



30 November 2012

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Via email: jsct@aph.gov.au

Dear Committee Secretary

**Protocol of 2010 to the International Convention on Liability and Compensation for Damage
in connection with the Carriage of Harmful and Noxious Substances by Sea (HNS
Convention)**

Thank you for the opportunity to provide comment on the Committee's review of the HNS Convention. The Plastics and Chemicals Industries Association (PACIA) and its members have a critical interest in any decision by Australia to ratify the HNS Convention.

PACIA is the pre-eminent national body representing Australia's chemistry industry. The chemistry industry is the third largest manufacturing industry in Australia with a turnover of approximately \$33.6 billion. The sector directly employs approximately 83,000 people with wages and salaries of almost \$5 billion. The sector represents between 9 and 10 per cent of total Australian manufacturing activity and provides industry value add of \$11.5 billion. PACIA members include chemicals manufacturers, importers and distributors, logistics and supply chain partners raw material suppliers, plastics fabricators and compounders, plastics and chemicals recyclers and service providers to the sector.

We are opposed to the adoption of the HNS Convention at this time.

PACIA is concerned that Australian Ratification of the Convention would impose significant cost imposts to the Australian industry in areas over which it has very little control. PACIA recognises the need to show leadership and take account of its products in the unlikely event of an incident. We are committed to ensuring prevention of HNS incidents at sea through appropriate dealings with shipping companies and we are committed to a strong product stewardship approach to our products. We are committed to the principle of "polluter pays" and we support appropriate response arrangements being in place to mitigate and minimise the impact of any HNS incidents, should they occur. However, PACIA is very concerned at the potential cost impact on the chemical industry, were Australia to adopt the HNS Convention.

Maintaining international competitiveness is critical to the survival of the Australian chemical industry. Chemicals production is typically a high fixed cost and energy intensive manufacturing activity, and most chemicals are extensively traded. International markets are sensitive to the

business cycle, to oil prices and to changes in market supply conditions (the commissioning of a new large-scale plant can cause a surplus and depressed prices for several years). In this highly competitive market, it is common place for world prices to be at or near marginal cost of production for extended periods. Australian producers are particularly exposed to low-cost competition and the fluctuations of world markets, including extended periods of depressed prices.

At a time when manufacturing is already significantly challenged through a significant cumulative burden, we can ill impose another cost that would further erode the industry's competitiveness.

PACIA has a number of concerns with Australia's ratification of the HNS Convention at this time.

Risk to Australia of an HNS Incident

The basic premise for Australian ratification of the HNS is to effectively manage the financial risks associated with clean-up associated with the release of HNS substances into the marine environment. The extension here is that this risk mitigation strategy should be shared equally among ratifying parties regardless of the regulatory standards in either Australia or other nations. As such, it is implicit that the risk of incidence is the same in any jurisdiction. Indeed, the Regulatory Impact Statement (RIS) states in s107 that the risk for Australia is magnified given its vast coastline.

Unfortunately, the risk of significant incidence in Australia such as to require access to funding provided by the Convention is not supported by the evidence. The RIS is unable to identify a single case in Australia where the fund would have been accessed.

While there is a strong case for Australia's commitment to the International Oil Pollution Compensation Funds (of which there more than 100 ratifying nations) where the release of oil into the marine environment can have devastating consequences, this is largely not the case for HNS substances where in the majority of cases product simply disperses and evaporates. The substances list under the HNS Convention appears to be a catch all with little regard to their actual effects on the environment – there is no differentiation between the likely risks and impacts associated with any given HNS substance.

As discussed in the RIS, Australian marine regulatory standards are high by world standards. This has of course had the effect of ensure that the risk incidence is low. PACIA endorses this as an appropriate response. Also, as the RIS states in s116, Conventions are already in place that prescribe safe design and operation of ships to prevent or minimise pollution from ships that operate to further reduce the risk and that additional Australian regulation strengthens this further.

This position is further supported by the outcomes reflected by the Australian leadership position in its applied marine regulatory standards. To our knowledge Australia does not have any history of significant HNS incidents within its waters which have exceeded the existing ship owner maximum insurance liability thresholds thereby creating a notional liability shortfall that the HNS funding may otherwise meet. Based on evidence, it cannot be concluded that Australia has a shortfall within its management of HNS cargo within its waters that would warrant participation in the HNS Convention. In essence, Australia's participation in the HNS Convention may well serve the interests of other poorly managed and regulated countries, but it remains that it cannot be concluded participation that would serve Australia's best interests.

Therefore, it can only be concluded that the HNS Convention seeks to disproportionately shift liability for risk activities, that are higher in other countries, onto Australian receivers of goods in a manner in which those receivers have limited capacity to minimise any risks themselves and would in fact also be liable for possible ineffective regulation and/or poor shipping practices elsewhere in the world.

Costs imposed on industry

Above all, it is PACIA's firm view that the potential benefits of ratification do not match the expected costs that would be imposed on Australian industry and Australian consumers. Indeed, the RIS is unable to quantify the cost impact and simply assumes them to be minimal. This assumption is inadequate for truly assessing the impact of the convention and only serves to portray a highly unbalanced position within the published RIS.

Further, PACIA does not accept that the risks posed to Australian waters are high enough to warrant ratification.

