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# Legal Briefing

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MARINE LEGISLATION

## Australia toughens maritime pollution laws

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BY **THOMAS  
MILLER**

# Recent changes to Australia's Maritime Legislation

*The Australian government passed a bill through parliament on the 21 November 2011 which expands and toughens the penalty provisions with regard to pollution incidents in Australian waters.*

The bill introduces new, and expands upon existing, offence and civil penalty provisions in the *Navigation Act 1912* (Navigation Act) and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (PPS Act). The amendments contained within the bill are expected to take effect and become law by 18 December 2011.

The new penalty provisions are higher than those currently provided for in the PPS Act and the Navigation Act and are aimed at *'detering shipping companies and their crews from engaging in unsafe and irresponsible actions at sea, particularly near Australia's environmentally sensitive marine ecosystems.'*<sup>1</sup>

Australia is currently also advocating for changes to limits of liability under the various governing conventions through the IMO. However, there has as yet been no change to the limits of liability for pollution incidents in Australian waters.

## Background

The amendments have been introduced in response to two recent shipping incidents involving damage to reef and oil spillage: the first in March 2009, involving the Hong Kong China registered general cargo ship, *Pacific Adventurer*; and the second in April 2010, involving the Chinese bulk carrier, *Shen Neng 1*.

Following the *Shen Neng 1* incident, the Australian Maritime Safety Authority (AMSA) undertook a review of safe navigation in the Great Barrier Reef. The review resulted in recommendations to strengthen regulatory arrangements and modernise the penalty and offence provisions under the PPS Act and the Navigation Act and to make them more consistent with other Commonwealth and State legislation such as the

regulatory regime that applies in the Great Barrier Reef Marine Park.<sup>2</sup>

Prior to the amendments, the PPS Act provided for a maximum of 2,000 penalty units (A\$220,000 for an individual and A\$1.1 million for a corporation) for the *'reckless or negligent discharge of oil or an oily mixture into the sea'*. In addition the PPS Act provided an additional strict liability offence of 500 penalty units (A\$55,000 for an individual, or A\$275,000 for a corporation) for the master, and the owner of a ship in relation to such discharge.<sup>3</sup>

The new amendments to the PPS Act and the Navigation act will bring the offence provisions in line with the Great Barrier Reef Marine Park Act, which provides for penalties of up to 20,000 penalty units (A\$2.2 million for an individual and A\$5.5 million for a corporation) for an aggravated contravention.<sup>4</sup>

## Key Amendments

### Navigation Act 1912

- Creation of a new offence at Section 267ZZI in circumstances where the master of a ship operates the ship in a negligent or reckless manner that causes pollution or damage to the marine environment in Australian waters.
- Creation of a new offence at Section 267ZZJ in circumstances where the master of a ship fails to ensure that the ship is not operated in a negligent or reckless manner that causes pollution or damage to the marine environment in Australian waters.
- Expansion of the types of ships to which the new provisions will apply at Section 267ZZK.

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<sup>1</sup> Margaret Harrison-Smith, Bills Digest no. 60 2011-12 – Maritime Legislation Amendment Bill 2011, Parliament of Australia, <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId\\_Phrase%3A%22r4674%22%20Dataset%3Abillsdgs;rc=0](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22r4674%22%20Dataset%3Abillsdgs;rc=0)>, 23.11.2011

<sup>2</sup> Ibid. <sup>3</sup> Ibid. <sup>4</sup> Ibid.

- A new offence at Section 267ZZL in circumstances where the master of an Australian ship operates the ship in a negligent or reckless manner that causes pollution or damage to the marine environment in the high seas outside Australia.
- A new offence at Section 267ZZM in circumstances where the master of an Australian ship fails to ensure that the ship is not operated in a negligent or reckless manner that causes pollution or damage to the marine environment in the high seas outside Australia. For the purpose of determining whether a master has operated the ship in a reckless or negligent manner under the new provisions, the legislation provides that a court may take account of matters including:
  - the characteristics of the ship;
  - the type of cargo carried and the amount of bunker oil on board the ship;
  - the state of visibility, wind, sea and current;
  - the presence of other ships and navigation hazards in the vicinity; and
  - the rules under the Prevention of Collisions Convention.
- Civil and criminal penalties are provided for in the new offence provisions, with the civil penalty requiring the lesser civil burden of proof, the ‘balance of probabilities’. The civil penalty provisions carry a financial penalty only and do not constitute a criminal conviction. The criminal and civil penalty units are set at 600 penalty units with a higher civil penalty of 6,000 penalty units provided for an ‘aggravated contravention’.
- An ‘aggravated contravention’ is defined at Section 267ZZN as a contravention of a civil penalty provision ‘*if the conduct the person engaged in that constituted the contravention... resulted in serious harm to the marine environment*’ or ‘*had the potential to cause serious harm to the marine environment*’. Matters which may be considered by a court in determining whether the harm constitutes serious harm under Section 267ZZN include:
  - the nature and magnitude of the harm;
  - the size, sensitivity and significance of the

affected environment;

- whether the harm is irreversible; and
- the measures required to remedy the harm.

