Protection of the Sea (Prevention of Pollution from Ships) Amendment (Oil Transfers) Bill 2011

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Protection of the Sea (Prevention of Pollution from Ships) Amendment (Oil Transfers) Bill 2011

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House: House of Representatives

Portfolio: Infrastructure and Transport

Commencement: On the day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Protection of the Sea (Prevention of Pollution from Ships) Amendment (Oil Transfers) Bill 2011 (the Bill) is to amend the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (the Act) so as to give effect to amendments to Annex 1 of the International Convention for the Prevention of Pollution from Ships (MARPOL) adopted in July 2009.¹

Annex 1 to MARPOL was amended to include a new Chapter 8—Prevention Of Pollution During Transfer Of Oil Cargo Between Oil Tankers At Sea.²

Background

MARPOL

MARPOL is the main international Convention relating to the prevention of pollution of the sea by ships from operational or accidental causes. MARPOL now has six Annexes.³

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¹ Explanatory Memorandum, Protection of the Sea (Prevention of Pollution from Ships) Amendment (Oil Transfers) Bill 2011, p. 1.

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Annex 1 to MARPOL, which is the subject of the Bill, came into force in 1983 and has been subject to various amendments over time. Annex 1 specifically relates to the prevention of pollution by oil. On 17 July 2009, the Marine Protection Committee of the International Maritime Organization (IMO) adopted amendments to Annex 1 to regulate ship-to-ship oil transfers.

In particular, Regulation 41 sets out requirements in relation to an oil tanker involved in ship-to-ship operations having an operations plan and complying with such plan; and Regulation 42 sets out notification requirements of scheduled ship-to-ship operations.


Several provisions of the *United Nations Convention on the Law of the Sea 1982* (Law of the Sea Convention) set up the jurisdictional framework for the adoption and implementation of IMO safety rules and standards. For example: Article 21(1) of the Law of the Sea Convention states:

> The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

> ...

> (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;

> ...

Therefore, it is argued that:

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See also Australian Maritime Safety Authority, ‘Table of MARPOL amendments’, op. cit.


See also Appendix 1 of this Digest.

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Article 21(2) of the Law of the Sea Convention is of paramount importance for the implementation of IMO Conventions containing such rules and standards because it sets a clear limit to the jurisdiction of the coastal State. Regulations imposing either additional or more stringent requirements than those regulated in the relevant IMO Conventions could potentially violate the rules of innocent passage regulated by the Law of the Sea Convention.  

**International Maritime Organization**

The IMO is the United Nations agency, established in 1948, which is responsible for the safety and security of shipping, as well as the prevention of pollution by ships.

IMO has six main entities involved in adopting or implementing international Conventions, membership of which may consist of Member States. These entities are the IMO Assembly, the IMO Council and the Committees, of which the Marine Protection Committee, established in November 1973, is one. Developments in shipping and related industries are discussed by Member States in these entities and the need for new conventions or amendments to existing conventions can then be raised.

**International conventions**

An international Convention only comes into force when individual governments of Member States formally accept being bound by the Convention by means such as ratification or signature.

Governments of Member States, such as Australia, then enforce the Convention by enacting domestic legislation to implement the provisions of the Convention. In other words—in Australia, international treaties are not self-executing.

**Australia and MARPOL**

Australia has now ratified all Annexes of MARPOL and there is Commonwealth, State and Territory legislation complementing and/or giving effect to MARPOL.

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7. See IMO, *Introduction to IMO*, viewed 31 May 2011, [http://www.imo.org/About/Pages/Default.aspx](http://www.imo.org/About/Pages/Default.aspx)

IMO was known as the Inter-Governmental Maritime Consultative Organization until May 1982: ibid.


9. IMO, *Conventions – an introduction*, viewed 31 May 2011, [http://www.imo.org/About/Conventions/Pages/Home.aspx](http://www.imo.org/About/Conventions/Pages/Home.aspx)

10. Ibid.

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The primary Commonwealth legislation related to preventing pollution from ships is the Act and the *Navigation Act 1912*, both of which are administered by the Australian Maritime Safety Authority (AMSA).  

AMSA is a Commonwealth statutory agency established under section 5 of the *Australian Maritime Safety Authority Act 1990* (the AMSA Act) and is largely self-funded through levies imposed on the commercial shipping industry. Section 6 of the AMSA Act provides that AMSA’s role includes combating pollution in the marine environment.

