

National Interest Analysis [2012] ATNIA 22

with an attachment on consultation and Regulation Impact Statement

**Protocol of 2010 to the International Convention on Liability and
Compensation for Damage in Connection with the Carriage of
Hazardous and Noxious Substances by Sea, 1996,
done at London on 30 April 2010**

[2010] ATNIF 55

and

**International Convention on Liability and Compensation for Damage in Connection with
the Carriage of Hazardous and Noxious Substances by Sea, 2010
(consolidated text of the International Convention on Liability and
Compensation for Damage in Connection with the Carriage of
Hazardous and Noxious Substances by Sea, 1996
and the Protocol of 2010 to the Convention)
done at London on 30 April 2010**

[2010] ATNIF 56

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, done at London on 30 April 2010

[2010] ATNIF 55

and

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010

[2010] ATNIF 56

Nature and timing of proposed treaty action

1. The proposed treaty action is accession to the *Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996* (“the Protocol”).
2. The Protocol was adopted by the International Maritime Organization (“IMO”) on 30 April 2010. The Protocol amends the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996* (“the 1996 HNS Convention”), which has not yet entered into force. The 1996 HNS Convention, as amended by the Protocol, is known as the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010* (“the 2010 HNS Convention”). Article 2 of the Protocol requires the Parties to the Protocol to give effect to the 2010 HNS Convention. Consequently, by becoming a Party to the Protocol, Australia would be bound by the 2010 HNS Convention.¹
3. The Protocol (and hence the 2010 HNS Convention) will enter into force eighteen months after:
 - at least twelve States, including four States each with at least 2 million units of gross tonnage of ships, have expressed their consent to be bound by the Protocol; and
 - the Secretary-General of the IMO has been informed that persons in those States who would be liable to contribute to the International Hazardous and Noxious Substances Fund (HNS Fund)² received during the previous calendar year a total of at least 40 million tonnes of hazardous and noxious substances (“HNS”) in respect of which there will be a liability to contribute to the fund.

¹ References to Articles in this National Interest Analysis are to Articles of the 2010 HNS Convention, unless otherwise specified.

² As indicated in paragraph 16 below, the HNS Fund is the international compensation fund established under the 2010 HNS Convention.

4. As at 20 September 2012, eight States have signed the Protocol, subject to ratification, but none of them has ratified it yet.

Overview and national interest summary

5. Implementation of the Protocol in Australia will ensure that in the event that damage or pollution arising from the carriage by ship of HNS occurs anywhere in Australia, including its territorial sea and exclusive economic zone, prompt, adequate and effective compensation for the persons affected will be available.

Reasons for Australia to take the proposed treaty action

6. Around the globe, hundreds of millions of tonnes of HNS are transported by ship each year. They are shipped to, from and around Australia both in bulk form (often in specialised chemical tankers or bulk carriers) and in packaged form.

7. The carriage of HNS by ship involves risks such as pollution, contamination, explosion or fire (depending on the type of HNS involved). Damage from such incidents can be very significant – particularly the costs of cleaning up pollution and undertaking environmental restoration and environmental monitoring after the incident.

8. Currently there is no legal requirement for ships carrying HNS to have liability insurance cover in respect of damage or pollution caused by the HNS. By contrast, ships carrying oil, whether as cargo or fuel (called “bunker fuel”), are required to have insurance cover.³

9. Under the *Convention on Limitation of Liability for Maritime Claims, 1976* [1991] ATS 12 (“LLMC 76”) as amended by the *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976* [2004] ATS 16 (“LLMC Protocol 96”) (together called the “LLMC Convention”), the liability of shipowners for damage or pollution caused by HNS carried by their ship (other than pollution damage resulting from spills of persistent oil from oil tankers which are covered by the Civil Liability Convention) is limited to relatively modest amounts based on the ship’s gross tonnage.

