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Oil Pollution Damage Conventions

Amendments to the Limitation Amounts in the 1992 Protocol of the International Convention on Civil Liability for Oil Pollution Damage and Amendments to the Limits of Compensation in the 1992 Protocol of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

2.1 Compensation for pollution damage caused by oil spills from tankers is governed by an international regime established by the 1992 Protocol of the International Convention on Civil Liability for Oil Pollution Damage and the 1992 Protocol of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. Under this regime, the burden of compensating victims of oil spills is shared between shipowners and cargo owners. The Committee examined the Amendments to the two Conventions together and investigated some broader maritime and treaty issues.

2.2 The Committee noted that the resolutions of the International Maritime Organization (IMO) to accept these Amendments were adopted by its legal committee in October 2000 by what is called the 'tacit acceptance procedure'.[1] This procedure is being introduced by the IMO where proposed amendments to conventions are of a 'technical' nature.[2] As no

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1 Information about the proposed treaty action is taken from the National Interest Analysis, tabled in conjunction with the treaty text on 27 August 2002, and a public hearing held in Canberra on 16 September 2002.

2 R. Alchin, *Transcript of Evidence*, p.14.

states indicated that they did not accept the Amendments by the May 2002 deadline, they will enter into force on 1 November 2003.

2.3 The Committee did not receive adequate notification (that is, before the deadline had passed) from the Department of Transport and Regional Services that the proposed treaty actions should have been reviewed. The Department advised that this oversight was caused by a number of factors, including confusion as to whether treaty actions listed for 'tacit acceptance' are subject to consideration by this Committee.

2.4 The Committee recognises the objectives of the IMO to make the process of implementation of amendments more efficient by ensuring that they will automatically enter into force after a passage of time. While the Committee also accepts that many changes will be of a technical nature, they may still have significant ramifications of which the Committee, as well as the relevant Government department, should be aware. The Committee has been assured that improved procedures are now in place to ensure that the Committee is advised of any proposed amendments in a timely manner, regardless of the manner of their acceptance.

Recommendation 1

The Committee recommends that improved departmental procedures be implemented such that the Committee is advised in a timely fashion of International Maritime Organization amendments proposed to take effect through a 'tacit acceptance' procedure.

1992 Civil Liability Convention

2.5 The 1992 Civil Liability Convention governs the liability of shipowners for oil pollution damage and created a system of compulsory liability insurance. Shipowners are normally entitled to limit their liability to an amount which is linked to the tonnage of their ships.

2.6 The 1992 Civil Liability Protocol increased the limitation amounts for oil pollution damage; Resolution LEG.1(82) will amend the protocol to further increase the limitation amounts to take account of the erosion of the value of the current limits, caused by inflation. Under the new Agreement, the limitation amount applying, for example, to a 26 000 tonne tanker will increase from approximately A$29 million to approximately A$44 million.

2.7 The Committee agrees that, while it is important to provide limits to liability so that a tanker owner is not exposed to unlimited liability in cases of claims arising from an oil spill, 'the tanker owner should also be expected to pay a reasonable amount towards the cost of compensation for consequent damages.'[3]

2.8 The limitation amounts set out in the 1992 Civil Liability Convention, in the 1992 Civil Liability Protocol and in Resolution LEG.1(82) are expressed in terms of Units of Account.[4] The following table compares the current limitation amounts with the limits proposed by Resolution LEG.1(82).

Table 1 Limitation amounts

	Current limitation amounts		Proposed limitation amounts	
	Units of Account	$A[5]	Units of Account	$A
For a ship up to 5,000 tons	3,000,000	7,384,000	4,510,000	11,100,000
For each additional ton	420	1,033	631	1,553
Maximum limitation amount	59,700,000	146,900,000	89,770,000	221,000,000

Source National Interest Analysis

2.9 The increased limitation amounts have the potential to increase the costs of insurance for owners. Advice was sought from the International Group of P&I Associations (whose members provide cover for over 90% of world ocean-going shipping tonnage) on the potential effect of the increased limitation amounts. The component of a tanker's insurance that covers oil spills is only a very minor part of the whole cost of the insurance for this vessel, therefore an increase in liability will probably not result in an increase in the insurance premiums.

3 National Interest Analysis, paragraph 13.

4 One Unit of Account is the same as a Special Drawing Right (SDR) as defined by the International Monetary Fund. The value of the SDR varies from day to day in accordance with changes in currency values. On 24 July 2002, one SDR was worth $A2.46136.

