MARITIME LEGISLATION AMENDMENT (PREVENTION OF AIR POLLUTION FROM SHIPS) BILL 2006

EXPLANATORY MEMORANDUM

(Circulated by authority of the Parliamentary Secretary to the Minister for Transport and Regional Services, the Honourable De-Anne Kelly, MP)
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OUTLINE


The Bill adds a new Division 12D to Part IV of the Navigation Act 1912, to provide for the survey and certification requirements of Annex VI. The Bill also adds a new Part IIID to the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 to provide the operational requirement of Annex VI.

The proposed amendments set limits on sulphur oxide and nitrogen oxide emissions from ship exhausts and prohibit deliberate emissions of ozone depleting substances; and include a global cap of 4.5% on the sulphur content of fuel oil.

Annex VI contains provisions allowing for special Sulphur Oxide (SOx) Emission Control Areas to be established with more stringent controls on sulphur emissions. In these areas, the sulphur content of fuel oil used on board ships must not exceed 1.5% m/m. Alternatively, ships must fit an exhaust gas cleaning system or use any other technological method to limit SOx emissions. Both the Baltic Sea and the North Sea are designated as SOx Emission Control areas. Annex VI also sets limits on emissions of nitrogen oxides (NOx) from diesel engines and prohibits the incineration onboard ship of certain products, such as contaminated packaging materials and polychlorinated biphenyls.

The Bill also includes a number of miscellaneous amendments unrelated to Annex VI, these include changes to any reference in the Navigation Act 1912 from “pilot” to “licensed pilot”; an amendment to a reference in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 to better reflect revised Annex I of MARPOL; and to remove the limit in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 on the amount of penalty for a breach of a regulation (or an order) to remain consistent with other MARPOL legislation.

Financial impact statement

There is minimal financial impact arising from this Bill. The Bill will have some administrative impact on the Australian Maritime Safety Authority (AMSA) and fuel oil suppliers in Australian ports. AMSA will be required to maintain an up-to-date register of fuel oil suppliers in Australian ports (currently 62 suppliers in 27 ports). Suppliers will be required to provide to the Master, or a ship’s officer, a bunker delivery note and sample certified by the supplier that the fuel oil meets the requirements relating to sulphur content and quality. A copy of this delivery note must be retained by fuel oil suppliers for at least three years. These minor administrative requirements are unlikely to be burdensome for any fuel suppliers. As these measures apply to all fuel suppliers, they will not disadvantage small fuel supply firms.
NOTES ON CLAUSES

Clause 1: Short Title

1. This is a formal provision specifying the title of the proposed Act.

Clause 2: Commencement

2. Clause 2 sets out the commencement dates of the Bill:
   - Clause 1 to 3: Royal Assent.
   - Schedule 1 commences on a date to be proclaimed. If schedule 1 has not commenced by Proclamation within the 6 month period beginning on the day on which Annex VI enters into force for Australia, it will commence automatically on the first day after the end of that 6 month period. In this case, the Minister will be required to announce the commencement by notice published in the Gazette.
   - Schedule 2:
     - Items 13, 14 and 19 - on Royal Assent
     - Items 1 to 4, 7 to 12 and 15 to 18 - the day after Royal Assent
     - Items 5 and 6 - the later of Royal Assent or 1 August 2007.
     These two items implement amendments to Annex I of MARPOL which enter into force internationally on 1 August 2007.

Clause 3: Schedule(s)

3. This clause provides that the Navigation Act 1912 and Protection of the Sea (Prevention of Pollution from Ships) Act 1983 are amended as set out in Schedule 1.

SCHEDULE 1 – AMENDMENTS DEALING WITH PREVENTION OF AIR POLLUTION FROM SHIPS

NAVIGATION ACT 1912

Item 1 – Subsection 6(1)

Item 1 inserts a new definition for approved form.

Item 2 – section 6F

Item 2 inserts a new section 6F to allow the Australian Maritime Safety Authority to approve a form for the purposes of a provision of the Navigation Act 1912.

