REGULATION IMPACT STATEMENT

Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996,

done at London on 30 April 2010

[2010] ATNIF 55

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010

(consolidated text of the International Convention on Liability and

Compensation for Damage in Connection with the Carriage of

Hazardous and Noxious Substances by Sea, 1996 and the Protocol of 2010 to the Convention)

done at London on 30 April 2010

[2010] ATNIF 56

PURPOSE

1. This Regulation Impact Statement ("RIS") has been prepared by the Department of Infrastructure and Transport ("the Department").

2. This RIS analyses the regulatory implications of Australia's proposed accession to the *Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996* ("the Protocol").

BACKGROUND

History and status of the Protocol and the 2010 HNS Convention

3. The Protocol was adopted by the International Maritime Organization ("IMO") on 30 April 2010. The Protocol amends the *International Convention on Liability and Compensation for*

Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 ("the 1996 HNS Convention"), which contains a liability and compensation regime relating to hazardous and noxious substances ("HNS") carried by ship as cargo. The 1996 HNS Convention never came into force. The 1996 HNS Convention, as amended by the Protocol, is known as the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010* ("the 2010 HNS Convention").

4. The Protocol requires the State Parties to the Protocol to give effect to the 2010 HNS Convention.[1] Thus, by becoming a State Party to the Protocol, a State will be bound by the 2010 HNS Convention. (Since the 2010 HNS Convention contains the liability and compensation regime relating to HNS, the discussion in this RIS will focus on the 2010 HNS Convention rather than on the Protocol *per se*.)

5. The Protocol (and hence the 2010 HNS Convention) will enter into force eighteen months after the following two preconditions are fulfilled:

- at least twelve States, including four States each with at least 2 million units of gross tonnage of ships registered in the State concerned, have ratified, acceded to or otherwise expressed their consent to be bound by the Protocol; and
- the Secretary-General of the IMO ("the Secretary-General") has been informed that persons[2] in those States who would be liable to contribute to the international compensation fund established under the 2010 HNS Convention (called "the HNS Fund"[3]) received during the previous calendar year a total of at least 40 million tonnes of HNS cargo in respect of which there will be a liability to contribute to the fund.[4]

(Hereafter, a reference to ratification or accession should be taken to include a reference to any other method by which a State expresses its intention to be bound by the convention.)

6. As at 20 September 2012, eight States have signed the Protocol and are undertaking the process of ratification.[5] Therefore the Protocol (and hence also the 2010 HNS Convention) has not entered into force.

Brief description of the 2010 HNS Convention

7. The 2010 HNS Convention establishes a liability and compensation regime covering damage arising from the carriage of HNS by ship as cargo. The convention applies to around 6,500 kinds of HNS, comprising liquids, gases and solid materials. The kinds of damage covered are death or injury to persons, loss or damage to property, and costs of cleaning up pollution, preventing the spread of pollution and undertaking environmental remediation. The key elements of the regime are as follows:

---

[1] Article 2 of the Protocol.
[2] In this RIS a reference to a "person" includes a corporation and any other kind of entity that has a separate legal personality.
[3] The long name of the HNS Fund is the International Hazardous and Noxious Substances Fund.
[4] Article 46, paragraph 1, of the 2010 HNS Convention. (Hereafter, references to Articles are to Articles of the 2010 HNS Convention, unless otherwise indicated.)
[5] The eight States are France, Germany, the Netherlands, Denmark, Norway, Greece, Turkey and Canada.

- Shipowners will be strictly liable for damage arising from the carriage of HNS by their ship, subject to limited exceptions.
- As a corollary of the strict liability imposed on shipowners, the convention will "channel" liability to the shipowner by precluding the bringing of claims for damage against crew members and other persons connected with the operation of the ship (including charterers, operators, managers, pilots, salvors, persons taking measures to prevent the spread of pollution after an HNS incident,[6] and employees and agents of the foregoing).
- Shipowners' liability for damage arising from the carriage of HNS by their ship will be limited (or "capped") to a specified maximum amount, based on the ship's gross tonnage.
- Shipowners will be required to maintain liability insurance cover in respect of damage arising from the carriage of HNS by their ship, up to the limit of their liability. Ships will be required to carry an insurance certificate, issued by the State where the ship is registered, evidencing that the ship has the required insurance cover.
- Persons who suffer damage arising from the carriage of HNS by the ship will have a right to claim directly against the insurer.
- Where the amount of the damage exceeds the shipowner's mandatory insurance cover, the HNS Fund will make up the shortfall, up to a maximum of 250 million Special Drawing Rights ("SDRs") ($401 million) in respect of any one incident, less the amount of any compensation actually paid by the shipowner or its insurer.[7]
- The HNS Fund will be funded by contributions that will be payable by receivers who received during the previous calendar year more than specified minimum tonnages of HNS that have been carried by ship in bulk form. (HNS carried by ship in bulk form will be referred to as "bulk" HNS. HNS carried by ship in packaged form will be referred to as "packaged" HNS.) The minimum tonnages are:
  - for IOPC contributing oil[8] – 150,000 tonnes;
  - for liquefied natural gas ("LNG") – any amount (*ie* there is no minimum threshold for LNG);
  - for all other HNS – 20,000 tonnes.

