THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PROTECTION OF THE SEA LEGISLATION AMENDMENT BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Infrastructure, Transport, Regional Development and Local Government
the Honourable Anthony Albanese, MP)
PROTECTION OF THE SEA LEGISLATION AMENDMENT BILL 2008

OUTLINE

The Protection of the Sea Legislation Amendment Bill 2008 is intended to implement the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the Supplementary Fund Protocol) (Schedule 1), introduce amendments to the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (MARPOL Amendments - Schedule 2), and amendments relating to shipping and marine navigation levies (Schedule 3).

Supplementary Fund Protocol (Schedule 1)

The Supplementary Fund Protocol creates a third tier of compensation for pollution damage resulting from spills of oil from an oil tanker.

Australia is Party to two Conventions which establish the international liability and compensation regime for pollution damage resulting from spills of oil from an oil tanker: the International Convention on Civil Liability for Oil Pollution Damage, 1992 (Civil Liability Convention); and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention).

These conventions establish a two-tier scheme to provide compensation for loss or damage resulting from a spill of oil from an oil tanker. The burden of compensating victims for oil spills is shared in the first instance between shipowners and their insurers. If the monies available are insufficient, the outstanding compensation is provided by the International Oil Pollution Compensation Fund (the IOPC Fund) which is financed by levies on cargo owners (i.e. the oil receiving entities).

Under the first tier, the tanker owner is strictly liable to pay compensation to a maximum amount, which is determined based on the size of the tanker. Owners of tankers registered in a Contracting State carrying more than 2,000 tons of oil as cargo are required to maintain insurance to cover their liability under the Convention. The Civil Liability Convention is implemented by the Protection of the Sea (Civil Liability) Act 1981.

The second tier is provided by the IOPC Fund which provides compensation for substantiated claims in excess of the shipowner’s liability for the incident. The IOPC Fund is financed by levies imposed on entities receiving more than 150,000 tonnes of contributing oil after sea transport in Contracting States. The 1992 Fund Convention is implemented by the Protection of the Sea (Oil Pollution Compensation Fund) Act 1993.

Under this two-tier scheme, the maximum amount of compensation available for a single incident involving spills of oil from an oil tanker is 203 million Special Drawing Rights (SDR), approximately A$350 million (as at 22 May 2008). SDR is a unit of account defined by the International Monetary Fund (IMF). The value of the SDR varies from day to day in accordance with changes in currency values. The daily rates for SDR can be found on the IMF website at <www.imf.org/>
Following a number of high profile, high impact tanker incidents (the *Nakhodka* off the coast of Japan in 1997, the *Erika* off the coast of France in 1999 and the *Prestige* off the coast of Spain in 2002), the maximum compensation afforded by these two Conventions has proven to be insufficient to provide full compensation for all claimants. In Australia, given our extensive coastline and strong environmental perspective, the compensation available under the IOPC Funds may not cover a major incident such as those experienced by Japan, France or Spain.

As a result the Supplementary Fund Protocol was adopted in 2003 by the International Maritime Organization (IMO) to create a further source of funds for compensation in the event of pollution damage caused by an oil spill from an oil tanker. The Supplementary Fund Protocol entered into force internationally on 3 March 2005.

The Supplementary Fund Protocol creates a third-tier of compensation for pollution damage resulting from spills of oil from an oil tanker, so that the maximum amount payable increases up to 750 million SDR, approximately A$1.3 billion (as at 22 May 2008) per incident.

The Supplementary Fund will be financed through levies on public or private entities in receipt of more than 150,000 tonnes of contributing oil per year in Contracting States. Levies for the Supplementary Fund will be collected after an oil spill occurred and after the first two tiers of compensation are exhausted. The Supplementary Fund Protocol does not impose additional costs on the shipping industry as the cost is borne by the oil importing entities.

Australia’s accession to the Supplementary Fund Protocol will ensure that compensation to Australian victims following an oil spill from an oil tanker incident is maximised and that adequate financial resources are provided for clean-up and restoration of Australia’s marine environment.

**MARPOL Amendments (Schedule 2)**

Australia is a Party to the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) and has implemented all six technical annexes to MARPOL, which deal, respectively, with the prevention of pollution by the discharge of oil, noxious liquid substances in bulk, harmful packaged substances, sewage, garbage and air pollution from ships.

The legislation giving effect to MARPOL in Australia is the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (POTS Act) and the *Navigation Act 1912*. The amendments to the POTS Act will implement changes to Annexes I, III and IV of MARPOL, make miscellaneous amendments to the requirements for maintenance of garbage record books, and allow regulations under the POTS Act to prescribe penalties of up to 50 penalty units.

In October 2004 IMO adopted a revised Annex I of MARPOL (Prevention of Pollution from Oil), which was given effect in Australia by the *Maritime Legislation Amendment (Prevention of Pollution from Ships) Act 2006* which amended the POTS Act and the *Navigation Act 1912*. These amendments commenced on 1 January 2007.
As well, the amendments substitute a new subsection 9(4) (the defence provision) to better reflect the requirements of Regulations 15 and 34 of Annex I of MARPOL.

In October 2006, IMO adopted a revised Annex III of MARPOL (Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form). The revised Annex III will enter into force on 1 January 2010. The Annex was revised to harmonise it with the criteria for defining marine pollutants which have been adopted by the UN Transport of Dangerous Goods Sub-Committee, based on the United Nations Globally Harmonized System of Classification and Labelling of Chemicals. This Bill makes the necessary amendments to implement this change as from 1 January 2010.

