Regulation Impact Statement

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

1. Problem

Current situation

1.1 The only comprehensive international convention covering oil spills currently in force is the International Convention on Civil Liability for Oil Pollution Damage, 1992 (the Civil Liability Convention). The Civil Liability Convention which applies only to oil spills from oil tankers provides that owners of oil tankers are strictly liable for oil pollution damage resulting from the escape or discharge of oil and creates a system of compulsory liability insurance. The Civil Liability Convention is implemented by the *Protection of the Sea (Civil Liability) Act 1981* (the Civil Liability Act).

1.2 Shipowners are able to limit their liability for general maritime claims (including pollution damage from oil spills) in accordance with limits set out in the Convention on Limitation of Liability for Maritime Claims (LLMC Convention).[1] The LLMC Convention does not apply where the Civil Liability Convention applies and it does not require shipowners to be insured to cover their liabilities. Further, because the LLMC Convention does not include strict liability provisions, shipowners are required to pay compensation for incidents only where they are found to be at fault.

1.3 The liability limits set out in the LLMC Convention are as follows:

- one million Special Drawing Rights (SDR)[2] 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.

1.4 The maximum liability for a typical ship with a gross tonnage of 40,000 is 15,200,000 SDR which is approximately $30 million.

1.5 Australia has enacted legislation (Part IIIA of the Civil Liability Act) to require ships with a gross tonnage of 400 or more entering Australian ports to be insured to cover "the liability of the owner for pollution damage caused in Australia". This requires ships other than oil tankers to be insured to cover their liabilities up to the LLMC Convention limits as referred to in paragraphs 1.2 and 1.3 above. While requiring ships other than oil tankers to be insured to cover liability in case of pollution damage resulting from a spill of bunker oil[3], this requirement does not cover other key elements such as strict liability,

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1 The LLMC Convention is implemented by the *Limitation of Liability for Maritime Claims Act 1989.*

2 The Special Drawing Right (SDR) is a unit of account defined by the International Monetary Fund. The value of the SDR varies from day to day in accordance with changes in currency values. As at 23 February 2006, one SDR was worth approximately $A1.95.

3 "Bunker oil" is defined in article 1(5) of the Bunkers Convention to mean any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil.

the precise forms of documents to be carried on board a ship, a definition of pollution damage or jurisdiction of courts.

Recent oil spills

1.6 Recent international data on oil spills indicates that, even in the case of larger spills, the number of non-tanker ship spills is greater than the number of tanker spills. This is supported by experience in Australia where, during the ten year period 1995/96 to 2004/05, of 185 incidents requiring some type of response action where the type of ship responsible was identified, 93 per cent originated from ships other than oil tankers.

1.7 Of the 13 ship-sourced pollution incidents in Australian waters involving the loss of 100 or more tons of oil, six were not oil tankers so bunker oil was the only type of oil involved (see Table 1 below).

Ship	Year	Ship type	Oil lost (tonnes)
Oceanic Grandeur	1970	Oil Tanker	1,067
Bethioua	1976	Oil Tanker	350
Yun Hai	1977	Bulk carrier	100
World Encouragement	1979	Oil Tanker	110
Hui Ju Hup	1979	Fishing	100
Esso Gippsland	1982	Oil Tanker	180
Korean Star	1988	Bulk Carrier	800
Al Qurain	1988	Livestock Carrier	184
Kirki	1991	Oil Tanker	17,000
Sanko Harvest	1991	Bulk Carrier	700
Era	1992	Oil Tanker	296
Iron Baron	1995	Bulk Carrier	300
Laura D'Amato	1999	Oil Tanker	250

Table 1 – Ship-sourced oil spills in Australia greater than 100 tonnes

1.8 The lack of a comprehensive liability and compensation regime makes it more difficult to deal with bunker oil spills from ships that are not oil tankers. Some bulk carriers and container ships carry more oil as bunker oil than coastal tankers carry as cargo. Bunker oils carried by large commercial ships are normally heavy fuel oils that are highly persistent and viscous when spilled. Such oils have the potential to travel great distances from the original spill location, causing widespread contamination of coast lines. Heavy fuel oils are generally not amenable to many of the clean-up techniques normally employed to deal with floating oil. As a consequence, the clean-up of heavy fuel oil spills can extend over large areas and be extremely costly.