  A "receiver" is a person that physically receives the HNS cargo when it is discharged from the ship; but where the person receives the cargo as agent for a principal and discloses the identity of the principal to the HNS Fund, then the "receiver" will be the principal. The contributions will be calculated as a rate per tonne of bulk HNS received. The contribution rate will be determined annually based on the amount needed by the HNS Fund to pay actual and anticipated compensation claims in respect of known HNS incidents and to cover its administration costs.

---

[6] In this RIS "HNS incident" means a maritime incident in which the carriage of HNS cargo by a ship results in damage (*ie* death, injury, loss or damage to property, or pollution which reasonably necessitates action to clean up the pollution, prevent its spread, or remediate the environment).

[7] SDRs are a notional monetary unit used by the International Monetary Fund and are based on the average value of a basket of major currencies. As at 20 September 2012, 1 SDR was equal to 1.54228 United States dollars, and 1 United States dollar could be exchanged for approximately 1.04 Australian dollars. All the Australian dollar amounts specified in this RIS are based on these conversion rates, and are appropriately rounded. ("$" signifies Australian dollars.)

[8] "IOPC contributing oil" is defined in paragraph 11 below.

A more detailed description of the convention is provided below under the heading "Detailed Description of the 2010 HNS Convention" (paragraphs 20 to 89).[9]

[9] Further information about the convention is provided on the "HNS Convention" website maintained by the Secretariat of the International Oil Pollution Compensation Funds, at www.hnsconvention.org.

Brief description of other relevant conventions:

- Civil Liability Convention and IOPC Funds Conventions
- LLMC Convention
- Bunkers Convention

8. The following international conventions are relevant to, and have various impacts on the operation of, the 2010 HNS Convention.

The Civil Liability Convention and IOPC Funds Conventions

9. The following three related international conventions establish a liability and compensation regime covering pollution damage caused by spills or discharges of persistent hydrocarbon mineral oil (*ie* heavy oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil) from oil tankers:

- the *International Convention on Civil Liability for Oil Pollution Damage, 1992* ("the Civil Liability Convention");
- the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992* ("the Fund Convention"); and
- the *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992* ("the Supplementary Fund Protocol 2003").

(The Fund Convention and the Supplementary Fund Protocol 2003 will be referred to collectively as "the IOPC Funds Conventions".)

10. The key elements of the liability and compensation regime established by the Civil Liability Convention and IOPC Funds Conventions are similar to those of the liability and compensation regime in the 2010 HNS Convention, namely: limitation of liability of shipowners; strict liability of shipowners; channelling of liability to shipowners; compulsory liability insurance for shipowners; and an international compensation fund which pays compensation for damage that exceeds the shipowner's mandatory insurance cover. The IOPC Funds Conventions establish two related international compensations funds, called the International Oil Pollution Compensation Funds ("the IOPC Funds").

11. The IOPC Funds are funded by contributions that are required to be paid by receivers of cargoes of crude oil and certain other kinds of persistent hydrocarbon mineral oil (collectively referred to as "IOPC contributing oil") who receive more than 150,000 tonnes of such oil per year. (Such receivers are typically oil refineries.)

12. The regime established by the Civil Liability Convention and IOPC Funds Conventions has served as the model for the 2010 HNS Convention.

The LLMC Convention

13. The *Convention on Limitation of Liability for Maritime Claims, 1976* as amended by the *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976* (this amended convention will be referred to as "the LLMC Convention") limits the liability of shipowners (as well as ship charterers, managers, operators and salvors) for death, injury and other kinds of loss and damage arising from the operation of the ship (whatever the basis of liability may be). Different limits of liability apply to:

- claims relating to death or injury of passengers;
- claims relating to death or injury of persons other than passengers; and
- claims relating to loss or damage, other than death or injury (when discussing the LLMC Convention, this kind of damage will be called "general loss or damage").