Item 3 – New Division 12D – Air pollution

Item 3 inserts a new Division 12D into Part IV of the Navigation Act 1912 to set out the certification and survey requirements that apply to ships. Subsections 267ZW(4), 267ZX(3), 267ZZ(6) and 267ZZF(3) are provided to assist readers and are not legislative instruments within the meaning of section 5 of the Legislative Instruments Act 2003.
New sections 267ZY, 267ZZA, 267ZZC, 267ZZD and 267ZZF impose collective responsibility on both the shipowner and the master of the ship because of the shared responsibility of the shipowner and the master of the ship, and the difficulty in ascertaining who is most directly responsible for the offence. While the master of the ship has immediate responsibility for the ship, he or she is subject to the direction of the shipowner.

The high penalties have been developed to discourage shipping operators from attempting to avoid compliance with the proposed Act as a cost saving measure. The maximum penalty is proportionate to discourage non-compliance and takes into consideration the levels of cost savings that such shipping operators may achieve and the perceived likelihood of non-compliant ships being identified and prosecuted. These provisions are consistent with other penalty provisions in similar maritime legislation.

It is appropriate to use strict liability for the relevant offences because the defendant is the best placed person to provide evidence on whether any culpability should be attached to the physical offence. The elements of the offence that deal with the intention of the master of the ship or shipowner and whether or not the act was committed as a result of intention or negligence or was the result of an honest and reasonable mistake will be specifically and exclusively within the defendant’s knowledge, making it easier and less costly for the defendant to disprove an unjust charge than for the prosecutor to make out the fault elements of a just charge. In these circumstances it would be difficult and costly for the prosecutor to attempt to prove the fault elements for many of the maritime offences in this Bill, and so the effectiveness of the regulatory regime established by the Bill may be undermined if the offences were not offences of strict liability.

The new provisions in Division 12D apply to all Australian and foreign ships of 400 gross tonnage or above and provide the requirements for International Air Pollution Prevention Certificates.

Section 267ZT provides for the definitions used within this Division.

Section 267ZU provides for the application of the Division following the States or Territory giving effect to Regulations 5, 6, 8, 9, 13 and 16 of Annex VI. This is in accordance with the division of responsibility agreed with the States/NT for the implementation of Annex VI.

Section 267ZV provides the regulation making power to give effect to Regulations 5, 6, 8, 9, 13 and 16 of Annex VI.

Section 267ZW provides for the issue of Air Pollution Prevention Certificates for Australian ships.

Section 267ZX provides for the issue of International Air Pollution Prevention Certificates for foreign ships. This would only be required for a ship registered in a country that is not a party to Annex VI.

Section 267ZY outlines the obligation of the master and owner of a ship to report within seven days any damage etc. to the ship that may affect the ship’s compliance with Annex VI.
Section 267ZZ outlines the circumstances in which the Australian Maritime Safety Authority may cancel Air Pollution Prevention Certificates and follow-up action that can be taken if a certificate is cancelled.

Section 267ZZA requires the owner of the ship to have the ship surveyed periodically to ensure it complies with Annex VI.

Section 267ZZB provides for the lapse of Air Pollution Prevention Certificate if a ship ceases to be an Australian ship.

Section 267ZZC requires ships to have an Air Pollution Certificate to be in force before going to sea.

Section 267ZZD requires that Air Pollution Prevention Certificates are carried on board Australian ships.

Section 267ZZE requires the master of a ship to produce the certificate to an officer of Customs when a Customs clearance is sought for a voyage from an Australian port.

Section 267ZZF allows the Australian Maritime Safety Authority to give directions to a foreign ship which it considers is not constructed in accordance with Annex VI.

Items 4 – Section 377H

Item 4 amends section 377H to allow the owner or master of a ship, in respect of which the Australian Maritime Safety Authority has given a direction under new section 267ZZF, to seek review of that direction by the Administrative Appeals Tribunal.

PROTECTION OF THE SEA (PREVENTION OF POLLUTION FROM SHIPS) ACT 1983

Item 5 – Title

Item 5 amends the title to enable air pollution from ships to be included.

Item 6 – Subsection 5(2)

Item 6 incorporates the prevention of air pollution provisions into the saving of other laws and do not substitute any laws within the states and territory. This is in accordance with the division of responsibility agreed with the States/NT for the implementation of Annex VI.