In addition, AMSA manages a National Plan; in conjunction with the States and Northern Territory, as well as industry; to facilitate response to marine pollution.

**Committee consideration**

At the time of writing, the Bill had not been referred to any parliamentary committee.

However, the Senate Scrutiny of Bills Committee did review the Bill and made no comment on it.

**Financial implications**

According to the Government, the Bill has no financial impact on the Government.

**Key provisions**

*Item 1* of the Bill proposes to insert new sections 11B–11G into Part II of the Act. Part II contains provisions relating to the prevention of pollution by oil.

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12. For information regarding Commonwealth, State and Territory legislation complementing and/or giving effect to MARPOL, see Australian Maritime Safety Authority, ‘International Convention for the Prevention of Pollution from Ships (MARPOL) - implementation’, *Protection of the sea – conventions and legislation in Australia*, op. cit.
13. There are also related regulations and marine orders: see ibid.

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Proposed section 11B provides that transfers of oil cargo must be in accordance with the relevant ship-to-ship operations plan, the meaning of which is explained in proposed subsection 11B(2). This requirement applies to transfers between oil tankers each with a gross tonnage of at least 150 and to transfers that occur while the subject oil tanker is located:

- in the sea near a State; or the Jervis Bay or external Territory; where there is no local law giving effect to the requirement for a ship-to-ship operations plan under the new Regulation 41 of Annex 1 to MARPOL (in other words, if there is local law giving effect to such requirement, then that State or Territory law will apply)
- in the exclusive economic zone, or
- beyond the exclusive economic zone and the subject oil tanker is an Australian ship.

As previously mentioned, Regulation 41 of Annex 1 to MARPOL was introduced in the amendments to Annex 1 and relates specifically to ship-to-ship operations plans.

‘Exclusive economic zone’ is defined in existing section 3 of the Act as:

the exclusive economic zone, within the meaning of the Seas and Submerged Lands Act 1973, adjacent to the coast of Australia or the coast of an external Territory.\(^ {18}\)

The master of the subject oil tanker commits an offence if the oil cargo transfer is not in accordance with the subject oil tanker’s ship-to-ship operations plan and would be subject to a maximum penalty of 200 penalty units or $22 000.\(^ {19}\)

The Explanatory Memorandum states:

The penalty of 200 penalty units for a breach of subsection 11B(1) is intended to discourage deviation from the oil tanker's STS operations plan, without which there would be an increased risk of an oil spill incident occurring with potential environmental damage. The penalty is intended to ensure that the master of an oil tanker does not attempt to secure a commercial advantage by taking short cuts during STS oil transfer operations.

The level of the penalty is the same as that applying to other non-compliance offences in the PPS Act such as subsection 26FE(1) where a master is guilty of an offence if the master does not allow sufficient time for a ship's fuel oil system to be flushed of non-compliant fuel before the ship enters an emission control area.\(^ {20}\)

The requirement that transfers of oil cargo comply with the relevant operations plan is consistent with Regulation 41.3 of Annex 1 to MARPOL.

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19. A penalty unit is $110: section 4AA Crimes Act 1914.
Importantly, this requirement would not apply to transfers described in paragraphs 2–5 of the new Regulation 40 of Annex 1 to MARPOL, which state:

2 The regulations contained in this chapter shall not apply to oil transfer operations associated with fixed or floating platforms including drilling rigs; floating production, storage and offloading facilities (FPSOs) used for the offshore production and storage of oil; and floating storage units (FSUs) used for the offshore storage of produced oil.

3 The regulations contained in this chapter shall not apply to bunkering operations.

4 The regulations contained in this chapter shall not apply to STS operations necessary for the purpose of securing the safety of a ship or saving life at sea, or for combating specific pollution incidents in order to minimize the damage from pollution.

5 The regulations contained in this chapter shall not apply to STS operations where either of the ships involved is a warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such ships that the STS operations are conducted in a manner consistent, so far as is reasonable and practicable, with this chapter.