Both the limits of liability that apply to *death or injury of persons other than passengers* and the limits of liability that apply to *general loss or damage* are determined by reference to the ship's gross tonnage, but the limits of liability that apply to *death or injury of persons other than passengers* are double the limits of liability that apply to *general loss or damage*. The limit of liability that applies to *death or injury of passengers* is a specified lump sum multiplied by the number of passengers the ship is authorised to carry.

(The table in paragraph 152 indicates the limits of liability that apply in relation to general loss or damage for ships of various indicative gross tonnages.)

14. The limits of liability under the LLMC Convention are much lower than the limits of liability under the Civil Liability Convention and the limits of liability under the 2010 HNS Convention.

15. The limits of liability under the LLMC Convention do not apply to claims for pollution damage within the meaning of the Civil Liability Convention (*ie* pollution damage caused by spills of persistent hydrocarbon mineral oil from oil tankers).[10]

The Bunkers Convention

16. The *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001* ("the Bunkers Convention") establishes a liability regime which covers pollution damage caused by spills or discharges of bunker oil from ships.[11] The regime provides for the limitation of liability of shipowners (including ship charterers, managers and operators), strict liability of shipowners, and compulsory liability insurance for shipowners. However, the Bunkers Convention does not establish a compensation fund to pay claims that exceed the shipowner's insurance cover.

---

[10] Article 3, paragraph (b), of the LLMC Convention.

[11] "Bunker oil" is the generic name for any fuel used by a ship for propulsion. The Bunkers Convention covers any kind of hydrocarbon mineral oil that is used for the propulsion or operation of a ship (including lubricating oil).

17. The Bunkers Convention permits shipowners to limit their liability for pollution damage caused by a spill or discharge of bunker oil in accordance with any applicable national or international regime for the limitation of liability, such as the LLMC Convention. (In other words, in jurisdictions where the LLMC Convention applies, shipowners' liability for pollution damage caused by a spill of bunker oil is subject to the liability limits in the LLMC Convention.)

18. The Bunkers Convention does not apply to pollution damage as defined in the Civil Liability Convention (*ie* pollution damage caused by spills of persistent hydrocarbon mineral oil from oil tankers).[12]

Detailed description of the 2010 HNS Convention

19. A detailed description of the 2010 HNS Convention is provided in paragraphs 20 to 89 below.

Definition of HNS

20. HNS are defined in the 2010 HNS Convention as hazardous and/or noxious substances identified in various IMO conventions and codes relating to maritime safety and prevention of pollution.[13] There are currently around 6,500 kinds of HNS. They include a wide range of hydrocarbon mineral oils (both crude and refined) and vegetable oils carried in bulk, certain kinds of liquefied gases carried in bulk, including LNG and liquefied petroleum gas ("LPG"), and a wide range of bulk and packaged industrial chemicals and substances.[14]

21. Certain bulk commodities which constitute major Australian exports, notably sugar, woodchips, coal, and a number of mineral ores and refined minerals, such as iron ore, bauxite and alumina, are not classified as HNS for the purposes of the 2010 HNS Convention.

Types of ships covered

22. The 2010 HNS Convention applies to "ships", which are defined as seagoing vessels and seaborne craft of any type whatsoever.[15] The references to "seagoing" and "seaborne" exclude craft used only in internal waters (*ie* areas of water lying landward of the baseline of the territorial sea, which include lakes, rivers and estuaries, harbours, bays and inlets, and certain sea areas on the landward side of reefs and lines of islands).

---

[12] Article 4, paragraph 1, of the Bunkers Convention.
[13] Article 1, paragraph 5.
[14] The HNS Convention website at www.hnsconvention.org contains a functionality called the "HNS Finder" which lists all the HNS that come within the scope of the 2010 HNS Convention and enables them to be browsed and searched.
[15] Article 1, paragraph 1.

23. Warships, naval auxiliary ships and other ships owned or operated by a State that are being used only on government non-commercial business are excluded from the scope of the 2010 HNS Convention.[16] A State Party can, at any time, bring any of these kinds of ships within the scope of the convention, either unconditionally or subject to conditions, by notifying the Secretary-General.[17]

[16] Article 4, paragraph 4.
[17] Article 4, paragraph 5.