10. The 2010 HNS Convention is a significant step forward from the LLMC Convention, which is focused on limiting the liability of shipowners, charterers, managers, operators and salvors. The 2010 HNS Convention aims to ensure adequate, prompt and effective compensation for damage (including death or injury to persons, and loss or damage to property) or pollution (including costs of preventing the spread of pollution, cleaning up pollution, and environmental remediation) resulting from the maritime transport of HNS. It requires shipowners to have

³ The *International Convention on Civil Liability for Oil Pollution Damage, 1992* (“the Civil Liability Convention”), the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992* (“the 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 2003”) together establish a liability and compensation regime in respect of pollution damage resulting from spills of persistent oil (*ie* crude oil, lubricating oil and other heavy petroleum-based oils) from oil tankers. The *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001* (“the Bunkers Convention”) establishes a liability regime in respect of pollution damage caused by spills of bunker fuel from ships.

compulsory liability insurance, establishes significantly higher liability limits in respect of incidents involving the carriage of HNS by ship than the liability limits that apply under the LLMC Convention and establishes a two-tier system for paying compensation in the event of HNS incidents; the first tier of compensation is provided by compulsory liability insurance taken out by shipowners, and the second tier is provided by the HNS Fund, which will be funded by annual contributions payable by entities that receive bulk HNS cargoes carried by ship which exceed specified minimum annual tonnage thresholds. Increasing the liability limits is in Australia's national interest because it reduces the likelihood of the Australian Government having to meet the cost of damage and pollution. The 2010 HNS Convention differentiates between bulk and packaged HNS cargo by requiring contributions to be paid to the HNS Fund only by receivers of bulk HNS, not by receivers of package HNS; this reduces the administrative cost and burden of the compensation arrangements for both businesses and government. In the case of liquefied natural gas ("LNG") cargoes, the 2010 HNS Convention provides flexibility for the receiver and the titleholder of the LNG to agree that contributions to the HNS Fund in respect of the LNG are to be payable by the titleholder. Compared to the 1996 HNS Convention, the 2010 HNS Convention strengthens the requirement for States seeking to be bound by the 2010 HNS Convention to report to the IMO their total annual receipts of bulk HNS cargoes carried by ship by suspending the convention's entry into force for such a State until the State complies with the reporting requirement. As foreshadowed in JSCOT Report 115, Australia intends to denounce LLMC 76 and lodge a reservation to the LLMC Protocol 96 which excludes claims for damage within the meaning of the 2010 HNS Convention from the scope of the limitation of liability regime established under the LLMC Convention. This will avoid conflict between the LLMC Convention and the 2010 HNS Convention and ensure that in the event of damage or pollution caused by HNS, the higher liability limits in the 2010 HNS Convention will apply.

11. The principal benefits of the 2010 HNS Convention are:

- It clarifies legal responsibility for damage or pollution resulting from HNS carried on ships, by "channelling" liability to the shipowner and holding the shipowner strictly liable for the damage or pollution, subject to certain narrow exceptions. It will thereby reduce expensive and time-consuming litigation to determine responsibility.
- It ensures that shipowners will have liability insurance cover in respect of damage or pollution resulting from HNS carried by their ships, up to the limit of the shipowner's liability specified in the 2010 HNS Convention, which will be based on the ship's gross tonnage. Those limits of liability are considerably higher than the limits of liability under the LLMC Convention.
- It enables persons who suffer damage or incur costs of preventing, cleaning up or remediating the effects of pollution as a result of an incident involving the carriage of HNS by ship to make a claim directly against the shipowner's liability insurer, instead of being restricted to claiming against the shipowner.

- Where the shipowner's insurance is insufficient to cover the cost of the damage or pollution, or where, for some other reason, compensation is not available from the shipowner, the HNS Fund will make up the shortfall, up to a maximum of 250 million Special Drawing Rights ("SDRs") (approximately \$401 million) in respect of any one incident, less the amount of any compensation actually paid by the shipowner or its insurer.⁴

12. Under the liability and compensation regime established by the 2010 HNS Convention, the costs of damage or pollution arising from the carriage of HNS by ship will be shared between shipowners (who will be required to maintain liability insurance in respect of damage or pollution caused by HNS cargo) and receivers of bulk HNS cargoes (who will be required to pay annual contributions to the HNS Fund); such receivers are generally wholesale suppliers of HNS or industrial users of HNS. Subject to market forces, the shipowners and the receivers will pass on some or all of the cost to their wholesale HNS customers, and ultimately to consumers of HNS-based products. This allocation of the costs of HNS incidents can be considered fair and efficient: the shipowners, receivers, and downstream purchasers and end-users benefit from the trade in HNS and/or drive the demand for HNS, and should therefore bear the costs of addressing the risks which it poses to third parties and the marine environment. Further, the shipowners are best placed to take measures to improve the safe transport and handling of their HNS cargoes, and thereby mitigate the risks. Consignors of HNS cargo are also able to contribute to the safe transport and handling of the HNS through careful selection of the appropriate mode of shipping.