1.9 The Australian Maritime Safety Authority (AMSA) receives about 300 oil spill sighting reports each year. Of these, an average of 37 incidents are serious enough to warrant some type of response activity. All ships involved in past major spills in Australian waters have been insured and all costs of the oil spill response have been reimbursed. However, this has not always been the experience in international incidents.

The Bunkers Convention

1.10 Implementation of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention) will ensure that clean-up and response costs are recoverable from all shipowners without difficulty. In establishing a liability and compensation regime for bunker oil spills from ships that are not oil tankers, the Bunkers Convention provides that:

- the shipowner[4] is strictly liable for pollution damage[5] resulting from a spill of bunker oil;
- the shipowner is able to limit liability under any applicable national or international regime;
- the registered owners of ships having a gross tonnage greater than 1,000 are required to maintain insurance to cover their liabilities; and
- claims for pollution damage may be brought directly against the insurer.

1.11 The Bunkers Convention does not impose unlimited liability on a shipowner in the case of pollution damage resulting from a spill of bunker oil. Shipowners and insurers are able to limit their liability under any applicable national or international regime. The applicable regime in Australia is the LLMC Convention which is discussed in paragraphs 1.2 and 1.3 above.

2. Objectives

2.1 The objectives of the proposed ratification of the Bunkers Convention are:

- to ensure, to the maximum extent available under international law, the payment of adequate, prompt and effective compensation for damage caused by pollution resulting from the escape or discharge of bunker oil from ships; and
- to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases.

2.2 The Bunkers Convention will enter into force one year after the date on which 18 States, including five States each with ships whose combined gross tonnage is not less than one million have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the International Maritime Organization (IMO).

3. Options

There are four options:

1. Maintain the current situation, i.e. not adopt the Bunkers Convention and continue to rely only on the current legislation relating to ships with a gross tonnage of 400 or more;

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4 "Shipowner" is defined in article 1(3) to mean the owner, including the registered owner, bareboat charterer, manager and operator of the ship.

5 "Pollution damage" is defined in article 1(9) to include loss or damage arising from the escape or discharge of bunker oil from a ship and the costs of preventative measures taken after an incident to prevent or minimise pollution damage.

2. Develop legislation to enable Australia to ratify the Bunkers Convention and repeal the current legislation relating to ships with a gross tonnage of 400 or more;

3. Develop legislation to enable Australia to ratify the Bunkers Convention and maintain the current legislation relating to ships with a gross tonnage of 400 or more, with an amendment to ensure there is no duplication of requirements;

4. Develop legislation to enable Australia to ratify the Bunkers Convention by amending the current legislation to apply the Bunkers Convention to ships with a gross tonnage of 400 or more.

4. Impact Analysis

4.1 The effect on shipowners of ratifying the Bunkers Convention (options 2, 3 and 4) will be negligible. The Convention does not create any new liabilities – the effect will be to ensure that a ship's registered owner, bareboat charterer, manager and operator are strictly responsible for, and have the necessary insurance to cover, existing liabilities. The existence of liability cover for a business is nothing more than sound business practice.

4.2 The inclusion of the bareboat charterer, manager and operator within the definition of "shipowner" will have no impact. The reason for this is that, unlike the Civil Liability Convention, the Bunkers Convention does not have its own limitation scales and figures – it refers to the limits in the LLMC Convention. The broad definition of "shipowner" in the Bunkers Convention reflects the definition used in the LLMC Convention and, as such, reflects the existing position in international law regarding liability for pollution damage from ships other than oil tankers.

4.3 As discussed in paragraph 1.5 above, Australia already has a domestic requirement for ships with a gross tonnage of 400 or more to have proof of insurance when visiting Australian ports.

4.4 Australia took a leading role in the negotiations within IMO which led to the development of the Bunkers Convention. Both Australia's role at IMO and the domestic legislation referred to in paragraph 1.5 above requiring ships with a gross tonnage of 400 or more to be insured to cover liability in case of pollution damage complement Australia's Oceans Policy.