The note to proposed subsection 11B(3) states that the defendant bears the evidential burden in relation to claiming that the oil cargo transfer is of a type that falls within any of those exceptions. In other words, the defendant would have to point to evidence that suggests a reasonable possibility that the oil cargo transfer is of a type that falls within any of those exceptions.21

Proposed section 11C provides that a person, with overall advisory control of an oil cargo transfer between two oil tankers each with a gross tonnage of at least 150 and who is not master of either oil tanker, must meet prescribed qualification requirements in situations where the subject oil tanker is located:

- in the sea near a State; or the Jervis Bay or external Territory; where there is no local law giving effect to the requirement for a ship-to-ship operations plan under the new Regulation 41 of Annex 1 to MARPOL (in other words, if there is local law giving effect to such requirement, then that State or Territory law will apply), or
- in the exclusive economic zone.

The Explanatory Memorandum states:

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21. Evidential burden ‘in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’: Criminal Code Act 1995 subsection 13.3(6).

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This requirement to satisfy prescribed qualification requirements will not apply to masters as a master would satisfy the necessary requirements by virtue of being qualified as the master of a tanker.\(^{22}\)

Failure to meet this requirement would result in the person with overall advisory control of the oil cargo transfer committing a strict liability offence with a maximum penalty of 60 penalty units or $6600.

Again, the Explanatory Memorandum states:

> It is appropriate that strict liability applies to this offence as it would be straightforward for a person in overall advisory control of an STS oil transfer operation to demonstrate the level of qualifications he or she holds. Applying strict liability is consistent with other offences of this nature and complies with the recommendations of the Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 2002, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. It is also consistent with the guidelines approved by the then Minister for Home Affairs in December 2007 titled, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. A defence of honest and reasonable mistake of fact will be available in relation to this offence.\(^{23}\)

The requirement relating to meeting prescribed qualifications is consistent with Regulation 41.4 of Annex 1 to MARPOL.

Also, as in proposed section 11B, this requirement would not apply to transfers described in paragraphs 2–5 of the new Regulation 40 of Annex 1 to MARPOL as listed earlier; and the defendant would bear the evidential burden in that he or she would have to point to evidence suggesting a reasonable possibility that the oil cargo transfer is of a type that falls within any of those exceptions.

**Proposed subsection 11D(1)** provides that an Australian oil tanker engaged in an oil cargo transfer with another oil tanker, each with a gross tonnage of at least 150, must carry its ship-to-ship operations plan, as defined in **proposed subsection 11D(2)**.

The master and owner of the subject oil tanker would each commit an offence where this requirement is not met and would be subject to a maximum penalty of 500 penalty units or $55 000.

The requirement to carry an operations plan is consistent with Regulation 41.1 of Annex 1 to MARPOL.

As in proposed section 11B, this requirement would not apply to transfers described in paragraphs 2–5 of the new Regulation 40 of Annex 1 to MARPOL as listed earlier; and the defendant would bear the evidential burden in that he or she would have to point to evidence suggesting a reasonable possibility that the oil cargo transfer is of a type that falls within any of those exceptions.

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23. Ibid., p. 5.

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**Proposed subsection 11E(1)** provides that the master of an Australian oil tanker engaged in an oil cargo transfer with another oil tanker, each with a gross tonnage of at least 150, must cause a ship-to-ship record of the oil cargo transfer to be made as soon as is practicable in the circumstances.

Under **proposed subsection 11E(3)**, a ship-to-ship record is a written record containing prescribed information.

Failure to cause a ship-to-ship record of the oil cargo transfer to be made as soon as is practicable under **proposed subsection 11E(1)** would be an offence with a maximum penalty of 200 penalty units or $22,000.

Similarly, **proposed subsection 11E(2)** provides that with respect to an Australian oil tanker, a ship-to-ship record of the oil cargo transfer between the Australian oil tanker and another tanker, each with a gross tonnage of at least 150, must either be retained in the Australian oil tanker for a three year period or be readily available for inspection by an inspector at all reasonable times during that period.

The master and owner of the Australian oil tanker would each commit a strict liability offence with a maximum penalty of 60 penalty units or $6,600 where this requirement is not met.

The requirement relating to retaining a ship-to-ship record for a three year period or making it readily available for inspection at all reasonable times during that period is consistent with Regulation 41.5 of Annex 1 to MARPOL.

As in **proposed section 11B**, this requirement would not apply to transfers described in paragraphs 2–5 of the new Regulation 40 of Annex 1 to MARPOL as listed earlier; and the defendant would bear the evidential burden in that he or she would have to point to evidence suggesting a reasonable possibility that the oil cargo transfer is of a type that falls within any of those exceptions.