24. A State Party can, at any time, make a declaration excluding from the scope of the 2010 HNS Convention ships of less than 200 gross tonnage while they are carrying HNS only in packaged form and are engaged on voyages between ports or facilities of that State Party.[18] Such a declaration can be withdrawn at any time.[19]

25. The 2010 HNS Convention allows two neighbouring States to make a declaration at any time excluding from the scope of the convention ships of less than 200 gross tonnage while they are carrying HNS only in packaged form and are engaged on voyages between ports or facilities of those States.[20] Either State can withdraw such a declaration at any time.[21]

Types of damage covered

26. The 2010 HNS Convention covers claims for damage arising from the carriage of HNS by ship as cargo.[22] The types of damage covered are:
- death or personal injury;
- loss of or damage to property;
- loss or damage by contamination of the environment (*ie* pollution), including the costs of reasonable environmental remediation that is or will be actually undertaken; and
- costs of measures to prevent pollution or the further spread of pollution (including any loss or damage caused by such measures).[23]

(Hereafter, a reference to "damage" should be taken to include all these kinds of damage and costs, unless the context otherwise requires.)

27. The coverage extends to damage caused during the loading and unloading of HNS from a ship. (Where the loading or unloading is carried out with equipment other than the ship's own equipment, the convention only covers damage caused by the HNS cargo before it passes outside the ship's rail.)[24]

28. The 2010 HNS Convention only applies to damage arising from the carriage of HNS by ship *as cargo*.[25] Thus, damage caused by HNS that is carried for another purpose (*eg* fuel used for the propulsion of the ship or a refrigerant used in the operation of the ship's refrigeration facilities) is not covered by the convention.

---

[18] Article 5, paragraph 1.
[19] Article 5, paragraph 3.
[20] Article 5, paragraph 2.
[21] Article 5, paragraph 3.
[22] Article 4, paragraph 1.
[23] Article 3.
[24] Article 1, paragraph 9.
[25] Article 4, paragraph 1, says that "This Convention shall apply to claims [...] for damage arising from the carriage of hazardous and noxious substances by sea." In the maritime context, a reference to the "carriage" of goods or substances is normally taken to be a reference to their carriage as cargo.

Territorial and nationality application criteria

29. The 2010 HNS Convention applies to damage arising from the carriage of HNS by ship, in the following circumstances:

- where the damage is caused in the territory or territorial sea of a State Party to the convention (irrespective of the nationality or place of registration of the ship carrying the HNS);
- where the damage involves environmental contamination and is caused in a State Party's exclusive economic zone (irrespective of the nationality or place of registration of the ship carrying the HNS);
- where the damage does not involve environmental contamination and is caused outside the territory and territorial sea of any State (but only if the ship carrying the HNS is registered in or is entitled to fly the flag of a State Party);
- where the damage consists of the cost of taking preventive measures to prevent or minimise any of the foregoing kinds of damage (irrespective of the place where the preventive measures are taken).[26]

Exclusions from the scope of the 2010 HNS Convention

30. The 2010 HNS Convention:

- does not apply to any damage or claim to the extent that its provisions are incompatible with applicable laws relating to workers' compensation or social security schemes;
- does not apply to pollution damage as defined in the Civil Liability Convention (*ie* pollution damage caused by spills of persistent hydrocarbon mineral oil from oil tankers);
- does not apply to claims arising out of contracts for the carriage of goods or passengers; and
- does not apply to damage caused by radioactive material.[27]

---

[26] Article 3.

[27] Article 4, paragraphs 1, 2 and 3.

Claims arising out of contracts for the carriage of goods or passengers are governed by the terms of the contract and are also subject to relevant international conventions. The conventions relating to the carriage of goods include the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (known as the Hague Rules) and the *United Nations Convention on the Carriage of Goods by Sea, 1978* (known as the Hamburg Rules). The *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974* (known as the Athens Convention) relates to the carriage of passengers and their luggage.

Liability for damage arising from the carriage of nuclear material by sea is regulated by the *Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material*.