13. Addressing the liability and compensation issues relating to HNS through an international treaty like the 2010 HNS Convention is more economically efficient and advantageous from the point of view of Australia's trade interests than addressing these issues through a domestic legislative scheme that is unique to Australia. Cargo ships operate internationally and it would be costly and administratively burdensome for shipowners to have to make special insurance arrangements relating to HNS when their ships visit Australian ports. In a buoyant global shipping market, such requirements could deter some ships from participating in the Australian trade or induce them to charge premium freight rates as a condition of doing so, to the detriment of Australian exporters and importers. Overall, addressing these issues through an international treaty rather than at individual country level is more conducive to a level competitive playing field in both international trade and shipping.

14. Because the HNS Fund will be available to pay compensation for HNS-related damage or pollution occurring not just in Australia (including Australia's territorial sea and exclusive economic zone) but also in the other State Parties to the 2010 HNS Convention, Australian receivers that contribute to the HNS Fund will potentially be contributing to the cost of addressing HNS-related damage or pollution occurring in those other State Parties. However, since it is not possible to predict where or when an HNS incident will occur, Australia stands to benefit from the HNS Fund equally to other State Parties. (Indeed, Australia's long coastline and large area of territorial sea and exclusive economic zone combined with its relatively low

⁴ SDRs are a notional monetary unit defined by the International Monetary Fund based on the average value of a basket of major currencies. As at 20 September 2012, one SDR was equal to 1.54228 US dollars, and 1 US dollar was equal to approximately \$1.04 Australian. All the Australian dollar amounts specified in this document are based on these conversion rates. ("\$" signifies Australian dollars.)

population and correspondingly low manufacturing base means that it probably faces a greater risk of damage from HNS incidents in proportion to the amount of its contributions to the HNS Fund than many of the other State Parties – which suggests that over time it might benefit from the HNS Fund *more* than many of the other State Parties.)

Obligations

15. The key obligations in the 2010 HNS Convention are outlined here. A detailed description of the 2010 HNS Convention is provided in paragraphs 18 to 86 of the attached Regulatory Impact Statement.

16. The 2010 HNS Convention establishes a liability and compensation regime covering damage (including death or injury to persons, and loss or damage to property) or pollution (including costs of preventing the spread of pollution, cleaning up pollution, and environmental remediation) arising from the carriage of HNS by ship. The key elements of the regime are:

- Shipowners are strictly liable for damage or pollution arising from the carriage of HNS by their ship, subject to limited exceptions (Article 7).
- Shipowners are able to limit their liability for damage or pollution arising from the carriage of HNS by their ship to a specified maximum amount, based on their ship's gross tonnage (Article 9).
- Shipowners will be required to maintain liability insurance in respect of damage or pollution arising from the carriage of HNS by their ship, up to the limit of their liability. Ships will be required to carry an insurance certificate, issued by the State of the ship's registry, attesting that the ship holds valid insurance in accordance with the 2010 HNS Convention. Third parties who suffer damage or costs will have a right to claim directly against the insurer (Article 12).
- The HNS Fund will be established to provide compensation for damage or costs of preventing, cleaning up or remediating the effects of pollution arising from the carriage of HNS by ship where:
 - no shipowner is liable to pay compensation; or
 - the shipowner that is liable to pay compensation is unable to pay it; or
 - the damage exceeds the shipowner's limit of liability (Articles 13 and 14).
- The HNS Fund will be funded by contributions that will be payable by receivers who received more than specified minimum tonnages of bulk HNS carried by ship during the previous calendar year. (A "receiver" is a person that receives HNS cargo when it is discharged from the ship.) The contributions will be calculated as a rate per tonne of bulk HNS received (Articles 16 to 20).