5 These values are rounded for convenience.

1992 Fund Convention

2.10 The 1992 Fund Convention is supplementary to the 1992 Civil Liability Convention. It established a regime for compensating victims when the compensation provided for under the Civil Liability Convention is inadequate or unable to be obtained through certain circumstances. The 1992 Fund Convention established the International Oil Pollution Compensation (IOPC) Fund that pays compensation where it may not be obtainable under the Civil Liability Convention for any of the following reasons:

- the shipowner is exempt from liability under the 1992 Civil Liability Convention because the shipowner can invoke one of the exemptions under that Convention; or
- the shipowner is financially incapable of meeting his or her obligations under the 1992 Civil Liability Convention and the shipowner's insurance is insufficient to satisfy the claims for compensation for pollution damage; or
- the damage exceeds the shipowner's liability under the 1992 Civil Liability Convention.

2.11 The Fund is financed by contributions levied on any person who has received by sea more than 150 000 tons of 'contributing oil' (crude oil and fuel oil) in a calendar year. Annual contributions are levied by the IOPC Fund to meet the anticipated payments of compensation and administrative expenses during the coming year. Each contributor pays a specified amount per ton of contributing oil received. The Committee notes that refined petroleum products are not covered by these conventions.

2.12 The 1992 Fund Protocol set the limitation amounts for compensation payable from the IOPC Fund; Resolution LEG.2(82) will amend the limits in Article 6(3) of that Protocol. Under the new Agreement, the maximum amount of compensation payable for a single incident would increase from 135 million units of account (approximately A$325 million) to 203 million units of account (approximately A$500 million).

2.13 It is important to provide a limit to the amount that the IOPC Fund may be required to pay in the case of a major oil spill so that there can be some estimate of potential liabilities of the IOPC Fund. However, it is recognised that the limit on liability should be set at a level that is sufficient to cover anticipated compensation costs arising from almost all oil pollution incidents involving oil tankers. The Committee was advised

that the amendments to the limits of compensation set out in Resolution LEG.2(82) will increase the existing limits to take account of the erosion of their value by inflation since 1992.

2.14 The Committee noted that there have been only two cases where the 1992 Fund Convention has applied and where the existing limits of compensation have been exceeded. Neither of these incidents occurred in Australia.[6]

2.15 The Committee was advised that the Fund is set up as a separate legal entity, collecting levies from companies who receive oil. The Committee notes the distinction between 'receiving' and 'importing' in this context: if oil is moved from one part of a country to another by sea it is deemed to have been received, meaning a levy is still applicable if the amount received exceeds 150 000 tons in a calendar year.

2.16 The limits of compensation set out in the 1992 Fund Convention, in the 1992 Fund Protocol and in Resolution LEG.2(82) are expressed in terms of Units of Account.[7] In accordance with Resolution LEG.2(82), the maximum amount of compensation to be paid for a single pollution incident will be increased from 135 million units of account to 203 million units of account. The increased limits have the potential to increase the costs of contributions by receivers of contributing oil, but this is unlikely to occur unless there is a very major oil pollution incident where the compensation costs exceed the current limit of 135 million units of account (approximately $A325 million).

2.17 The balance sheet for the Fund as at December 2001 showed a cash balance of 97.8 million pounds sterling, a figure which varies from year to year depending on the anticipated claims and the extent to which payments have been made by contributors.[8] This money is held in term deposit accounts at fifteen different banks, current and call deposit accounts at two banks and two foreign currency deposit accounts.

2.18 The Committee was advised that contributions held pending payments to claimants are invested with various financial institutions. As at 30 June 2002, the Fund's portfolio of investments totalled 114.5 million pounds sterling with twenty-one financial institutions.

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6 The incidents were the breaking up of the *Nakhodka* in the Sea of Japan on 2 January 1997 and the breaking up of the *Erika* off the coast of Brittany, France on 12 December 1999.

7 One Unit of Account is the same as a Special Drawing Right (SDR) as defined by the International Monetary Fund. The value of the SDR varies from day to day in accordance with changes in currency values.

8 Information in the following paragraphs was provided as supplementary information by the Department of Transport and Regional Services.

2.19 Funds are controlled by an Assembly comprising all states who are members of the Fund (currently eighty-one). The Fund Assembly approves annual budgets, investments, external audit reports[9] and contributions required for each marine pollution incident. Payments of compensation require endorsement by an Executive Committee comprising fifteen member states elected by the Assembly. Australia is currently a member of the Executive Committee.