4.5 Australia's role in the development of the Bunkers Convention had its origins in the 1992 House of Representatives Standing Committee on Transport, Communications and Infrastructure "Ships of Shame" Report (the Report). The Report recommended that "*the Australian Government require proof of possession of adequate Protection and Indemnity insurance cover as a prior condition of entry of any foreign ship into Australian ports*" (Recommendation 13). The reason for this was to provide a measure of certainty in cost recovery following a spill of bunker oil from a ship.

4.6 In responding to the Report, the Australian Government indicated that the feasibility of an appropriate international regime in relation to all ships would be explored with key countries and Australian and overseas industry groups. Adoption of the Bunkers Convention which is modelled on the Civil Liability Convention referred to in paragraph 1.1 above is the result of such an effort.

4.7 In implementing the Bunkers Convention Australia will have in place all the elements of a liability and compensation regime for damage caused by the sea carriage of all types of persistent oil, whether carried as cargo or bunker oil. This would be a major contribution towards the protection of the environment.

4.8 Shipowners usually have a single policy in respect of each ship to cover most, if not all, their third party liabilities in relation to the ship. The insurance policies of the vast majority of shipowners will already cover the liabilities to which the Bunkers Convention relates. Over 95 per cent of the world's shipping fleet is insured with Protection and Indemnity (P&I) Clubs, each of which provides the necessary insurance coverage. No additional P&I insurance would be required following implementation of the Bunkers Convention, and there would be no increase in P&I insurance premiums.

4.9 Insurance policies other than P&I may simply be endorsed to provide the additional cover. Because all ships entering Australian ports are already required to be insured to cover the liability of the owners for pollution damage caused in Australia, it is highly unlikely that there would be any increase in premiums. Even if there is any increase in premiums for non-P&I policies, it would be small.

4.10 The only additional requirement for ships will be the need to carry a Certificate of Insurance or Other Financial Security in Respect of Civil Liability for Bunker Oil Pollution Damage. The form of this certificate is set out in the Bunkers Convention and the certificate will normally be issued by the ship's flag State, based on documentation issued by an authorised P&I Club. It is proposed that the implementing legislation will establish similar arrangements to those in place under the Civil Liability Convention, where certificates are issued by AMSA at a cost of $50 for new certificates and $30 for a renewal.

4.11 Taking each of the options in turn, Option 1 would result in Australian shipping legislation not keeping pace with international developments, and leave open the possibility of government being ultimately responsible for the types of bunker oil spill response costs indicated in Table 1 on page 2. Australia played an active role in developing the Bunkers Convention at IMO and internationally has been a strong supporter of its early entry into force. While Part IIIA of the Civil Liability Act provides some additional level of certainty regarding ship's insurance coverage, it does not include the broader range of issues included in the Bunkers Convention. The key additional issues in the Bunkers Convention are strict liability (which means that the shipowner is generally automatically liable for a spill, regardless of fault) and the option to recover costs direct from the insurer if the owner is insolvent or difficult to find. The Bunkers Convention also provides additional assurance that victims of oil pollution damage will be satisfactorily compensated in that parties other than the registered owner are exposed to liability. This is achieved by defining "shipowner" to include registered owner, bareboat charterer, manager and operator of the ship.

4.12 Option 2 - ratification of the Bunkers Convention and repeal of Part IIIA of the Civil Liability Act – would reduce the effectiveness of the overall insurance requirements for smaller ships and pollution caused by substances other than oil. While Part IIIA of the Civil Liability Act covers some basic aspects of the requirements of the Bunkers Convention, it extends beyond the Convention in two important areas:

- Part IIIA of the Civil Liability Act applies to ships with a gross tonnage of 400 or more, whereas the Bunkers Convention applies to ships with a gross tonnage of 1,000 or more. Ships with a gross tonnage between 400 and 1,000 are therefore required to

demonstrate proof of insurance, whereas under the Bunkers Convention alone, they would not. While the number of pollution incidents from ships with a gross tonnage between 400 and 1,000 requiring a response is relatively small, it is nevertheless worthy of attention. Where the responsible ship could definitely be identified in the period 1990 to 2004, 12 pollution incidents involved ships with a gross tonnage between 400 and 1,000 compared with 124 incidents involving ships with a gross tonnage in excess of 1,000.