**According to the Explanatory Memorandum:**

The recording of oil transfers (and the retention of records as required by subsection 11E(2)) enables regulatory authorities to monitor STS oil transfers and helps to ensure that transfers are carried out in accordance with the requirements of Annex I of MARPOL.

The level of the penalty is the same as that applying to similar offences in subsections 12(5) and 22A(3) of the PPS Act which require the master of a ship to record a prescribed operation or a prescribed occurrence in, respectively, a ship’s oil record book or a ship’s cargo record book.

... This offence is directed at the owner and the master of a tanker. Such persons have shared responsibility and both can be expected to be fully aware of the requirements of the legislation (and of MARPOL) and, in particular, the requirement to retain records of STS oil transfers and for the records to be available for inspection. While the master has immediate responsibility for the ship, he or she is subject to the direction of the shipowner. Shared liability is consistent with

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offence provisions in other parts of the PPS Act and in other maritime legislation such as the 
\textit{Navigation Act 1912}.\textsuperscript{24}

\textbf{Proposed subsection 11F(1)} provides that the master of a subject oil tanker engaged in an oil cargo transfer with another oil tanker would commit an offence where:

- both oil tankers have a gross tonnage of at least 150
- the transfer occurs while the subject oil tanker is located:
  - in the sea near a State; or the Jervis Bay or external Territory; where there is no local law giving effect to the requirement for an STS operations plan under the new Regulation 41 of Annex 1 to MARPOL (in other words, if there is local law giving effect to such requirement, then that State or Territory law will apply), or
  - in the exclusive economic zone, and

- if the ship-to-ship transfer information was available to the master of the subject oil tanker at least 48 hours before the transfer commenced—the master did not notify the prescribed officer of the transfer and/or the information thereof, at least 48 hours before the transfer commenced
- if the ship-to-ship transfer information was not available to the master of the subject oil tanker at least 48 hours before the transfer commenced— the master did not notify the prescribed officer of the transfer at least 48 hours before the transfer commenced and/or the information thereof before the transfer began.\textsuperscript{25}

A reference to a ‘prescribed officer’ is a reference to AMSA or such person under subsection 3(2) of the Act.

This offence would attract a maximum penalty of 200 penalty units or $22 000.

The Explanatory Memorandum states:

The requirement for prior notification is intended to ensure that Australian authorities will be made aware of any proposed STS oil transfer operations and that they will be able to readily activate pollution response measures in case of an oil pollution incident during the transfer.

The level of the penalty is the same as that applying to the offences in subsections 12(5) and 22A(3) of the PPS Act which require the master of a ship to record a prescribed operation or a prescribed occurrence in, respectively, a ship’s oil record book or a ship’s cargo record book. While these offences apply in relation to incidents that have already occurred and subsection

\textsuperscript{24} Ibid., p. 6. In relation to requirements for the master of a ship to record a prescribed occurrence in a ship’s cargo record book, see subsection 23(5) of the Act.

\textsuperscript{25} ‘Ship-to-ship transfer information’ is explained in proposed subsection 11F(3) of the Bill.

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11F(1) refers to an STS transfer which is required to be reported before it occurs, both sorts of occurrences impose an obligation on the master to report.  

**Proposed subsection 11F(2)** provides for a strict liability offence relating to failure to notify a change of arrival time by more than six hours within two hours of the master of the subject oil tanker becoming aware of the new arrival time. This offence would attract a maximum penalty of 60 penalty units or $6600.

As in **proposed section 11B**, these requirements would not apply to transfers described in paragraphs 2–5 of the new Regulation 40 of Annex 1 to MARPOL as listed earlier; and the defendant would bear the evidential burden in that he or she would have to point to evidence suggesting a reasonable possibility that the oil cargo transfer is of a type that falls within any of those exceptions.

**Proposed section 11G** provides similarly for offences relating to a failure to notify of an oil cargo transfer, as well as to a failure to notify of a change of arrival time, where the subject Australian oil tanker is located:

- in the territorial sea, or
- in the exclusive economic zone,

of a foreign country that is party to MARPOL.

The notification requirements under **proposed sections 11F** and **11G** are consistent with Regulations 42.1 and 42.3 of Annex 1 to MARPOL.