In July 2007, IMO adopted an amendment to Annex IV of MARPOL (Prevention of Pollution by Sewage from Ships) which extended an existing provision regarding the discharge of sewage to include sewage originating from spaces containing living animals and adopted a recommendation on standards for the rate of discharge of untreated sewage. This amendment will enter into force internationally on 1 December 2008. An amendment is necessary for Australia to continue to meet its international obligations.

Amendments relating to shipping and marine navigation levies (Schedule 3)


The Bill will improve the robustness of Australia’s maritime environment regulatory regime and provide clarity and consistency across existing legislation.

Financial Impact Statement

There is no financial impact arising from this Bill.
NOTES ON CLAUSES

Clause 1 – Short title

This clause provides that the Bill, once enacted, will be known as the Protection of the Sea Legislation Amendment Act 2008.

Clause 2 – Commencement

Subclause 2(1) provides that each provision of the Bill specified in column 1 of the table commences, or is taken to have commenced, on the day specified in column 2 of the table.

Sections 1 to 3 and anything in the Act not elsewhere covered by the table commence on the day on which the Act receives Royal Assent.

Schedule 1 commences on a single day to be fixed by Proclamation. A Proclamation must not specify a day prior to the day on which the Supplementary Fund Protocol enters into force for Australia. However, if any of the provision(s) do not commence within 6 months from the day on which the Protocol enters into force for Australia, they commence on the first day after the end of that period. If the provision(s) commence in this way, the Minister must announce by notice in the Gazette the day on which the Protocol comes into force for Australia.

Item 2 in the table to subclause 2(1) also provides that the notice is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003. This provision is merely declaratory of the law and included for the avoidance of doubt.

These amendments commence on a date set by proclamation because an instrument of accession to the Protocol will need to be lodged with the Secretary-General of the International Maritime Organization (IMO) following the passage of the Bill through Parliament. The Protocol will enter into force for Australia three months after the lodgement of the instrument of accession with the Secretary-General of the IMO. It is intended that Schedule 1 of the Bill be proclaimed to commence at the same time.

Schedule 2, items 1 and 2 commence on the day on which the Act receives the Royal Assent.

Schedule 2, item 3 commences on 1 January 2010. The amendments to the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) Annex III will enter into force internationally on 1 January 2010, and the amendment to the POTS Act will commence on that date.

Schedule 2, item 4 commences on 1 December 2008. The amendment to MARPOL Annex IV will enter into force internationally on 1 December 2008. This amendment will commence on that date.
Schedule 2, items 5 and 6 commence on the day on which the Act receives the Royal Assent.

Schedule 3 commences on the day on which the Act receives the Royal Assent.

Schedule 4, item 1 commences immediately after the commencement of Chapter 3 (other than Part 3.1) of the Protection of the Sea (Oil Pollution Compensation Fund) Act 1993 (9 October 1996). This amendment corrects a typographical error.

Schedule 4, item 2 commences immediately after the commencement of Chapter 1 of the Protection of the Sea (Oil Pollution Compensation Fund) Act 1993 (8 January 1995). This amendment corrects a typographical error.

Subclause 2(2) provides that information contained in column 3 of the table does not form part of the Bill.

Clause 3 – Schedule

This clause is the formal enabling provision providing that each Act that is specified in a schedule is amended as set out in Schedules 1, 2, 3 and 4 to the Bill.


Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – Customs) Act 1993


The purpose of the amendments at items 1 to 5 is to omit “Fund” and substitute “Funds” in recognition of the fact, that with the implementation of the Supplementary Fund, contributions will be payable in respect of a second Fund.

Item 1 Title

Item 1 omits “Fund” and substitutes “Funds” in the title of the Act.

Item 2 Section 1

Item 2 amends the short title of the Act by omitting “Fund” and substituting “Funds”.

Item 3 Section 2

Item 3 omits “Fund” and substitutes “Funds” in section 2.
Item 4 Section 3

Item 4 omits “Fund” and substitutes “Funds” in section 3. The heading to section 3 is also altered by omitting “Fund” and substituting “Funds”.

Item 5 Subsection 4(1)

Item 5 omits “Fund” and substitutes “Funds” in subsection 4(1).

Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – Excise) Act 1993


The purpose of the amendments at items 6 to 10 is to omit “Fund” and substitute “Funds” in recognition of the fact, that with the implementation of the Supplementary Fund, contributions will be payable in respect of a second Fund.

Item 6 Title

Item 6 omits “Fund” and substitutes “Funds” in the title of the Act.

Item 7 Section 1

Item 7 amends the short title of the Act by omitting “Fund” and substituting “Funds”.

Item 8 Section 2

Item 8 omits “Fund” and substitutes “Funds” in section 2.

Item 9 Section 3

Item 9 omits “Fund” and substitutes “Funds” in section 3. The heading to section 3 is also altered by omitting “Fund” and substituting “Funds”.

Item 10 Subsection 4(1)

Item 10 omits “Fund” and substitutes “Funds” in subsection 4(1).

Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – General) Act 1993

The purpose of the amendments at items 11 to 15 is to omit “Fund” and substitute “Funds” in recognition of the fact that, with the implementation of the Supplementary Fund, contributions will be payable in respect of a second Fund.

**Item 11 Title**

Item 11 omits “Fund” and substitutes “Funds” in the title of the Act.

**Item 12 Section 1**

Item 12 amends the short title of the Act by omitting “Fund” and substituting “Funds”.

**Item 13 Section 2**

Item 13 omits “Fund” and substitutes “Funds” in section 2.

**Item 14 Section 3**

Item 14 omits “Fund” and substitutes “Funds” in section 3. The heading to section 3 is also altered by omitting “Fund” and substituting “Funds”.

