australia or arrives at or leaves an offshore facility in the coastal sea of Australia or an external Territory or in internal waters of a State or Territory without having on board an appropriate insurance certificate that is in force. The maximum penalty for this offence is 500 penalty units ($55,000 for an individual or $275,000 for a body corporate).

This clause, which gives effect to paragraph 12 of Article 7 of the Bunker Oil Convention, applies to all ships to which Part 3 of the Bunker Oil Bill applies, irrespective of where those ships are registered.

The requirement to have an insurance certificate on board a ship will not apply (and there will therefore be no offence) if an appropriate certificate is in force, the issuer of the certificate has notified the Secretary-General of IMO that it maintains electronic records attesting to the existence of the certificate and such records are available to all countries to which the Bunker Oil Convention applies.

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: Ships registered in Australia must carry insurance certificates when in operation

Clause 17 provides that the master or registered owner of an Australian-registered ship commits an offence of strict liability if an Australian ship to which Part 3 of the Bunker Oil Bill applies operates anywhere in the world without there being on board an appropriate insurance certificate that is in force. The maximum penalty for this offence is 500 penalty units ($55,000 for an individual or $275,000 for a body corporate).

The requirement to have an insurance certificate on board a ship will not apply (and there will therefore be no offence) if an appropriate certificate is in force, the issuer of the certificate has notified the Secretary-General of IMO that it maintains electronic records attesting to the existence of the certificate and such records are available to all countries to which the Bunker Oil Convention applies.

This clause gives effect to paragraph 11 of article 7 of the Bunker Oil Convention. By restricting the application of this offence to when a ship is in operation, there will be no requirement for an insurance certificate to be carried on board a ship while, for example, the ship is in dry dock or is otherwise not in operation.

The discussion under clause 16 in relation to the level of the penalty, the offence being a strict liability offence and the collective liability of the registered owner and master is also relevant to clause 17.

Division 3 – Insurance certificates

Subdivision A – Issue of certificates

Clause 18: Issue of certificates for ships other than government ships

Clause 18 provides that applications for the issue of insurance certificates for ships (other than government ships) may be made to the Authority in respect of ships registered in Australia or in a country to which the Bunker Oil Convention does not apply. Applications must be made in accordance with a form approved by the Authority and be accompanied by the fee to be prescribed in regulations.

The Authority must issue a certificate if it is satisfied that the registered owner has insurance that will provide cover at least up to the limits of liability applying to the ships under the LLMC Convention (as described above in the discussion on clause 11). But, if the Authority is not so satisfied, it must not issue a certificate. A certificate is to be in a form approved by the Authority and must include the following particulars which are set out in paragraph 2 of Article 7 of the Bunker Oil Convention:

(a) name of the ship, its distinctive number or letters and its port of registry;

(b) name and principal place of business of the registered owner;

(c) IMO ship identification number;

(d) type and duration of security;

(e) name and principal place of business of the insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and

(f) period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

In accordance with clause 24, a decision by the Authority under clause 18 to refuse to issue a certificate is reviewable by the Administrative Appeals Tribunal.

Subclause 18(11), which advises that an insurance certificate issued under clause 18 is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*, is merely declaratory of the law. It is included to assist readers of the Bunker Oil Bill.

Clause 19: Issue of certificates for government ships

Clause 19 provides that, if the Minister is satisfied that the Commonwealth will meet any liability for pollution damage for a ship owned or operated by the Commonwealth at least up to the limits of liability applying to the ship under the LLMC Convention (as described above in the discussion on clause 11), the Authority may issue an insurance certificate certifying that any liability will be met by the Commonwealth.

Similar provisions apply to:

- ships owned or operated by an authority of the Commonwealth if the Minister is satisfied that liabilities for pollution damage will be met by the Commonwealth or the authority
- ships owned or operated by a State or Territory if the Minister is satisfied that liabilities for pollution damage will be met by the State or Territory
- ships owned or operated by an authority of a State or Territory if the Minister is satisfied that liabilities for pollution damage will be met by the State or Territory or the authority of the State or Territory.

A certificate is to be in a form approved by the Authority. A certificate issued under this clause will cease to be in force if the ship covered by the certificate ceases to be owned or operated by the Commonwealth, the State or the Territory, or by the authority of the Commonwealth, State or Territory.

Subdivision B – Production of certificates

Clause 20 Enforcement officer may require insurance certificate to be produced

Clause 20 provides that it is an offence of strict liability with a maximum penalty of 20 penalty units ($2,200 for an individual or $11,000 for a body corporate) if the master or other person in charge of a ship fails to produce an appropriate insurance certificate if requested to do so by an enforcement officer. It is a defence if an appropriate certificate is in force, the issuer of the certificate has notified the Secretary-General of IMO that it maintains electronic records attesting to the existence of the certificate and that such records are available to all countries to which the Bunker Oil Convention applies. The equivalent penalty under the *Protection of the Sea (Civil Liability) Act 1981* is also a strict liability offence with the same penalty of 20 penalty units.