**Concluding comments**

The amendments proposed in the Bill are consistent with the new Chapter 8 of Annex 1 to MARPOL.

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APPENDIX 1

Amendment to Annex 1 to MARPOL – new Chapter 8

1 A new Chapter 8 is added:

CHAPTER 8 – PREVENTION OF POLLUTION DURING TRANSFER OF OIL CARGO BETWEEN OIL TANKERS AT SEA

Regulation 40

Scope of application

1 The regulations contained in this chapter apply to oil tankers of 150 gross tonnage and above engaged in the transfer of oil cargo between oil tankers at sea (STS operations) and their STS operations conducted on or after 1 April 2012. However, STS operations conducted before that date but after the approval of the Administration of STS operations Plan required under regulation 41.1 shall be in accordance with the STS operations Plan as far as possible.

2 The regulations contained in this chapter shall not apply to oil transfer operations associated with fixed or floating platforms including drilling rigs; floating production, storage and offloading facilities (FPSOs) used for the offshore production and storage of oil; and floating storage units (FSUs) used for the offshore storage of produced oil.27

3 The regulations contained in this chapter shall not apply to bunkering operations.

4 The regulations contained in this chapter shall not apply to STS operations necessary for the purpose of securing the safety of a ship or saving life at sea, or for combating specific pollution incidents in order to minimize the damage from pollution.

5 The regulations contained in this chapter shall not apply to STS operations where

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27. Revised Annex I of MARPOL, chapter 7 (resolution MEPC.117(52)) and UNCLOS article 56 are applicable and address these operations.

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either of the ships involved is a warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service.

However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such ships that the STS operations are conducted in a manner consistent, so far as is reasonable and practicable, with this chapter.

**Regulation 41**

**General Rules on safety and environmental protection**

1. Any oil tanker involved in STS operations shall carry on board a Plan prescribing how to conduct STS operations (STS operations Plan) not later than the date of the first annual, intermediate or renewal survey of the ship to be carried out on or after 1 January 2011. Each oil tanker’s STS operations Plan shall be approved by the Administration. The STS operations Plan shall be written in the working language of the ship.

2. The STS operations Plan shall be developed taking into account the information contained in the best practice guidelines for STS operations identified by the Organization. The STS operations Plan may be incorporated into an existing Safety Management System required by chapter IX of the International Convention for the Safety of Life at Sea, 1974, as amended, if that requirement is applicable to the oil tanker in question.

3. Any oil tanker subject to this chapter and engaged in STS operations shall comply with its STS operations Plan.

4. The person in overall advisory control of STS operations shall be qualified to

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perform all relevant duties, taking into account the qualifications contained in the best practice guidelines for STS operations identified by the Organization.29

5 Records of STS operations shall be retained on board for three years and be readily available for inspection by a Party to the present Convention.

**Regulation 42**

**Notification**

1 Each oil tanker subject to this chapter that plans STS operations within the territorial sea, or the exclusive economic zone of a Party to the present Convention shall notify that Party not less than 48 hours in advance of the scheduled STS operations. Where, in an exceptional case, all of the information specified in paragraph 2 is not available not less than 48 hours in advance, the oil tanker discharging the oil cargo shall notify the Party to the present Convention, not less than 48 hours in advance that an STS operation will occur and the information specified in paragraph 2 shall be provided to the Party at the earliest opportunity.

2 The notification specified in paragraph 1 of this regulation shall include at least the following:

1. name, flag, call sign, IMO Number and estimated time of arrival of the oil tankers involved in the STS operations;

2. date, time and geographical location at the commencement of the planned STS operations;

3. whether STS operations are to be conducted at anchor or underway;

4. oil type and quantity;

5. planned duration of the STS operations;

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30. Revised Annex I of MARPOL chapters 3 and 4 (resolution MEPC.117(52)); requirements for recording bunkering and oil cargo transfer operations in the Oil Record Book, and any records required by the STS operations Plan.

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.6 identification of STS operations service provider or person in overall advisory control and contact information; and

.7 confirmation that the oil tanker has on board an STS operations Plan meeting the requirements of regulation 41.

3 If the estimated time of arrival of an oil tanker at the location or area for the STS operations changes by more than six hours, the master, owner or agent of that oil tanker shall provide a revised estimated time of arrival to the Party to the present Convention specified in paragraph 1 of this regulation.
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