**Item 15 Subsection 4(1)**

Item 15 omits “Fund” and substitutes “Funds” in subsection 4(1).

**Protection of the Sea (Oil Pollution Compensation Fund) Act 1993**

The 1992 Fund Convention is implemented by the Protection of the Sea (Oil Pollution Compensation Fund) Act 1993 which establishes the compensation regime under the 1992 Convention including giving legal recognition to the Fund, implementing the compensation regime under the Convention and establishing requirements for certain persons to make contributions to the Fund and keep records of relevant cargo receipts.

**Item 16 - Section 1 Short Title**

Item 16 amends the short title of the Protection of the Sea (Oil Pollution Compensation Fund) Act 1993 by omitting “Fund” and substituting “Funds” in recognition of the fact that, with the implementation of the Supplementary Fund, a second Fund will provide a third tier of compensation.

**Item 17 - Section 3 Interpretation**

Item 18 - Section 3 Interpretation

Item 18 inserts a new definition of *the Supplementary Fund* to mean The International Oil Pollution Compensation Supplementary Fund, 2003 established by the 2003 Protocol.

Item 19 - Section 30 Director is the legal representative of the 1992 Fund

Item 19 inserts the words “of the 1992 Fund” after “Director” in section 30 and in the heading to section 30.

Item 20 After Chapter 3

Item 20 inserts a new “Chapter 3A – The 2003 Protocol”, which deals with the Supplementary Fund.

Part 3A.1 – Outline of Chapter

Section 46A Simplified Outline

The purpose of the Supplementary Fund is to provide compensation to a person who has established a claim for compensation for certain oil pollution damage and who has not been able to obtain full and adequate compensation for the claim from the 1992 Fund, because the damage does or may exceed the compensation limit for that Fund.

The Supplementary Fund is liable to provide compensation for certain oil pollution damage (Part 3A.4). Certain persons who receive oil in Australian ports and terminals are liable to contribute to the Supplementary Fund (Division 1 of Part 3A.5). The Australian Maritime Safety Authority (the Authority) is empowered to collect information about contributors and give information to the Supplementary Fund (Division 3 of Part 3A.5).

The diagram at clause 46A shows the flow of money in relation to the Supplementary Fund.

Part 3A.2 – Interpretation

46B Interpretation

Clause 46B provides that new Chapter 3A is to be interpreted consistently with the definitions used in the 2003 Protocol. These definitions are set out in the text under subclause 46E.

Part 3A.3 – Legal Recognition of the Supplementary Fund

46C Supplementary Fund is a legal person

Clause 46C provides that the Supplementary Fund has the same legal personality as a company incorporated under the *Corporations Act 2001* and assumes rights and obligations. In particular, it may sue and be sued.
46D Director of the Supplementary Fund is legal representative of the Supplementary Fund

Clause 46D provides that the Director of the Supplementary Fund is the legal representative of the Supplementary Fund.

Part 3A.4 – Compensation

46E Certain provisions of the 2003 Protocol to have the force of law

Clause 46E makes the following provisions of the 2003 Protocol legally enforceable under Commonwealth law.

(a) Article 1 which defines terms used in the 2003 Protocol. Article 1 of the 2003 Protocol contains the following definitions:

1 "1992 Liability Convention" means the International Convention on Civil Liability for Oil Pollution Damage, 1992;
3 "1992 Fund" means the International Oil Pollution Compensation Fund, 1992, established under the 1992 Fund Convention;
4 "Contracting State" means a Contracting State to this Protocol, unless stated otherwise;
5 When provisions of the 1992 Fund Convention are incorporated by reference into this Protocol, "Fund" in that Convention means "Supplementary Fund", unless stated otherwise;
6 "Ship", "Person", "Owner", "Oil", "Pollution Damage", "Preventive Measures" and "Incident" have the same meaning as in article I of the 1992 Liability Convention;
7 "Contributing Oil", "Unit of Account", "Ton", "Guarantor" and "Terminal installation" have the same meaning as in article 1 of the 1992 Fund Convention, unless stated otherwise;
8 "Established claim" means a claim which has been recognised by the 1992 Fund or been accepted as admissible by decision of a competent court binding upon the 1992 Fund not subject to ordinary forms of review and which would have been fully compensated if the limit set out in article 4, paragraph 4, of the 1992 Fund Convention had not been applied to that incident;
9 "Assembly" means the Assembly of the International Oil Pollution Compensation Supplementary Fund, 2003, unless otherwise indicated;
10 "Organization" means the International Maritime Organization;
11 "Secretary-General" means the Secretary-General of the Organization.
(b) Article 3 which deals with geographical locations where the Protocol will apply (in the territory, including the territorial sea of a Contracting State, and in the exclusive economic zone of a Contracting State and extending not more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured).

(c) Article 4 which deals with the amount of supplementary compensation payable by the Supplementary Fund (which shall not exceed 750 million Special Drawing Rights (SDR), which is approximately A$1.3 billion. The value of the SDR varies from day to day in accordance with changes in currency values).

(d) Article 5 which details the circumstances in which the Supplementary Fund will pay compensation.

Article 5 provides that the Supplementary Fund shall pay compensation when the Assembly of the 1992 Fund has considered that the total amount of an established claim exceeds or will exceed the aggregate amount of compensation payable under article 4, paragraph 4 of the 1992 Fund Convention (i.e. 135 million SDR).

(e) Article 6 which details circumstances in which a claim against the Supplementary Fund can be extinguished.