Item 7 – Part IIID – Prevention of air pollution

Item 7 inserts the prevention of air pollution requirements into the Protection of the Sea (Prevention of Pollution from Ships) Act 1983. Subsections 26FEH(5) and 26FEM(5) are provided to assist readers and are not legislative instruments within the meaning of section 5 of the Legislative Instruments Act 2003.

Sections 26FEG, 26FEH, 26FEI, 26FEJ, 26FEL, 26FEN, 26FEO, 26FEP, 26 FEQ and 26FER within this item impose collective responsibility on both the shipowner and the master of the ship because of the shared responsibility of the shipowner and the master of the ship, and the
difficulty in ascertaining who is most directly responsible for the offence. While the master of the ship has immediate responsibility for the ship, he or she is subject to the direction of the shipowner.

The high penalties within this item have been developed to discourage shipping operators from attempting to avoid compliance with the proposed Act as a cost saving measure. The maximum penalty is proportionate to discourage non-compliance and takes into consideration the levels of cost savings that such shipping operators may achieve and the perceived likelihood of non-compliant ships being identified and prosecuted. These provisions are consistent with other penalty provisions in similar maritime legislation.

It is appropriate to use strict liability for the offences because the defendant is the best placed person to provide evidence on whether any culpability should be attached to the physical offence. The elements of the offence that deal with the intention of the master of the ship or shipowner and whether or not the act was committed as a result of intention or negligence or was the result of an honest and reasonable mistake will be specifically and exclusively within the defendant’s knowledge, making it easier and less costly for the defendant to disprove an unjust charge than for the prosecutor to make out the fault elements of a just charge. In these circumstances it would be difficult and costly for the prosecutor to attempt to prove the fault elements for many of the maritime offences in this Bill, and so the effectiveness of the regulatory regime established by the Bill may be undermined if the offences were not offences of strict liability.

Division 1 inserts the definitions used in new Part IIID.

Division 2 of new Part IIID relates to the sulphur content of fuel oil.

Section 26FEG requires the use of fuel oil with a sulphur content of no more than 4.5 per cent mass on mass (m/m).

Section 26FEH requires Australian ships to comply with SOx emission control considerations while in an SOx emission control area.

Section 26FEI requires the flushing of fuel oil service system and incorporates the penalties involved if flushing of the fuel oil’s services system has not occurred before entering an SOx emission control area. This applies only where separate fuel oils are used on board a ship.

Section 26FEJ requires the recording of any fuel-changeover operation to be made in a prescribed record book.

Section 26FEK provides for the application of new Part IIID to any further designated SOx emission control areas that may be approved by the International Maritime Organization in the future. Following the designation of a new SOx emission control area, there will be a 12 month period of grace before ships transiting such areas need to comply with the applicable requirements. The Australian Maritime Safety Authority will issue a Marine Notice to ensure Australian shipowners and operators are informed.

Division 3 of new Part IIID provides the requirements for fuel oil quality.

Section 26FEL provides that local suppliers of fuel oil must be registered.
Section 26FEM provides that the Australian Maritime Safety Authority will establish and maintain a register of local suppliers of fuel oil and requirements for the register will be set out in regulations. The information contained on the register will not be confidential information.

Section 26FEN requires the fuel oil used on board the ship to meet the fuel oil quality requirements of Annex VI.

Section 26FEO provides for a bunker delivery note and sample to be provided to the master in accordance with the regulations.

Section 26FEP provides penalties if the fuel oil delivered does not meet the requirements set of Annex VI.

Section 26FEQ requires the bunker delivery notes to be retained by the master and owner of the ship for 3 years after the delivery and made available for inspection.

Section 26FER requires samples of the fuel oil to be retained in accordance with the regulations for 12 months after the delivery of fuel oil.

Item 8 – the end of paragraphs 27(1)(e), (f), (g), (h), (j), (k), (m) and (n)

Item 8 makes drafting changes to subsection 27(1)

Item 9 – Paragraph 27(1)(p)

Item 9 replaces the power of the inspector to examine, and take samples of, any substances on board the ship and replace it with new powers to require the master of the ship to produce any substances on board the ship or under the ship’s control when asked by an inspector and to allow inspectors to examine, and take samples of any substances on board the ship or under the ship’s control.

Item 10 – Subsection 27A(6) (definition of pollution breach)

Item 10 updates the definition of “pollution breach” to include reference to discharge or disposal from a ship, the use of fuel oil with sulphur content more than 4.5% and that do not meet specific fuel oil quality requirements.