It is appropriate that this be a strict liability offence as intention would be difficult to prove and, particularly where the penalty level is so low, the Director of Public Prosecutions may not pursue a prosecution if there was a need to prove intention. It is necessary that there be a disincentive to fail to produce insurance certificates. There is little disincentive if prosecution is unlikely to occur.

The discussion under clause 16 in relation to the offence being a strict liability offence is also relevant to clause 17.

Subdivision C – Detention of ships

Clause 21: Enforcement officer may detain ships

Clause 21 provides that an enforcement officer may detain a ship that is attempting to leave a port in Australia if the officer has reasonable grounds to believe that the ship does not have an appropriate insurance certificate. The ship may be detained until the certificate is produced or the enforcement officer is satisfied that a certificate has been obtained. This takes account of the fact that certificate may be issued by a country that has notified the Secretary-General of IMO that it maintains electronic records attesting to the existence of the certificate and that such records are available to all countries to which the Bunker Oil Convention applies.

The registered owner and master of a ship are jointly liable for a strict liability offence with a maximum penalty of 2,000 penalty units ($220,000 for an individual or $1,100,000 for a body corporate) if a ship that has been detained under clause 21 leaves port before being released from detention.

It is appropriate that the registered owner and master be collectively liable in this case because, although the master has immediate responsibility for the ship, the master is also subject to the direction of the registered owner. Similar considerations in relation to joint liability also apply to clause 21 as those which apply to clauses 16 and 17 as set out above.

The application of strict liability for an offence under clause 21 is appropriate as a ship leaving port without an insurance certificate (and therefore unlikely to have insurance as required by the Bunker Oil Bill) increases significantly the risk to the environment if there is a spill of bunker oil from the ship. The requirement for insurance is fundamental to the liability and compensation scheme established by the Bunker Oil Convention and implemented in Australia by the Bunker Oil Bill. An effective liability and compensation scheme is a basic component of any comprehensive marine pollution response regime.

The offence under clause 21 is at the same level as applies to the similar strict liability offence imposed by subsection 27A(5) of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

Subdivision D – Certificates ceasing to be in force

Clause 22: Authority may cancel certificate

Clause 22 provides for the cancellation by the Authority of an insurance certificate which the Authority has issued under clause 18 if the Authority is satisfied that the registered owner is no longer maintaining insurance sufficient to cover the owner's liabilities under the Bunker Oil Convention. Notice of cancellation must be given to the registered owner, the master, and, where the ship is registered in a foreign country that is not a country to which the Bunker Oil Convention applies, that foreign country.

In accordance with clause 24, a decision by the Authority under clause 22 to cancel a certificate is reviewable by the Administrative Appeals Tribunal.

Clause 23: When certificate automatically ceases to be in force

Clause 23 provides that a certificate issued by the Authority under clause 18 for a ship registered in Australia ceases to be in force immediately if the ship ceases to be registered in Australia.

A certificate issued by the Authority under clause 18 for a ship registered in a foreign country (not being a country to which the Bunker Oil Convention applies) ceases to be in force immediately if the ship ceases to be registered in that foreign country or that country becomes a country to which the Bunker Oil Convention applies. In the latter case, a certificate is obtainable only from the country where the ship is registered once the Bunker Oil Convention applies in that country.

Subdivision E – Review of decisions

Clause 24: Review of decisions

Clause 24 provides that applications may be made to the Administrative Appeals Tribunal for review of decisions of failing to issue an insurance certificate under subclause 18(7) or of cancelling such a certificate under subclause 22(1).

Part 4 – Other matters

Clause 25: No time limits for prosecution

Clause 25 provides that there is no time limit in which a prosecution may be brought for an offence under the Bunker Oil Bill.

Clause 26: Submission to jurisdiction

Clause 26 provides that, in any proceedings in an Australian court to enforce a claim under the Bunker Oil Convention, every foreign country to which the Bunker Oil Convention applies is taken to have submitted to the jurisdiction of the Australian court and to have waived any defence based on its status as a foreign country. However, the levy of execution against the property of such a foreign country is not permitted.

Clause 27: Regulations to give effect to Article 10 of the Bunker Oil Convention

Clause 27 provides for the making of regulations to give effect to Article 10 of the Bunker Oil Convention. Article 10 relates to the recognition and enforcement of judgements. The text of Article 10 is as follows:

> *1 Any judgement given by a Court with jurisdiction in accordance with article 9 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any State Party, except:*
> *(a) where the judgement was obtained by fraud; or*
> *(b) where the defendant was not given reasonable notice and a fair opportunity to present his or her case.*
>
> *2 A judgement recognised under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.*

Clause 27 provides that the regulations may confer jurisdiction on the Federal Court of Australia and the Supreme Courts of the States and Territories with respect to matters made under the regulations for the purposes of clause 27. The regulations may also make provision for the payment of fees with respect to matters arising under those regulations but such fees must not be such as to amount to taxation.

Clauses 28 and 29: Treatment of partnerships and unincorporated associations

Larger vessels are almost invariably owned by bodies corporate but some smaller vessels which will incur liabilities under the Bunker Oil Bill may be owned by a partnership or an unincorporated association. Further, the owners of any such vessels with a gross tonnage in excess of 1,000 will be required to meet obligations relating to insurance and the carriage of insurance certificates as are imposed by Part 3 of the Bunker Oil Bill.