Under Article 6 of the Supplementary Fund Convention (and subject to paragraphs 2 and 3 of Article 15 which deal with obligations to communicate information in relation to oil receipts) a right to compensation will be extinguished if it would be extinguished against the 1992 Fund under Article 6 of the 1992 Fund Convention.

Article 6 of the 1992 Fund Convention provides that a claim shall be extinguished unless an action is brought within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.

(f) Paragraph 1 of Article 7 (jurisdiction of the judiciary in dealing with compensation matters) to the extent that it applies the provisions of paragraphs 1, 5 and 6 of Article 7 of the 1992 Convention to actions for compensation brought against the Supplementary Fund.

(g) Paragraphs 2 and 3 of Article 7 which deal with jurisdictional competence of courts.

(h) Article 9 which deals with the subrogation of rights by the Supplementary Fund and a Contracting State of any amount of compensation paid to a person for pollution damage.

Subrogation is a legal term meaning assuming the legal rights of a person entitled to make a claim. Under Article 9, the Supplementary Fund and a Contracting State which have paid compensation to a person would acquire the legal rights of that person in relation to the pollution damage;

(i) Paragraphs 2, 3 and 4 of Article 15 (except to the extent that they impose an obligation on the Assembly) which provide that no compensation is payable by the Supplementary Fund where the reporting obligations set out in Articles 10 and 13 have not been complied with by a Contracting State.
The “Assembly” is defined in Article 1 to mean the Assembly of the International Oil Pollution Compensation Supplementary Fund, 2003, unless otherwise indicated.

46F Claims for Compensation

Clause 46F deals with actions against the Supplementary Fund for compensation. Subclause 46F(2) provides that an action may be brought in the Federal Court of Australia or in the Supreme Court of a State or Territory.

Subclauses 46F(3), (4), (5) and (6) deal with the transfer of proceedings from one court to another court.

46G Supplementary Fund may intervene in proceedings under the Protection of the Sea (Civil Liability) Act 1981

Clause 46G enables the Supplementary Fund to intervene in proceedings for compensation arising under Part II of the Protection of the Sea (Civil Liability) Act 1981.

46H Regulations to give effect to Article 8 of the 2003 Protocol

Subclause 46H(1) enables regulations to be made to give effect to Article 8 of the Supplementary Fund Protocol, including:

(a) provision for investing the Supreme Courts of the States and Territories with federal jurisdiction;
(b) provision for investing jurisdiction on the Federal Court of Australia;
(c) provision for fixing fees to be paid.

Subclause 46H(2) makes it clear that subclause 46H(1) does not limit the power of a judge to make rules of court with respect to any matter that is not provided for in the regulations.

Part 3A.5 – Contributions to the Supplementary Fund


Division 1 – Liability to make contributions

46J Liability to contribute to the Supplementary Fund

Subclause 46J(1) enacts into Commonwealth law Article 10 of the Supplementary Fund Protocol, in so far as it relates to ports or terminal installations.

Under Article 10 the Supplementary Fund is to be financed by a levy on receipts of contributing oil after sea transport to port and terminal installations within a
Contracting State to the Protocol. Contributions to the Supplementary Fund will be paid by public or private entities that receive more than 150,000 tons of contributing oil per year. This will require the major Australian oil importing companies to pay a levy to the Supplementary Fund.

Subclause 46J(2) provides that a person is not liable to contribute to the Supplementary Fund unless the obligation is imposed by a different Act. This obligation is imposed by the Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund - Customs) Act 1993, the Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – Excise) Act 1993 and the Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – General) Act 1993.

Subclause 46J(3) deals with persons who are treated as associated persons for the purposes of Article 10 of the Supplementary Fund Protocol. Article 10.2 of the Supplementary Fund Protocol provides that the provisions of Article 10, paragraph 2, of the 1992 Fund Convention shall apply in respect of the obligation to pay contributions to the Supplementary Fund. Article 10.2(a) provides that, in determining whether the quantity of oil received exceeds 150,000 tons, the quantity received by any person shall be aggregated to the quantity received by any associated person. Article 10.2(b) defines “Associated person” to mean “any subsidiary or commonly controlled person. The question whether a person comes within this definition shall be determined by the national law of the State concerned.”

Accordingly, subclause 46J(3) provides that a person (the first person) is an associated person in relation to another person (the second person) provided both the first and second person are bodies corporate; and the first and the second person are related to each other within the meaning of section 50 of the Corporations Act 2001. Section 50 of the Corporations Act 2001 provides that where a body corporate is:

(a) a holding company for another body corporate; or
(b) a subsidiary of another body corporate; or
(c) a subsidiary of a holding company of another body corporate;
the first-mentioned body and the other body are related to each other.

Subclause 46J(4) provides that a contribution is payable to the Supplementary Fund as agent of the Commonwealth.

46K Amount of contributions

Clause 46K provides that the following paragraphs and article of the Supplementary Fund Protocol are legally enforceable under Commonwealth law.

- Paragraph 2 of Article 11, which deals with responsibilities for calculating annual contributions and the factors to be taken into account in this calculation;
- Paragraph 3 of Article 11, which details how annual contributions are to be calculated; and
- Article 18 which sets out transitional provisions in relation to the amount of annual contributions payable.
46L When contributions are due and payable

Clause 46L provides that a contribution is required to be paid as determined under paragraph 4 of Article 11 of the 2003 Protocol.

Paragraph 4 of Article 11 provides that the annual contribution shall be due on the date to be laid down in the internal regulations of the Supplementary Fund.

Division 2 - Recovery of contributions etc.

46M Late payment penalty

Clause 46M imposes a liability to pay late payment penalty if a payment is not made by the date established under section 46L.