The explanatory memorandum accompanying the bill provides the justification for the higher civil penalty units as being ‘*to discourage non-compliance and take into consideration the levels of cost saving that shipping operators may achieve through non-compliance and any perceived likelihood of non-compliant ships being identified and prosecuted.*’<sup>5</sup>

- Creation of a strict liability offence at Section 269E where the master of a ship fails to report in a mandatory reporting area.
- Creation of a provision at Section 399N where a person will be taken as having contravened a civil penalty provision in circumstances where that person:
  - attempts to contravene a civil penalty provision;
  - aids in, procures or induces a contravention of a civil penalty provision;
  - is knowingly concerned in a contravention of a civil penalty provision; or
  - conspires with others to cause a contravention of a civil penalty provision.
- Provision at Section 399Q for a person to avoid liability for a penalty if they can show that they were ‘*under a mistaken but reasonable belief*’ about the facts surrounding a contravention, and that, had they had a correct understanding of the facts, the contravention would not have occurred. The explanatory memorandum offers the example, ‘*where a person reasonably believes the circumstances in the present situation to be the same as those in a past situation which did not constitute a contravention*’.

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

- Amendment to the existing strict liability offence at Subsection 9(1B) where a person ‘*engages in conduct that causes a discharge of oil or of an oily mixture from a ship into the sea*’ near the coastline of Australia, near one of the Australian external territories, or within the EEZ (or, in the case of an Australian ship, outside the EEZ). The amendment extends the offence to

<sup>5</sup> Explanatory Memorandum, Maritime Legislation Amendment Bill 2011

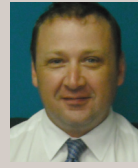
'charterers' and provides that in such circumstances, the 'charterer' of a ship, in addition to the master and the owner of the ship, will upon conviction be taken to have committed the offence and will be subject to a fine.

- Amendment to the strict liability offence at Subsection 10(3) similarly provides that in circumstances where an 'oil residue is discharged from an Australian ship into the sea' the 'charterer', in addition to the master and the owner of the ship, will upon conviction be taken to have committed the offence and will be subject to a fine.
- Substantial increases in the maximum penalty attached to the strict liability offences at Subsection 9(1B) and Subsection 10(3) of 'discharging oil or oily mixture from a ship into the sea' near the coastline of Australia, near one of the Australian external territories, or within the EEZ (or, in the case of an Australian ship, outside the EEZ). The amendments provide for an increase in the existing fine from 500 penalty units (A\$55,000 for an individual, or A\$275,000 for a corporation) to a new maximum fine of 20,000 penalty units (A\$2.2 million for an individual and A\$11 million for a corporation).

## THE AUTHOR

### Daniel Twikler

Brian White & Associates



Daniel joined Brian White and Associates in 2011 after working extensively with a number of Commonwealth and State government agencies in government investigations and environmental regulation, in addition to working within the private sector in commercial fisheries and aquaculture. Daniel has a Bachelor of Laws and tertiary qualifications in Marine Science and is a qualified coxswain and commercial diver. If you have any questions regarding the issues in this legal briefing, please contact Daniel at:

### Brian White & Associates

Lawyers & P&I Club Correspondents  
Level 1, Moresby Haus,  
4 Scott Street, Cairns  
Australia

PO Box 5701 Cairns Qld 4870

Tel: +61 7 4031 4711 (24 hours)

Fax: +61 7 4031 3810

Email: [Daniel@bwamarine.com](mailto:Daniel@bwamarine.com)

[www.bwamarine.com](http://www.bwamarine.com)

**UK P&I CLUB**



**UKDC**

**UK DEFENCE CLUB**

**Thomas Miller P&I Ltd – London**

Tel: +44 20 7283 4646 Fax: +44 20 7283 5614

**Thomas Miller (Hellas) Ltd – Piraeus H1**

Tel: +30 210 42 91 200 Fax: +30 210 42 91 207/8

**Thomas Miller (Americas) Inc – New Jersey**

Tel: +1 201 557 7300 Fax: +1 201 946 0167

**Thomas Miller (Hong Kong) Ltd – Hong Kong**

Tel: + 852 2832 9301 Fax: + 852 2574 5025

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