Strict liability of shipowners

31. Shipowners will be strictly liable for damage resulting from HNS carried by their ship, except in the following limited circumstances:
- where the damage resulted from war, hostilities, civil war, insurrection or exceptional, inevitable and irresistible natural phenomena;
- where the damage was wholly caused by a third party with intent to cause damage;
- where the damage was wholly caused by negligence or wrongful act of a government or authority responsible for maintaining navigational aids; or
- where the shipper or another relevant person failed to provide information about the hazardous and noxious nature of the cargo and this caused the damage or led to the shipowner not obtaining the required liability insurance cover (unless the shipowner or its employees or agents knew or reasonably ought to have known about its hazardous and noxious nature).[28]

32. Where the damage is caused by two or more ships each of which is carrying HNS, the owners of the ships will be jointly and severally liable for damage which is not reasonably separable.[29]

Channelling of liability to shipowners

33. As a corollary of the strict liability imposed on shipowners, the 2010 HNS Convention precludes the bringing of claims for damage against certain categories of persons who are connected with the shipowner or with the operation of the ship, namely:
- crew members;
- charterers (including bareboat charterers);
- managers or operators of the ship;
- pilots;
- salvors;
- persons taking preventive measures; and
- employees and agents of the shipowner, crew members, charterers, salvors and persons taking preventive measures.[30]

34. There is no restriction on bringing claims for damage against third parties other than the persons just enumerated.[31] (However, claimants might not have an incentive to pursue claims against third parties if they are able to recover compensation from the shipowner and/or the HNS Fund pursuant to the 2010 HNS Convention.)

---

[28] Article 7, paragraphs 1 to 3.
[29] Article 8, paragraph 1.
[30] Article 7, paragraph 5.
[31] Article 7, paragraph 6.

Limitation of liability of shipowners

35. Shipowners will be entitled to limit their liability for damage resulting from HNS carried on their ship to a specified maximum amount, based on the ship's gross tonnage. The limits of liability are as follows:

Where the damage is *caused by bulk HNS*:

- for a ship of up to 2,000 gross tonnage: 10 million SDRs ($16 million);
- for a ship of over 2,000 gross tonnage: 10 million SDRs ($16 million) plus:
  - 1,500 SDRs ($2,406) for each unit of gross tonnage from 2,001 to 50,000;
  - 360 SDRs ($577) for each unit of gross tonnage over 50,000;

  up to a maximum liability of 100 million SDRs ($160.4 million).

Where the damage is *caused by packaged HNS, or by both bulk and packaged HNS*:

- for a ship of up to 2,000 gross tonnage: 11.5 million SDRs ($18.4 million);
- for a ship of over 2,000 gross tonnage: 11.5 million SDRs ($18.4 million) plus:
  - 1,725 SDRs ($2,766) for each unit of gross tonnage from 2,001 to 50,000;
  - 414 SDRs ($664) for each unit of gross tonnage over 50,000;

  up to a maximum liability of 115 million SDRs ($184.5 million).[32]

(The table in paragraph 152 below illustrates how these limits of liability apply to ships of various indicative gross tonnages. As noted in paragraphs 151 to 153 below, these limits of liability are significantly higher than the limits of liability specified in the LLMC Convention, which currently apply to HNS incidents.)

36. The reason why the liability limits that apply in relation to damage caused by bulk HNS are 15% lower than the liability limits that apply in relation to damage caused by packaged HNS or by a combination of bulk and packaged HNS is as follows. For the reason explained in paragraph 65 below, receivers of packaged HNS are not required to pay contributions to the HNS Fund, which means that receivers of bulk HNS bear the entire burden of funding the HNS Fund. To compensate the receivers of bulk HNS for this, the liability limits that apply in relation to damage caused by bulk HNS are set 15% lower, which has the effect that shipowners bear a greater proportion of the risk when carrying packaged HNS or a combination of bulk and packaged HNS, by dint of the mandatory liability insurance requirement (which is discussed below).

37. Shipowners are not permitted to limit their liability where it is proved that the damage resulted from the shipowner's personal conduct committed either with intent to cause damage or recklessly with knowledge that such damage would probably result.[33]

38. If there has been an HNS incident, in order to take advantage of the right to limit its liability, the shipowner must establish a fund of an amount equal to the limit of its liability with a court or other competent authority in the State Party where proceedings are brought, or are permitted to be brought, against the shipowner. (The State Parties in which proceedings may be

[32] Article 9, paragraph 1.
[33] Article 9, paragraph 2.

brought against the shipowner are indicated in paragraph 73 below.) The fund must consist either of money or an appropriate guarantee.[34]

39. The fund must be distributed to the persons entitled to compensation in respect of the HNS incident on a pro rata basis.[35] However, claims for death and personal injury have priority over all other claims, until the point where payments in respect of death and personal injury have consumed two-thirds of the fund.[36]

Compulsory liability insurance by shipowners

40. Under the 2010 HNS Convention, State Parties will have to ensure that owners of the following kinds of ships maintain liability insurance (or other financial security such as a bank guarantee) in respect of their liability for damage caused by HNS, up to the limit of their liability under the convention:

- ships registered in the State Party that actually carry HNS; and
- ships that enter or leave the State Party's ports, irrespective of where the ships are registered.[37]

(The requirement for State Parties to enforce the mandatory insurance requirement in respect of *all* ships visiting their ports will promote the objectives of the convention and will give States an incentive to sign up to the convention once it has come into force, as their ships engaging in international trade will not be able to escape the cost of mandatory liability insurance even if they do not become a State Party.)