Subclause 46M(1) provides that if the Internal Regulations of the 1992 Fund have fixed, or provided for a method of determining one or more interest rates in accordance with paragraph 1 of Article 13 of the 1992 Convention, a person is liable to pay late payment penalty calculated at the annual percentage rate equal to whichever of the interest rates is applicable to a person’s circumstances, on the amount unpaid computed from the time it became payable.

Subclause 46M(2) provides that a late payment penalty is payable to the Supplementary Fund on behalf of the Commonwealth.

46N Supplementary Fund to be paid amounts equal to amounts of contributions

Subclause 46N(1) provides that amounts received, or purporting to be received, under clause 46J or 46M must be paid to the Commonwealth.

Subclause 46N(2) provides that where an amount is paid to the Commonwealth under subsection (1), the Commonwealth must pay to the Supplementary Fund an equal amount.

Subclause 46N(3) provides that a payment of an amount to the Supplementary Fund under subclause (2) is subject to the condition that, if the Commonwealth becomes liable to refund the whole or part of that amount, the Supplementary Fund must pay to the Commonwealth an equivalent amount. Pursuant to subclause 46N(4), the Consolidated Revenue Fund is appropriated for the purposes of subclause (2).

46P Recovery of contributions and late payment penalty

Subclause 46P(1) provides that contributions and late payment penalty may be recovered by the Supplementary Fund as debts due to the Commonwealth.

Under subclause 46P(2) liability to costs is to be determined as if the Supplementary Fund were a party to an action and not the Commonwealth. Subclause 46P(3) provides that the Supplementary Fund is not entitled to recover any costs incurred in recovering a contribution or late payment penalty from the Commonwealth.
46Q Regulations relating to recovery of contributions etc.

Subclause 46Q(1) enables regulations to be made in relation to the methods by which contributions and late payment penalty may be paid, and for refunds of, or overpayment of contributions.

Subclause 46Q(2) enables regulations to be made in relation to the making of payments using electronic funds transfer systems.

Division 3 – Record-keeping and returns etc.

46R Authority to inform Supplementary Fund

Subclause 46R(1) provides that Article 13, paragraph 1 of Article 15, and Article 20 of the 2003 Protocol will be enforceable under Commonwealth law.

Article 13 provides that Contracting States shall report to the Director of the Supplementary Fund information on oil receipts. Provisions for reporting to the 1992 Fund are currently found in sections 43 – 46 of the Protection of the Sea (Oil Pollution Compensation Fund) Act 1993.

Paragraph 1 of Article 15 sets out an obligation on the part of the Contracting State to report to the Director of the Supplementary Fund when there is no person meeting the conditions of Article 10.

Article 20 imposes a requirement on Contracting States to report to the Supplementary Fund the details of parties liable to pay contributions and information on quantities of contributing oil. This applies whether the oil receiver is a Government authority, a State-owned company, a private company or an individual.

The Supplementary Fund Protocol imposes certain obligations on Contracting States. Subsection 46R(2) provides that these obligations fall on the Australian Maritime Safety Authority (the Authority). Pursuant to subclause 46R(3), the Authority may inform the Supplementary Fund of any additional matters relating to contributions as it considers appropriate.

The Authority in the course of its normal duties will ensure that relevant Australian companies complete and submit to the Supplementary Fund their contributing oil returns.

46S Record-keeping and returns etc.

Clause 46S enables regulations to be made in relation to record keeping and returns.

Subclause 46S(1) enables the regulations to be made requiring a person:

(a) to keep and retain records, relevant to a person’s liability to make contributions;
(b) to give relevant information and returns to the Authority; and
(c) to produce relevant documents or copies of documents to the Authority.
Subclause 46S(2) enables the regulations to provide that information or returns given to the Authority in accordance with a requirement covered by paragraph (1)(b) must be verified by statutory declaration.

Subclause 46S(3) entitles a person to be paid by the Authority reasonable compensation for making copies in complying with a requirement covered by subparagraph (1)(c)(ii).

Subclause 46S(4) provides that a person is not excused from giving information or producing a document under regulations made for the purposes of Division 3 on the ground that the information or return or the production of the document might tend to incriminate the person or expose the person to a penalty. However:

(a) giving the information or return or producing the document or copy; or
(b) any information, return, document obtained as a consequence of giving the information or producing the document;

is not admissible in evidence against the person in:

(c) criminal proceedings other than proceedings under, or arising out of, clause 46R or 46S;
(d) or proceedings for recovery of an amount of late payment penalty.

46T Failure to give information or returns

Pursuant to clause 46T a person commits an offence if the person is required under regulations made for the purposes of Division 3 to give any information or return to the Authority; and the person engages in conduct which contravenes the requirement. A penalty of 300 penalty units is provided for.

Subclause 46T(2) provides that strict liability applies to paragraph (1)(a). Subclause 46T(3) provides that engage in conduct means to do an act, or omit to perform an act.

Strict liability is appropriate because the offence is directed at a person, which is defined in the Supplementary Fund Protocol to have the same meaning as in Article 1 of the International Convention on Civil Liability for Oil Pollution Damage, 1992 to mean “any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.” Such a person can be expected to be fully aware of the requirements of the legislation, including the requirement to provide information or returns.

Clause 46T, including the penalty of 300 penalty units for an offence, is identical with section 45 of the Protection of the Sea (Oil Pollution Compensation Fund) Act 1993. A penalty of 300 penalty units is considered an appropriate penalty for failure to give information or returns.