17. The 2010 HNS Convention allows a State Party to decide to apply the Convention to its warships, naval auxiliary ships or other ships owned or operated by the Party that are used only on government non-commercial service (Article 4). The Australian Government does not propose, at this time, to apply the 2010 HNS Convention to such ships. The reason is that these ships generally do not carry significant amounts of cargo (apart from bunker fuel) and they meet high standards with regard to design, construction, maintenance and operation; and, in the case

of warships, they are not normally subject to port State control. The Commonwealth generally self-insures against liability and has the financial capacity to meet any claims.

18. A State Party to the 2010 HNS Convention can make a declaration excluding from the scope of the Convention ships of less than 200 gross tonnage while they are carrying HNS only in packaged form and are engaged on voyages between ports or facilities of that State Party (Article 5, paragraph 1). The Australian Government intends to make a declaration excluding such ships from the scope of the 2010 HNS Convention. Vessels in this category are small and pose a commensurately small risk, and they are very numerous – they include seagoing fishing boats and pleasure craft. The administrative costs of subjecting them to the 2010 HNS Convention (including issuing and inspecting insurance certificates) would be large, and it is considered that those costs would outweigh the benefits.

19. The 2010 HNS Convention also allows two neighbouring States to make a declaration excluding from the scope of the Convention ships of less than 200 gross tonnage while they are carrying HNS only in packaged form and are engaged on voyages between ports or facilities of those States (Article 5, paragraph 2). It is not currently proposed that Australia will enter into such an arrangement with any neighbouring State (such as Papua New Guinea or New Zealand). Any future proposal for Australia to enter into such an arrangement with a neighbouring State will need to be carefully considered.

20. The 2010 HNS Convention gives State Parties that self-insure their own ships the option of not obtaining liability insurance cover for the ship but instead providing it with a certificate stating that the State Party itself will meet its liability for damage from HNS carried by the ship, up to the limit of liability specified in the convention (Article 12, paragraph 12). To the extent that the Australian Government self-insures its ships, it will exercise this option in relation to the ships concerned.

Implementation

21. The Protocol (including the 2010 HNS Convention) will be implemented by a proposed Protection of the Sea (Hazardous and Noxious Substances) Bill. The timing for introduction of this Bill into Parliament will depend on the Government's legislative priorities.

Costs

22. The mandatory insurance requirement in the 2010 HNS Convention is not expected to impose very significant additional costs on responsible and prudent shipowners. Shipowners already take out liability insurance: as a minimum, they maintain insurance cover up to the limit of their liability under the LLMC Convention. Those limits are set at relatively moderate levels consistent with the carriage of non-hazardous cargo. Shipowners who only maintain such minimal levels of cover will have to increase the level of cover in respect of voyages on which their ship carries HNS as cargo, which is likely to involve their having to pay higher insurance premiums. However, the higher levels of cover mandated under the 2010 HNS Convention reflect the higher risks associated with the carriage of HNS.

23. The requirement to pay contributions to the HNS Fund will impose a new cost on the persons that will be liable to pay the contributions, namely, receivers of bulk HNS cargoes carried by ship who receive certain specified minimum tonnages of bulk HNS in a calendar year. However, in the absence of very serious and costly HNS incidents, contributions can be expected to remain low because:

- contributions will only be payable to the extent that they are needed to cover the HNS Fund's administration costs and actual and anticipated compensation claims arising from known incidents; and
- the HNS Fund will only be called on to pay compensation where the shipowner's mandatory liability insurance cover is insufficient (or where adequate compensation is unavailable for other reasons).

24. The International Group of P & I Clubs (whose thirteen members are the principal providers of third party liability insurance for shipping) has indicated that, in the eight years spanning 2002 to 2009, there were only three incidents in respect of which compensation would have had to be paid by the HNS Fund (if the 2010 HNS Convention had applied at the time of the incidents), and that the total amount payable by the HNS Fund would have been approximately 29.9 million SDRs (approximately \$48 million). Australian contributors would only have had to contribute a small fraction of this sum, since Australian contributions will comprise a small fraction of the total contributions to the HNS Fund.