41. Ships that are subject to the mandatory insurance requirement will be required to carry an insurance certificate evidencing that they have the requisite cover.[38]

42. State Parties will have to issue insurance certificates:

- to ships registered in that State Party that comply with the mandatory insurance requirement; and
- on request, to ships registered in a State that is not a State Party to the 2010 HNS Convention that comply with the mandatory insurance requirement.[39]

43. If a ship is owned by a State Party, the State Party will have the option of providing it with a certificate stating that the State Party will meet its own liability for damage resulting from HNS carried by the ship, up to the limit of liability that applies to the ship, in lieu of obtaining liability insurance cover from an insurer.[40] In effect, this allows State Parties to self-insure their own ships.

---

[34] Article 9, paragraph 3.
[35] Article 9, paragraph 4.
[36] Article 11.
[37] Article 12, paragraphs 1 and 11.
[38] Article 12, paragraph 4.
[39] Article 12, paragraph 2.
[40] Article 12, paragraph 12.

Claims can be made directly against the shipowner's insurer

44. Persons who have suffered loss or damage as a result of an incident involving HNS carried on a ship will be entitled to make a claim directly against the shipowner's insurer.[41]

45. The insurer will be able to rely on any defences against the claim that are available to the insured shipowner, except the bankruptcy or winding up of the shipowner, and will also be able to rely on the defence that the damage was caused by the wilful misconduct of the shipowner.[42]

46. The insurer will not be entitled to rely on any defences against the claim that would be available to it in proceedings brought against it by the shipowner (other than those referred to in paragraph 45 above).[43] This limitation and the exclusion of the defences relating to the bankruptcy or winding up of the shipowner will overcome problems posed by "pay to be paid" clauses which are commonplace in marine liability insurance policies. These clauses make the insurer's obligation to pay under the policy conditional on the insured shipowner first paying the damages claim.

HNS Fund – establishment and governance

47. The 2010 HNS Convention will establish the HNS Fund.[44] State Parties will be obliged:
- to recognise the HNS Fund under their domestic law as a separate legal person capable of assuming rights and obligations and of being a party to legal proceedings;[45] and
- to confer specified jurisdiction on their courts in respect of actions brought by or against the HNS Fund.[46]

48. The governing body of the HNS Fund will be the Assembly of the HNS Fund ("the Assembly"), which will consist of a representative from each State Party to the 2010 HNS Convention.[47] The Assembly will meet once in each calendar year, as well as in extraordinary session if such a session is convened at the request of one-third of the members of the Assembly.[48] It will decide matters by majority vote, except decisions relating to the appointment of the Director (who will be responsible for administering the fund through the Secretariat) and several other kinds of matters concerning the operation of the fund, which will require a two-thirds majority.[49]

HNS Fund – payment of compensation

[41] Article 12, paragraph 8.
[42] Article 12, paragraph 8.
[43] Article 12, paragraph 8.
[44] Article 13, paragraph 1.
[45] Article 13, paragraph 2.
[46] Article 39.
[47] Articles 25 and 26.
[48] Article 27.
[49] Articles 33 and 34.

49. The HNS Fund will provide compensation for damage arising from the carriage of HNS by ship where:

- the damage exceeds the shipowner's limit of liability under the 2010 HNS Convention;
- no shipowner is liable to pay compensation; or
- the shipowner that is liable to pay compensation is unable to pay it.[50]

---

[50] Article 14, paragraph 1.