In framing the offence provisions contained in this Bill consideration was given to the principles contained in Report 6/2002 on the Application of Absolute and Strict Liability Offences in Commonwealth Legislation by the Scrutiny of Bills Committee and to matters discussed in the Guide to Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers. In the development of the offence provisions
consultation was undertaken by the Department of Infrastructure, Transport, Regional Development and Local Government with industry, state and Northern Territory governments and with the Attorney-General’s Department.

The existence of strict liability does not make any other defence unavailable. Defences available to an accused other than those removed by making a matter one of strict liability remain available. For example, the application of strict liability allows a defence of honest and reasonable mistake of fact to be raised.

It is important that there be an appropriate penalty to discourage non-compliance with the prescribed requirements. Potential consequences of non-compliance are high and range from detrimentally affecting confidence in the oil industry, right through to the environmental harm as a result of a major oil spill and the associated costs not being equitably spread amongst receivers of all Contracting States.

46U False information or returns

Clause 46U makes it an offence for a person to intentionally give information or a return that, to the person’s knowledge, is false or misleading in a material particular. A penalty of 500 penalty units is prescribed.

Clause 46U, including the penalty of 500 penalty units for an offence, is identical with section 46 of the Protection of the Sea (Oil Pollution Compensation Fund) Act 1993, which provides the same offence and penalty for providing false information on record keeping in relation to the 1992 International Oil Pollution Compensation Fund. 500 penalty units is considered an appropriate penalty for failure to give information or returns or giving false information or returns.

Given the costs of running a ship and the potential serious problems that might arise if insurance is not available to cover pollution damage a penalty of 500 penalty units is considered to be an appropriate deterrent. It is important that there be an appropriate penalty to discourage non-compliance with prescribed requirements.

Item 21 Chapter 4 (heading)

Item 21 repeals the heading of Chapter 4 – “Regulations” and substitutes a new heading “Chapter 4 – Miscellaneous”.

Item 22 Before section 47

Item 22 inserts new sections 46V and 46W.

46V Treatment of partnerships

46W Treatment of unincorporated associations

Clauses 46V and 46W impose collective liability on partners and members of unincorporated associations respectively for an offence against the Act.

Clauses 46V and 46W take account of the definition of “person” in the International Convention on Civil Liability for Oil Pollution Damage 1992 which is as follows:
"Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

Subclauses 46V(1) and 46W(1) provide that the Act applies to a partnership or an unincorporated association respectively, as if it were a person (but with the changes set out in clauses 46V and 46W).

Subclauses 46V(2) and 46W(2) provide that an obligation that would otherwise be imposed on a partnership or an unincorporated association, respectively, is taken to have been imposed on, respectively, each partner or member of the association's committee of management but may be discharged by any of the partners or by any of the members.

Subclauses 46V(3) and 46W(3) provide that an offence that would otherwise be committed by, a partnership or an unincorporated association, respectively, is taken to have been committed by each partner or member of the association's committee of management, respectively.

The collective liability of partners and members of unincorporated associations for an offence against clause 46V or 46W is appropriate for a number of reasons.

Persons liable to pay a contribution to the Supplementary Fund will predominantly be bodies corporate but some persons which will incur a liability under the Bill may be a partnership or an unincorporated association.

Collective responsibility is well established in shipping law, where it has been traditional for offence provisions to apply to the ship master and the owner.

Subclauses 46V(4) and 46W(4) provide respectively that a partner or a member of the association’s committee of management does not commit an offence if the partner or member:

(a) does not know of the circumstances that constitute the contravention; or
(b) knows of the circumstances that constitute the contravention but takes all reasonable steps to correct the contravention as soon as possible after the partner or the member become aware of those circumstances.

This protects individual partners and members from inadvertently committing an offence and will require the prosecution in a hearing for an offence to prove that the partner or member knew or ought reasonably to have known about the circumstances that constitute the offence.

**SCHEDULE 2 – MARPOL amendments**

Australia is a Party to the International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 (MARPOL) and has implemented all six annexes to MARPOL. The legislation giving effect to MARPOL in Australia is the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (POTS Act) and the *Navigation Act 1912* and Marine Orders made under this legislation.
**Navigation Act 1912**

**Item 1 Section 267A Regulations to give effect to certain Regulations of Annex I**

Item 1 inserts Regulation 15 in section 267A. Regulation 15 of Annex I of MARPOL deals with control of the discharge of oil by ships into the sea.

Section 267A enables Regulations to be made to give effect to certain Regulations of Annex I of MARPOL. The Regulations currently may make provision for and in relation to giving effect to Regulations 12, 12A, 13, 14, 16, 18, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 of Annex I.

**Protection of the Sea (Prevention of Pollution from Ships) Act 1983**

The amendments to the POTS Act implement changes to Annexes I, III and IV of MARPOL, make miscellaneous amendments to the requirements for maintenance of garbage record books and allow regulations under the POTS Act to prescribe penalties up to 50 penalty units.

**Item 2 Subsection 9(4) Prohibition of discharge of oil or oily mixtures into sea**

Subsection 9(1) of the POTS Act makes it an offence for a person to do an act that results in the discharge of oil or an oily mixture into the sea. Subsection 9(4) creates defences to a prosecution for an offence by reference to the exceptions to the prohibition on discharges of oil contained in Regulations 15 and 34 of Annex I of MARPOL.

Since subsection 9(4) was first enacted revisions have been made to Annex I of MARPOL. Most of these revisions were implemented through the *Maritime Legislation Amendment (Prevention of Pollution from Ships) Act 2006*; however regulation 15.6 was overlooked at that time.

Item 2 substitutes a new subsection 9(4) to give effect to the current requirements of Regulations 15 and 34 of Annex I.