Clauses 28 and 29 therefore change the treatment of, respectively, partnerships and unincorporated associations by providing that obligations that would otherwise be imposed on a partnership or unincorporated association are imposed, respectively, on each partner or member of the association's committee of management and that offences may be taken to have been committed by the individual partner or member.

Clauses 28 and 29 take account of the definition in the Bunker Oil Convention of "person" which is as follows:

> *"Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.*

The offences in clause 16, 17 and 21 apply to the "registered owner". The term "registered owner" is defined in the Bunker Oil Convention in the following terms:

> *"Registered owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "registered owner" shall mean such company.*

To comply with the requirements of the Bunker Oil Convention, it is necessary that partnerships and unincorporated associations can be considered to be the registered owners of ships. The Note to the definition of "person" in clause 3 of the Bunker Oil Bill draws readers' attention to clauses 28 and 29 and ensures that those clauses will be considered when interpreting the application of the Bunker Oil Bill.

Offences that would otherwise be committed by a partnership or an unincorporated association are taken to have been committed by, respectively, each partner or member of the association's committee of management who knew or who reasonably ought to have known that the partnership or association was the registered owner of the ship concerned. This protects individual partners or members from inadvertently committing an offence and will require the prosecution in a hearing for an offence to prove that the partner or member knew or ought reasonably to have known about the ownership of the ship concerned.

Clause 30: Regulations

Clause 30 is a standard clause to provide that regulations may be made for purposes of the Bunker Oil Bill.

PROTECTION OF THE SEA (CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE) (CONSEQUENTIAL AMENDMENTS) BILL 2008

NOTES ON CLAUSES

Clause 1: Short Title

Clause 1 is a formal provision specifying the short title of the proposed Act.

Clause 2: Commencement

Clause 2 sets out when the provisions contained in the Consequentials Bill will commence:

- Clauses 1 to 3 will commence on the date that the proposed Act receives Royal Assent.

- Schedule 1 will commence at the same time as sections 3 to 30 of the proposed *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Bunker Oil Act).

Clause 3: Schedule(s)

Clause 3 is a formal clause indicating that each Act specified in Schedule 1 to the Bill is amended as set out in the Schedule.

Schedule 1 - Amendments

Items 1 to 4 amend the *Admiralty Act 1988* (the Admiralty Act).

Items 1 and 3 add the word "or" at the end of each of the paragraphs (except the last paragraph) in subsection 4(3) of the Admiralty Act to reflect current drafting practice.

Item 2 amends subsection 4(3) of the Admiralty Act which sets out the meaning of the term "general maritime claim" for purposes of that Act. As a result of the amendment made by item 2, claims relating to matters arising under the applied provisions of the Bunker Oil Bill will be "general maritime claims" for purposes of the Admiralty Act. This will have the effect of conferring jurisdiction on the Federal Court and State and Territory Supreme Courts to hear and determine matters (including claims for compensation) under the applied provisions of the Bunker Oil Bill.

Item 4 inserts new section 26A into the Admiralty Act to provide that proceedings under the Admiralty Act relating to liability claims (including claims for compensation) under the Bunker Oil Bill must not be brought otherwise than in accordance with paragraphs 1 and 2 of article 9 of the Bunker Oil Convention. In accordance with those two paragraphs, actions can be brought only in the courts of countries in whose territory or exclusive economic zone pollution damage has occurred. Reasonable notice of any such action must be given to each defendant.

Item 5 amends subsection 19B(1) of the *Protection of the Sea (Civil Liability) Act 1981* (Civil Liability Act) to ensure that Part IIIA of the Civil Liability Act will not apply to ships to which the Bunker Oil Bill applies.

Currently, Part IIIA of the Civil Liability Act requires all ships (other than oil tankers carrying more than 2,000 tons of oil as cargo) with a gross tonnage of at least 400 and which are carrying oil as cargo or as bunker, when entering or leaving a port in Australia, to carry evidence that the ship is insured to cover the liability of the owner for pollution damage caused in Australia. This currently includes ships to which the Bunker Oil Bill applies.

The amendment made by item 5 will ensure that there is no overlap between Part IIIA of the Civil Liability Act and the Bunker Oil Bill.

Item 6 inserts new subsection 17A(5A) into the *Protection of the Sea (Powers of Intervention) Act 1981* (the Intervention Act).

New subsection 17A(5A) explicitly preserves the right of the Australian Maritime Safety Authority (the Authority) and others to recover preventive and pollution response costs and to receive compensation for pollution damage under the Bunker Oil Bill, even if the owner or the master of a ship has been the subject of a direction under the Intervention Act. New subsection 17A(5A) makes it clear that, to the extent that the Authority or others are entitled to recover their costs or receive compensation under the Bunker Oil Bill, those rights are not affected by other provisions of section 17A giving a person complying with a direction immunity from civil or criminal proceedings.

New subsection 17A(5A) will also ensure that any proceedings under the Bunker Oil Bill in the Federal Court or a State or Territory Supreme Court are not affected only because the registered owner or master of the ship involved has been issued with a direction under the Intervention Act.