50. The HNS Fund will be exempted from having to pay compensation where:
- it proves that the damage resulted from war, hostilities, civil war or insurrection, or was caused by HNS discharged from a warship or other ship owned or operated by a State which was being used only on government non-commercial service; or
- the claimant cannot prove that there is a reasonable probability that the damage resulted from an incident involving one or more ships.[51]

51. The maximum amount payable from the HNS Fund in respect of any one incident will be capped at 250 million SDRs ($401 million), less the amount of any compensation actually paid by the shipowner or its insurer. (However, if the damage was caused by a natural phenomenon of an exceptional, inevitable and irresistible character, the maximum amount payable will be 250 million SDRs without any deduction for the amount of compensation recovered from the shipowner or its insurer.)[52]

52. Where the maximum amount that is payable by the HNS Fund in respect of an HNS incident is insufficient to meet the claim or claims, it must be paid to the claimants on a pro rata basis, taking into account any amounts actually recovered by a claimant pursuant to the liability and insurance arrangements. However, this pro-rating requirement is subject to the qualification that claims for death and personal injury have priority over all other claims, until the point where the claims for death and personal injury have consumed two-thirds of the maximum amount that is payable by the HNS Fund in respect of the HNS incident.[53]

HNS Fund – rights of subrogation

53. If the HNS Fund pays compensation to a claimant, it will be subrogated to the rights of the claimant against the shipowner or the shipowner's guarantor.[54] The 2010 HNS Convention does not prejudice any rights of subrogation or recourse of the HNS Fund against any other person.[55]

Rights of subrogation of State Parties and their agencies

54. If State Parties or their agencies pay compensation under their national laws for damage caused by an HNS incident, they will be subrogated to the compensated person's rights under the 2010 HNS Convention against the shipowner, the shipowner's insurer and the HNS Fund (without prejudice to the HNS Fund's rights of subrogation or recourse).[56]

---

[51] Article 14, paragraph 3.
[52] Article 14, paragraph 5.
[53] Article 14, paragraph 6.
[54] Article 41, paragraph 1.
[55] Article 41, paragraphs 1 and 2.
[56] Article 41, paragraph 3.

Annual contributions to the HNS Fund

55. The HNS Fund will be funded by annual contributions that will be payable by receivers of bulk HNS who, during the previous calendar year, received more than the following tonnages of bulk HNS that had been carried by ship:

- IOPC contributing oil – 150,000 tonnes;
- LNG – any amount;
- other kinds of bulk HNS (this includes other kinds of oil) – 20,000 tonnes.[57]

(These thresholds for liability to pay annual contributions to the HNS Fund will be referred to as the "minimum annual tonnage thresholds".)

As explained in paragraph 63 below, in the case of LNG, in some circumstances contributions to the HNS Fund will be payable by the titleholder of the LNG rather than by the receiver of the LNG.

56. The annual contributions will be payable in respect of bulk HNS cargo received, at a rate per unit of cargo – normally expressed as a rate per tonne of cargo. (For brevity, hereafter contribution rates will be referred to in terms of rates per tonne.) Each year, the Assembly will determine the rate per tonne that will be payable in respect of bulk HNS received during the following calendar year.[58] (As indicated in paragraph 69 below, different rates per tonne will be determined for different types of HNS.)

57. The total amount of annual contributions payable to the HNS Fund in respect of a calendar year will be limited to an amount needed to cover:

- actual and anticipated compensation claims that will be payable from the HNS Fund in respect of known HNS incidents; and
- the administration costs of the fund.[59]

58. The Director of the IOPC Funds has estimated that the administration costs of the HNS Fund will be about £1 million ($1.56 million) per annum.[60] To minimise the administration costs, the States that participated in the negotiation of the Protocol have agreed that the HNS Fund will be administered by the Secretariat of the IOPC Funds.

59. It is expected that, in some years, no contributions to the HNS Fund will be required because there will not have been any incidents in respect of which compensation is payable by the fund and the fund will have sufficient reserves to cover its administration costs. (A similar situation has occurred previously in relation to the IOPC Funds.)

---

[57] Article 18 and Article 19, paragraphs 1 and 1*bis*. Article 1, paragraph 10, has the effect that contributions are only payable to the HNS Fund in respect of receipts of *bulk* HNS.

[58] Article 17.

[59] Article 17, paragraph 1.

[60] Based on a conversion rate of 1 pound sterling equals approximately 1.56 Australian dollars (as at 20 September 2012).

60. A “receiver” is defined as a person who physically receives HNS cargo when it is discharged from a ship; but where the person who physically receives the cargo does so as an agent of another person (the principal) whose identity is disclosed to the HNS Fund, the “receiver” is the principal.[61] (The definition in this paragraph will be referred to as “the primary definition of ‘receiver’”.)