2.20 The Committee was concerned that, in the event of several marine incidents during a calendar year, the Fund's reserves would become depleted to a point where it would be unable to fully fund payment for compensation claims for damage caused by oil pollution.

2.21 The Committee was advised that the Fund Assembly operates a system of deferred invoicing. The total amount to be levied in contributions for a given calendar year will be set by the Assembly, who may decide to levy the amount in two separate portions. In the unlikely event that it is found that the Fund does not have sufficient money for payments in a particular year, the contributions would be increased in the following year.

2.22 The Committee also noted that payments for a particular incident are often made some time after the incident. There may be a multitude of claims which are paid at different times. For example, in the case of the Erika, which broke up off France in December 1999, 5,840 claims for compensation had been lodged with the Fund by 31 December 2001.

Impact on existing treaty obligations

2.23 The 1976 Convention on Limitation of Liability for Maritime Claims is a general convention that provides a limit on the amount of damages that can be claimed as a result of an incident connected with the operation of a ship. The Committee was advised by the Department that the Civil Liability Convention is specifically excluded from the coverage of the 1976 Convention.

9 The external auditor is the Comptroller and Auditor-General of the United Kingdom.

Insurance and Prevention of Oil Pollution Damage

2.24 The Committee considered the role of the Australian Maritime Safety Authority (AMSA) and Australian Customs in inspections of ships using Australian ports. Insurance certificates are checked as part of this process. The Committee was advised that a tanker will be detained until it has appropriate insurance. The Department advised that 202 tankers visited Australian ports between August 2001 and August 2002, and of the ships 'eligible' for inspection (i.e. that had not been inspected by AMSA for 3-6 months prior to arrival at an Australian port), 68 per cent were inspected. The Department also advised that, in the twenty years that the Civil Liability regime has been in place in Australia, AMSA was not aware of any instances where a tanker did not have the required insurance.

Future increases of amounts under the Conventions

2.25 The Committee noted that each of the conventions limits the amount of future increases to no more than six per cent compounded from the time of the previous increase. That is, if a further amendment was required to the current amount, it could only be a six per cent increase on 203 million units of account.

2.26 The Committee also understands that there has not been any previous increase by the tacit acceptance procedure, however, the 1992 Protocol itself was an increase on the previous conventions.

2.27 The Committee was advised that in response to concerns from the European countries that the level of compensation may not be adequate, the Legal Committee of the IMO is developing a further protocol to the Fund Convention. This protocol is to be considered by diplomatic conference in 2003.

Implementation and Conclusion

2.28 For both treaty actions, the Committee was advised that implementation can occur by amending existing legislation, and there will be no additional costs on the Australian Government. In the case of the Civil Liability Convention, there would be a likely increase to insurance costs for ship owners, but this is not quantifiable. For the Fund Convention, there is a potential increase in the costs of contributions by receivers of contributing oil, but this would only occur if a very major incident occurred with compensation costs exceeding the current limit.

2.29 In order to avoid the application of the amended amounts in either Convention, Australia would be required to denounce the relevant treaty, which the Committee agrees would not be in the national interest.

2.30 Consultation with interested parties suggests that there is support, including among ship owners, for the introduction of revised amounts. The changes would be implemented by amendments to the *Protection of the Sea (Civil Liability) Act 1981* and the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* to commence 1 November 2003 (when both actions, if accepted by the Committee, will enter into force).

2.31 The Committee was advised that the views of the governments of the States and the Northern Territory, the Australian Shipowners Association (representing Australian owners of ships), Shipping Australia Limited, the Association of Australian Ports and Marine Authorities and to the receivers of contributing oil in Australia were sought on whether Australia should accept the revised limits of compensation. The Committee understands that all responses received supported the proposed treaty actions. The Committee also noted that the matters were discussed as part of the consultative procedures between the Commonwealth and State transport authorities from the Australian Maritime Group, the Standing Committee on Transport, and the Australian Transport Council.

2.32 The Committee noted that maritime unions were not involved in the consultation process. The Department advised that the only potential outcome of the amendments could be a minimal effect on the companies' insurance.[10] Given the positive feedback from all parties consulted, the Committee concurs that this was not an issue of importance for union consideration.

2.33 The Committee accepts that it is in Australia's interest to accept the proposed amendments to these Conventions and anticipates an improvement in the notification processes for such actions, whether accepted tacitly or by other means, in the future.

10 R. Alchin, *Transcript of Evidence*, p.17.