Item 11 – Subsection 28(4)

Item 11 amends subsection 28(4) to provide that, if a court summary jurisdiction convicts a person of an offence under new section 26FEG or 26FEH, the maximum penalty is 200 penalty units.

Item 12 – Subsection 33(2)

Item 12 amends subsection 33(2) to provide that regulations or orders giving effect to Annex VI do not apply to ships which state or territory law applies. This is in accordance with the division of responsibility agreed with the States/NT for the implementation of Annex VI.
SCHEDULE 2 – OTHER AMENDMENTS

NAVIGATION ACT 1912

Item 1 – Subsection 186G(1)

Item 1 inserts a new definition of “navigates without a licensed pilot”, which is similar to the repealed definition.

Item 2 – Subsection 186G(1) (definition of navigates without a pilot)

Item 2 removes the definition of “navigates without a pilot”.

Item 3 – Subsections 186G(4) and (5)

Item 3 amends the text to insert the word “licensed” before pilot.

Items 4 – Sections 186I, 186J and 186K

Item 4 amends the text to insert the word “licensed” before pilot.

Item 5 – Subsection 267(2)

Item 5 includes a reference to Regulation 12A of Annex I. The effect of this amendment is that Division 12 of Part IV of the Navigation Act 1912 will not apply to ships which states or territory law gives effect to Annex I. This is in accordance with the division of responsibility agreed with the States/NT for the implementation of Annex VI.

Item 6 – Section 267A

Item 6 includes a reference to Regulation 12A of Annex I to allow regulations to give effect to that Regulation.

Item 7 – Section 267(2)

Item 7 includes a reference to Regulation 27 of Annex I. The effect of this amendment is that Division 12 of Part IV of the Navigation Act 1912 will not apply to ships which states or territory law gives effect to Annex I. This is in accordance with the division of responsibility agreed with the States/NT for the implementation of Annex VI.

Item 8 – Section 267A

Item 8 includes a reference to Regulation 27 of Annex I to allow regulations to give effect to that Regulation.
Item 9 – Subsection 3(1) (definition of the 1973 Convention)

Item 9 substitutes the text “other than an amendment not accepted by Australia” with “other than an amendment that has not entered into force for Australia” in order to clarify the intention of the definition.

Item 10 – Subsection 3(1) (definition of the 1978 Protocol)

Item 10 substitutes the text “other than an amendment not accepted by Australia” with “other than an amendment that has not entered into force for Australia” in order to clarify the intention of the definition.

Item 11 – Sub-subparagraph 9(4)(a)(iv)(A)

Item 11 amends the reference to an existing tanker and replaces it with a tanker delivered after 31 December 1979. This amendment is necessary to be consistent with the revised Annex I.

Item 12 – Sub-subparagraph 9(4)(a)(iv)(B)

Item 12 amends the reference to a new tanker and replaces it with a tanker delivered on or before 31 December 1979. This amendment is necessary to be consistent with the revised Annex I.

Item 13 – Paragraph 9(4)(e)

Item 13 removes a spent provision.

Item 14 – Subsection 9(4A)

Item 14 removes a spent provision.

Item 15 – After subsection 32(1A)

Item 15 inserts a provision that the regulations for the keeping of a shipboard waste management plan applicable to Australian ships also applies equally to foreign ships.

Item 16 – At the end of paragraph 33(1)(c)

Item 16 includes a reference to any other Act or any instrument made under any other Act to clarify that regulation cannot be made under this Act in respect of any provision of MARPOL that are given effect by any other Act.

Item 17 – After subsection 33(1)

Item 17 provides for the penalty limit for regulations made under subsections 32(1), (1A) and (1B) to be consistent with penalties applicable to Australian vessels for the same offences. This is consistent with previous MARPOL legislation.
Item 18 – Application

Item 18 provides that the regulations made under subsection 32(1), (1A) and (1B) are not retrospective in nature.

Item 19 – Subsection 32(2) and (2A)

Item 19 provides for rollback provisions for the states and territory of regulations and orders made under section 34. This is consistent with section 109 of the Constitution which ensures that the Commonwealth laws do not prevail over state and territory laws.