25. The Australian Government will incur costs of administering the legislation implementing the 2010 HNS Convention in Australia, including carrying out port inspections of ships' insurance certificates to verify compliance with the mandatory liability insurance requirement and collecting from Australian receivers annual reports on their receipts of bulk HNS, to facilitate the collection of contributions to the HNS Fund. (Further details of these costs are provided in paragraph 122 of the attached Regulation Impact Statement.)

Regulation Impact Statement

26. A Regulation Impact Statement is attached.

Future treaty action

27. A conference for the purpose of revising or amending the 2010 HNS Convention must be convened by the IMO if requested by six State Parties or by one third of the State Parties, whichever is the higher figure (Article 47).

28. Special procedural requirements apply to any proposal to amend the 2010 HNS Convention which seeks to:

- amend the limits on the liability of shipowners; or
- amend the maximum amount of compensation payable by the HNS Fund (Article 48).

29. The main elements of the special procedural requirements are as follows:

- the proposed amendment must be requested by at least one half, and not less than six, of the State Parties;
- the proposed amendment needs to be adopted by a two-thirds majority of the Contracting States present and voting in the Legal Committee of the IMO, provided that at least one half of the Contracting States are present at the time of voting;⁵
- an amendment so adopted enters into force thirty-six months after it is notified by the IMO to Contracting States, unless at least one quarter of the Contracting States give notice within eighteen months from the date of notification that they do not accept the amendment (this is known as the “tacit acceptance” procedure);
- amendments cannot increase the limits of liability of shipowners or the maximum amount of compensation payable by the HNS Fund by more than a multiple of three or at a rate of 6% or more per annum;
- no amendment of the limits of liability applying to shipowners or the maximum amount of compensation payable by the HNS Fund may be considered less than five years from the date the Protocol opened for signature nor less than five years from the date of entry into force of a previous amendment.

30. Any decisions relating to amending the Protocol or the 2010 HNS Convention will be subject to Australia’s domestic treaty process.

Withdrawal or denunciation

31. The Protocol may be denounced by a State Party at any time after the expiration of one year after the Protocol enters into force for that State Party, by depositing an instrument of denunciation with the Secretary-General of the IMO. The denunciation takes effect twelve months after the instrument is deposited, or such later time as is specified in the instrument (Article 49). Notwithstanding a denunciation by a State Party, the Assembly of the HNS Fund may decide that certain provisions of the Protocol and the 2010 HNS Convention relating to obligations to pay contributions to the HNS Fund shall continue to apply in respect of payments of compensation relating to an incident which occurs before the denunciation takes effect.

32. Any decision to denounce the Protocol will be subject to Australia’s domestic treaty process.

Contact details

Maritime Economic Regulation Section
Surface Transport Policy Division
Department of Infrastructure and Transport

⁵ A “Contracting State” in relation to a convention is a State that has ratified, acceded to or otherwise expressed its consent to be bound by the convention, irrespective of whether the convention has entered into force for that State. By contrast, a “State Party” in relation to a convention is a State that has ratified, acceded to or otherwise expressed its consent to be bound by the convention and for which the convention has entered into force.

ATTACHMENT ON CONSULTATION**Protocol of 2010 to the International Convention on Liability and
Compensation for Damage in Connection with the Carriage of
Hazardous and Noxious Substances by Sea, 1996,
done at London on 30 April 2010
[2010] ATNIF 55****and****International Convention on Liability and Compensation for Damage in Connection with
the Carriage of Hazardous and Noxious Substances by Sea, 2010
[2010] ATNIF 56****Consultation**

33. A discussion paper on the Convention was sent to 43 industry and government stakeholders in May 2011. The discussion paper invited submissions about whether Australia should become a Party to the 2010 HNS Convention, as well as about a number of specific issues concerned with the convention's potential impact on Australian stakeholders.
34. In 2009-2010 a similar list of stakeholders was consulted about the proposed amendment of the 1996 HNS Convention by the Protocol.
35. Consultation also occurred during the period preceding the adoption of the 1996 HNS Convention.
36. Submissions in response to the discussion paper were received from two stakeholders, namely the Great Barrier Reef Marine Park Authority and National Bulk Commodities Group.
37. Further details about the consultation process, including a list of stakeholders consulted and a summary of issues raised, are provided in paragraphs 147 to 157 of the attached Regulatory Impact Statement.