The general principle is that there should be no discharge of oil from ships into the sea in the Antarctic area; that is waters south of 60 degrees south, and no discharges in special areas or other areas subject to certain exceptions.

New paragraph 9(4)(a) provides that, in the case of ships having a gross tonnage equal to or greater than 400 in areas that are not special areas, the discharge of oil or oily mixture may be permitted provided the ship is proceeding *en route*; the oily mixture is processed using oil filtering equipment as required by regulation made under section 267A of the *Navigation Act 1912*; the oil content of the effluent without dilution does not exceed 15 parts per million; and if the ship is an oil tanker—the oily mixture does not originate from the cargo pump room bilges of the ship and is not mixed with oil cargo residues. Paragraph 9(4)(a) gives effect to Regulation 15.2 of Annex I of MARPOL.
New paragraph 9(4)(b) provides that, in the case of ships having a gross tonnage equal to or greater than 400, in a special area other than the Antarctic area, the discharge of oil or an oily mixture may be permitted provided the ship is proceeding *en route*; the oily mixture is processed using oil filtering equipment as required by regulation made under section 267A of the *Navigation Act 1912*; the oil content of the effluent without dilution does not exceed 15 parts per million; and if the ship is an oil tanker—the oily mixture does not originate from the cargo pump room bilges of the ship and is not mixed with oil cargo residues. Paragraph 9(4)(b) gives effect to Regulation 15.3 of Annex I of MARPOL.

It should be noted that the regulations made for the purposes of subparagraphs 9(4)(a) and 9(4)(b) prescribe equipment requirements that are different with respect to discharges that are not in a special area compared to discharges that are in a special area other than the Antarctic area.

New paragraph 9(4)(c) provides that, in the case of ships having a gross tonnage of less than 400, in an area other than the Antarctic area, the discharge of oil or an oily mixture may be permitted provided the ship is proceeding *en route*; the ship has in operation equipment, as required by regulation made under section 267A of the *Navigation Act 1912*, that ensures that the oil content of the effluent without dilution does not exceed 15 parts per million; and if the ship is an oil tanker—the oily mixture does not originate from the cargo pump room bilges of the ship and is not mixed with oil cargo residues. Paragraph 9(4)(c) gives effect to Regulation 15.6 of Annex I of MARPOL.

Oil tankers are subject to additional requirements in relation to oil discharges from their cargo areas as specified in Regulation 34 of Annex I of MARPOL and in new paragraphs 9(4)(d) and (e).

New paragraph 9(4)(d) provides that, in the case of an oil tanker having a gross tonnage of 150 or more, the discharge of oil or an oily mixture (other than washings contaminated with oil) from the cargo area of an oil tanker that is not within a special area may be permitted provided the tanker is more than 50 nautical miles from the nearest land; the tanker is proceeding *en route*; the instantaneous rate of discharge of oil content does not exceed 30 litres per nautical mile; if the oil tanker is delivered on or before 31 December 1979 - the total quantity of oil discharged into the sea does not exceed one part in 15,000 parts of the total quantity of the cargo; if the oil tanker is delivered after 31 December 1979 - the total quantity of oil discharged into the sea does not exceed one part in 30,000 parts of the total quantity of cargo; and the oil tanker has in operation an oil discharge monitoring and control system and a slop tank arrangement as required by regulations made under section 267A of the *Navigation Act 1912*. Paragraph 9(4)(d) gives effect to Regulation 34.1 of Annex I of MARPOL.

New paragraph 9(4)(e) provides that, the discharge of washings contaminated with oil from an oil tanker that is not within a special area, may be permitted provided the tanker is more than 50 nautical miles from the nearest land; the tanker is proceeding *en route*; the instantaneous rate of discharge of oil content does not exceed 30 litres per nautical mile; if the oil tanker is delivered on or before 31 December 1979 - the total quantity of oil discharged into the sea does not exceed one part in 15,000 parts of the total quantity of the cargo; if the oil tanker is delivered after 31 December 1979 -
the total quantity of oil discharged into the sea does not exceed one part in 30,000 parts of the total quantity of cargo; and the oil tanker has in operation an oil discharge monitoring and control system and a slop tank arrangement as required by regulations made under section 267A of the *Navigation Act 1912*.

Regulation 34.1 of Annex I of MARPOL requires oily mixtures to be discharged from tankers of 150 gross tonnage or more in a particular way. Oil contaminated washings are a form of oily mixture. Regulation 34.6 requires oil contaminated washings from ships of less than 150 gross tonnage to be discharged in the same way. The result for oil contaminated washings is that they must be discharged in that way, no matter what the size of the ship from which they are discharged. Paragraph 9(4)(e) gives effect to Regulation 34.6 of Annex I of MARPOL.

Paragraph 9(4)(f) provides that the discharge of oil or an oily mixture from the cargo area of an oil tanker, either within or outside a special area, may be permitted if the discharge is of clean or segregated ballast. Paragraph 9(4)(f) gives effect to Regulations 34.2 and 34.4 of Annex I of MARPOL.

Pursuant to subsection 425 (1AA) of the *Navigation Act 1912*, it is proposed to amend Part 91 of Marine Orders to prescribe relevant requirements for the purposes of paragraphs 9(4)(a)(iii), 9(4)(b)(iii), 9(4)(c)(iii), 9(4)(d)(vii) and 9(4)(e)(vi).

This amendment is to commence on the date that the Act receives Royal Assent.

**Item 3 Subsection 26A(1) Interpretation (definition of harmful substance)**

Australia’s obligations under Annex III of MARPOL are implemented by Part IIIA of the POTS Act.