In relation to the costs:

- The RIS is quite open in its inability to assess either the immediate upfront establishment costs or the expected ongoing costs to industry.
 - (s168) *It is not possible to predict the contribution rates in any given year, as that will depend on the amount of contributions that will be needed to cover the administration costs of the HNS Fund and the compensation that will have to be paid out of the relevant account or sector of the HNS Fund during the next calendar year in respect of known HNS incidents.*
 - (s173) *A reliable estimate of the establishment costs is not available, but those costs are not expected to be very significant, particularly having regard to the fact that the HNS Fund and the IOPC Funds will share the same Secretariat.*
- Indeed, the RIS is unable to quantify how many companies will be affected parties.
 - (s170) *It is not feasible at the present time to determine the number of entities in Australia that will be liable to pay contributions to the HNS Fund as receivers of bulk HNS cargoes. The reason is that information about receipts of HNS is not collected by any Australian agency in a form that would enable the total number of receivers in Australia of bulk HNS in excess of the relevant minimum annual tonnage thresholds to be determined without disproportionately costly and time-consuming data sifting and matching.*
- Receivers of HNS substances will be hit by a double burden. They will be obliged to pay not only the direct costs imposed by the Convention, but will also receive the costs passed through from shippers as they recover the additional costs imposed on them by the Convention.
- Whether an incident occurs or not, industry is expected to carry the costs for the ongoing administration of the Fund, estimated to be its share of some £1million per annum. However, there are no details provided as to why the costs are estimated to be £1million per annum, or indeed what value that may deliver especially given that the fund is expected to be rarely accessed.
- Industry will be faced with additional costs associated with the ongoing burden of new regulatory red-tape to ensure reporting compliance. The RIS takes this burden a step further by proposing that a reporting threshold be set at some 10% lower than the contributing burden meaning that even if a company is not liable to pay into the fund, it is still burdened by red-tape.
- Further costs are imposed on industry due the proposal in s177 for the Commonwealth to recoup its costs through user charges or an industry levy, none of which have been quantified.
- It is also unfortunate that while industry is expected to carry these costs, the RIS proposes to exempt Commonwealth activity for “*Australian warships, naval auxiliary ships or other ships owned and operated by the Commonwealth or State or Territory governments that are used only on government non-commercial service*”. The reason provided is that “*these ships do not carry cargo on a commercial basis 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*”. The implication here is that neither the shipping industry, nor Australian receivers of HNS substances, have or expect the same high standards. Further, the implication is that current Australian regulatory practice is not deemed as being sufficient to ensure adequate protection of the Australian environment.

In short, the RIS is severely lacking in the basic content of the cost impact on businesses and thus, business is unable to adequately budget or plan for the costs imposed by the convention. Industry is also unable to directly manage these risks that are the direct responsibility of the international ship owners and insurers. Similarly, industry has no capacity to influence the fund, its administration or the policy settings surrounding it. Further, industry has no capacity to either influence the regulatory practice of other nations to manage their risks of incidence or those applying to shippers. Australian industry will always manage the risks under its control, including through the appropriate selection and contracting of companies moving goods. Under the HNS Convention, receivers are simply expected to contribute to a fund on the basis that an unlikely (as

stated in the RIS) incident may occur in Australia or elsewhere without any scope to manage or mitigate that risk.

Trade Distortions

At present, only a handful of nations have been identified as considering ratification of the HNS Convention. Australia's chemical industry largely competes with Asia and the Middle East where it is highly unlikely that nations will ratify the convention. Imposing the costs on Australian industry only serves to further erode the international competitiveness of the domestic industry.

Consultation with industry

PACIA is disappointed that the RIS states that "none of the stakeholders indicated any objections to the Protocol". PACIA has consistently expressed its concerns in submissions and meetings with the AMSA and the Department dating back as far as 2002. These concerns are in keeping with the views expressed in this submission, namely that the potential costs do not appear to match the like benefits and will result in further erosion of Australian industry competitiveness. For example:

- *"The PACIA Board remains firmly of the view that it is opposed to Australian ratification of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996 (hereafter referred to as 'the Convention') principally on the grounds that the potential benefits are significantly outweighed by the potential costs. This position is unchanged since the ratification was first presented to PACIA in 2002/03 by the Australian Maritime Safety Authority (AMSA) and our formal response to AMSA in February 2003" (PACIA Submission to 2006 RIS).*
- Subsequently in 2007, the PACIA Board amended its position to reflect some changes to the requirements and provisions of the HNS Convention. However, any support from PACIA was conditional on similar requirements being placed upon our competitors so as to avoid the aforementioned trade distortions.
 - *The PACIA Board agrees in principle to support Australian Ratification of the HNS Convention at such a time as major global chemical trading nations (and Australia's trading partners) agree to ratify on a common date and agree a fair and equitable share of the administrative costs and potential costs related to any future incident. (PACIA Letter to the Department of 12/2/07)*
- As identified in this submission, we continue to maintain these views as consistently expressed in all discussions with Government.

Through the networks of our members, PACIA is also aware that other parties have provided similar advice in opposing the ratification of the HNS Convention and to cite in the RIS (and other documentation) that "none of the stakeholders indicated any objections to the Protocol" is simply inaccurate and unbalanced.

Conclusion

PACIA remains opposed to Australian ratification of the HNS Convention at this time for a number of key reasons:

- the limited number of possible signatories to the Convention,
- the potential for trade distortion and erosion of international competitiveness given those signatories are not competitor nations, particularly at a time when Australian industry is already significantly economically challenged,
- the risks of incidence are low,
- the costs, while unable to be identified, would not match the identified risks,
- the Regulatory Impact Statement is deficient
- the imposition of further reporting burdens and red-tape, even on those who may not be required to contribute to the fund, and
- Australian industry would be liable for the risks and costs of other nation's poor, or unsatisfactory, regulation.

I would be pleased to discuss this further with the Committee should it wish. Do not hesitate to contact me via email at pgniel@pacia.org.au or telephone on 02 6230 6985.

Yours sincerely

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