- Part IIIA of the Civil Liability Act requires ships to have proof of insurance to cover any type of pollution incident, whereas the Bunkers Convention applies only to pollution damage caused by the loss of bunker oil. Other possible sources of pollution are not covered by the Bunkers Convention. These include chemicals which are increasingly being carried by ships in drums and containers.

4.13 Option 3 would maintain the existing requirements for proof of insurance, and maintain currency with international law by applying the full benefits of the new Bunkers Convention to ships with a gross tonnage of 1,000 and above. This option would require a minor amendment to Part IIIA of the Civil Liability Act to the effect that the requirement under that Part to carry proof of insurance does not apply to ships that fall within the scope of the Bunkers Convention.

4.14 The effect of Option 4 would be to apply the Bunkers Convention to a class of ships to which it is not expressed to apply, with associated enforcement difficulties, particularly in respect of international shipping.

4.15 The application of the Bunkers Convention to ships with a gross tonnage of 1,000 or more is the result of extensive negotiation and compromise at an international level, taking into account the likelihood of serious bunker oil spills and the administrative burdens associated with the implementation and enforcement of IMO conventions. Application of the implementing legislation to ships with a gross tonnage between 400 and 1,000, which is outside the agreed scope of the Bunkers Convention, could be problematic.

5. Consultation

5.1 The main parties affected by ratification of the Bunkers Convention and the development of implementing legislation will be the shipping industry. The Australian Shipowners Association, Shipping Australia Limited (which represents overseas shipowners operating in Australia) and the Association of Australian Ports and Marine Authorities all support Australian adoption of the Bunkers Convention. The shipping industry has been consulted at all stages in the development of the Convention and provided input and briefing on a number of issues for the IMO Legal Committee meetings at which the Bunkers Convention was discussed. In addition, the international shipping industry, which has consultative status at IMO, participates actively in deliberations and was a strong supporter of the adoption of the Bunkers Convention.

5.2 Consultation with the States and the Northern Territory has been undertaken through the Australian Maritime Group, the Standing Committee on Transport and the Australian Transport Council. The Australian Transport Council agreed to Australian ratification of the Bunkers Convention at its meeting on 8 November 2002.

5.3 There were no concerns raised by any stakeholders during the consultations.

6. Conclusion and recommended option

6.1 The preferred option is Option 3, namely to develop legislation to enable Australia to ratify the Bunkers Convention while maintaining the existing legislation relating to ships with a gross tonnage of 400 or more, with an amendment to Part IIIA of the Civil Liability Act to ensure there is no duplication of requirements.

7. Implementation and review

7.1 The Australian Customs Service (ACS) is responsible for the verification of statutory certificates required to be carried on board ships, in accordance with applicable legislation. AMSA and ACS have entered into a service level agreement and developed guidelines listing about 15 different types of certificates to be checked by ACS when ships are entering or leaving Australia. The service level agreement maximises the advantages of shared information and processes in the interests of harmonisation of Australian Government responsibilities related to Australian and foreign ships transiting Australian waters. Checking for the Certificate of Insurance or Other Financial Security in Respect of Civil Liability for Bunker Oil Pollution Damage will merely extend existing custom activity in respect of ships other than oil tankers.

7.2 Where ACS has any concerns regarding a particular ship, such as missing or invalid certificates, AMSA is contacted and a decision made regarding any necessary follow-up action. Such action might include withholding customs clearance by ACS or detention of the ship by an AMSA surveyor.

7.3 In addition, AMSA marine surveyors conduct port State control inspections of ships visiting Australian ports. Under this program about 70 per cent of foreign ships visiting Australian ports are inspected. The Certificate of Insurance or Other Financial Security in Respect of Civil Liability for Bunker Oil Pollution Damage will be added to the documents required to be produced during these inspections. This will have the added effect of covering foreign ships trading on the Australian coast for extended periods.

7.4 The outcomes of both the ACS verification and AMSA port State control procedures are closely monitored to determine compliance rates and any follow-up action required. Statistics on vessel compliance are produced in the annual reports of both organisations.

7.5 There would be a review of the implementing legislation if IMO adopts any amendments to the Bunkers Convention.