Item 3 substitutes a new definition of harmful substance consistent with the definition in Regulation 1 of the amended version of Annex III, to mean a substance which is identified as a marine pollutant in the International Marine Dangerous Goods Code; or meets the criteria in the Appendix of Annex III of the Convention.

It is proposed to amend Marine Orders Part 94 to prescribe technical requirements.

The amendments to Annex III of MARPOL will enter into force internationally on 1 January 2010, and the amendment to the POTS Act will commence on that date.

**Item 4 Paragraph 26D(6)(c) Prohibition of discharge of sewage into the sea**

Regulation 11.1.1 of Annex IV of MARPOL sets conditions on the discharge of sewage that has not been treated by an approved sewage treatment plant (STP). The Regulation applies to sewage which is comminuted and disinfected (a lower level of treatment than approved STP), and sewage which is not (raw sewage). The existing Regulation provides that sewage which has not been comminuted and disinfected that has been stored in holding tanks must not be discharged instantaneously.
From 1 December 2008, Regulation 11.1.1 will also require that sewage which has not been comminuted and disinfected that has originated from spaces containing living animals must not be discharged instantaneously.

Item 4 amends paragraph 26D(6)(c) by inserting the words “or sewage originating from spaces containing live animals”. Sewage originating from spaces containing living animals must be discharged at a moderate rate when the ship is proceeding en route at a rate of at least 4 knots.

The amendment to Annex IV of MARPOL will enter into force internationally on 1 December 2008. This amendment will commence on that date.

Item 5 Paragraph 26FA(8)(b) Garbage record book

Item 5 substitutes a new paragraph 26FA(8)(b) so that the master’s signature is required only on each page, rather than on each entry of a garbage record book. The requirement that an officer or other person in charge of a prescribed operation must sign each entry is retained.

Item 6 Paragraph 33(1)(f) Regulations

Currently, paragraph 33(1)(f) enables the Governor-General to make regulations prescribing penalties not exceeding 30 penalty units for a contravention of a provision of the regulations or of any orders made under section 34.

Item 6 amends paragraph 33(1)(f) to make it consistent with section 425(1)(h) of the Navigation Act 1912 by increasing the maximum penalty for a breach of regulations made under the POTS Act to 50 penalty units.

SCHEDULE 3 – Amendments relating to shipping and marine navigation levies

Marine Navigation Levy Collection Act 1989

Item 1 Section 3 (definition of Australian port)

Item 1 substitutes a new definition of Australian port to mean a place appointed, proclaimed or prescribed as a port under the Customs Act 1901, or under a law of a State or the Northern Territory.

The amendment will put beyond doubt that a place adjacent to an installation or indeed a place to which a ship comes for the purposes of unloading cargo, even if that place is not immediately adjacent to land, can be a “port”, if so prescribed under the Customs Act 1901.

As this amendment is also being made to the Marine Navigation (Regulatory Functions) Levy Collection Act 1991 and the Protection of the Sea (Shipping Levy Collection) Act 1981 this will ensure a consistent definition of Australian port in relevant legislation.
Marine Navigation (Regulatory Functions) Levy Collection Act 1991

Item 2 Section 3 (definition of Australian port)

Item 2 substitutes a new definition of Australian port to mean a place appointed, proclaimed or prescribed as a port under the Customs Act 1901, or under a law of a State or the Northern Territory.

The amendment will put beyond doubt that a place adjacent to an installation or indeed a place to which a ship comes for the purposes of unloading cargo, even if that place is not immediately adjacent to land, can be a “port”, if so prescribed under the Customs Act 1901.

Protection of the Sea (Shipping Levy Collection) Act 1981

Item 3 Subsection 4(1) (definition of Australian port)

Item 3 substitutes a new definition of Australian port to mean a place appointed, proclaimed or prescribed as a port under the Customs Act 1901, or under a law of a State or the Northern Territory.

The amendment will put beyond doubt that a place adjacent to an installation or indeed a place to which a ship comes for the purposes of unloading cargo, even if that place is not immediately adjacent to land, can be a “port”, if so prescribed under the Customs Act 1901.

Item 4 Subsection 4(1) Definitions

Item 4 inserts a new definition of authorised person to mean a person appointed under section 4B.

Item 5 Subsection 4(1) (definition of Collector)

The current definition of Collector in the Act cross references a provision in the Lighthouses Act 1911 which was repealed when the Marine Navigation Levy Collection Act 1989 was enacted in 1989. Consequently, no-one is defined as a Collector for purposes of this Act.

Item 5 repeals the current definition and substitutes a new definition of Collector to mean a Collector within the meaning of the Customs Act 1901; or an authorised person.

Item 6 After section 4A

Item 6 inserts a new section 4B which enables the Minister, in writing, to appoint a person to be an authorised person for the purposes of the Act. Subclause 4B(2) enables the Minister to delegate the power of appointment to an officer of the Department.
SCHEDULE 4 – Miscellaneous

Protection of the Sea (Oil Pollution Compensation Fund) Act 1993

Item 1 Paragraph 27(c) Simplified outline

Item 1 amends paragraph 27(c) by omitting “Part 3.7” and substituting “Part 3.6”. This amendment is being made to correct a typographical error in the principal Act. The commencement of this item is tied to the commencement of the provision that created the error.

Item 2 Article 1 of schedule 3

Item 2 amends Article 1 of Schedule 3 by omitting “or this” and substituting “of this”. This amendment is being made to correct a typographical error in the principal Act. The commencement of this item is tied to the commencement of the provision that created the error.