61. A State Party will be allowed to deem some other person to be the “receiver” of HNS cargo under its national law, provided that this does not result in a substantial difference in the amount of HNS in respect of which contributions must be paid to the HNS Fund.[62]

62. A person (in this paragraph called “the principal person”) and associated persons of the principal person are treated as if they were a single person for the purpose of determining their liability to pay contributions to the HNS Fund – *ie* the receipts of bulk HNS by the principal person and the associated persons in a calendar year are aggregated and if the aggregated amount exceeds the applicable minimum annual tonnage threshold then the principal person and each associated person will be required to pay contributions in respect of the bulk HNS that they individually received – even if it is below the minimum annual tonnage threshold. (“Associated person” is defined as any subsidiary or commonly controlled entity, as determined under the relevant State Party’s national law.)[63]

63. A receiver of LNG will be able to agree with the person who holds title to the LNG immediately before its discharge from the ship (“the titleholder”) that the titleholder rather than the receiver is to be liable to pay the contributions in respect of the LNG.[64] In many cases the titleholder will be the producer of the LNG. In the Australian context – Australia being a major exporter of LNG – this means that, depending on whether such an agreement is struck, *either* the foreign importer of the LNG *or* Australian producer of the LNG may be liable to pay contributions in respect of the LNG. (In the interests of brevity, hereafter, titleholders will not be separately mentioned; where the context allows, a reference to a receiver should be taken to include a reference to a titleholder of LNG who is liable to pay contributions to the HNS Fund.)

64. A State Party will have the option to pay to the HNS Fund the contributions in respect of a calendar year that would otherwise be payable to the HNS Fund by the receivers of bulk HNS cargo that has been carried by ship between two ports or terminals of the State Party – thereby relieving those receivers of the burden of having to pay the contributions. Before exercising this option the State Party must submit a report on aggregate receipts of bulk HNS in the State Party to the HNS Fund.[65] (The 2010 HNS Convention does not specify how the State Party should fund the contributions – that is left up to the State Party. For example, it could pass on the cost to general taxpayers, or seek to recoup it through an industry levy of some kind.)

65. The reason why contributions to the HNS Fund will be payable only in respect of bulk HNS is because it was considered impractical to impose a liability to pay contributions in respect of

---

[61] Article 1, paragraph 4(a).
[62] Article 1, paragraph 4(b).
[63] Article 16, paragraphs 5 and 6.
[64] Article 19, paragraph 1*bis*.
[65] Article 21, paragraph 5.

packaged HNS, due to the sheer volume and range of packaged HNS that is transported by sea. However, it should be noted that the HNS Fund will provide compensation for damage caused by both bulk and packaged HNS.

66. To facilitate the collection of contributions, receivers who receive bulk HNS of specified minimum tonnages in a calendar year will need to lodge an annual return with the relevant authority of their State Party. In Australia, the relevant authority will be the Australian Maritime Safety Authority ("AMSA"), which will be responsible for administering the contribution requirements. (Further details about the requirement to lodge annual returns are provided in paragraphs 174 to 176 below.)

Division of the HNS Fund into accounts and sectors

67. The HNS Fund will comprise four accounts, covering four types or categories of HNS:

1. general account (covering all HNS other than the substances covered by the other three accounts);
2. oil account (covering the full range of hydrocarbon mineral oils, from crude oil and other heavy oils to highly refined fuels like kerosene, automotive gasoline and jet fuel);
3. LNG account;
4. LPG account.[66]

(Hereafter, the oil account, LNG account and LPG account will be referred to as "separate accounts".)

68. The general account will be further divided into sectors, covering:

- solid bulk materials possessing chemical hazards (as defined in certain international codes);
- other HNS; and
- oil of the kind covered by the oil account, LNG and LPG (but only if the establishment of one or more of the oil, LNG and LPG accounts is postponed or if one or more of those accounts is suspended; the 2010 HNS Convention makes provision for such postponement or suspension if certain minimum total annual tonnages of oil, LNG or LPG have not been received by receivers in all the State Parties).[67]

69. Receivers of a type of bulk HNS covered by a separate account or by a sector of the general account who received bulk HNS of that type in excess of the minimum annual tonnage threshold applicable to that type of bulk HNS will be required to pay annual contributions to that separate account or that sector of the general account at the rate per tonne of that type of HNS that is determined by the Assembly.[68]

---

[66] Article 16, paragraphs 1 and 2.

[67] Article 18. Article 19, paragraphs 3 and 4, deal with the postponement and suspension of the oil, LNG and LPG accounts.

[68] Article 17, paragraph 3, and Article 18. As regards each separate account, the rate per tonne is calculated by dividing the total amount of contributions needed by that account in respect of the relevant calendar year by the total tonnage of the type of HNS covered by that account that was received during the previous calendar year. As regards the general account, the rate per tonne relating to each sector of the general account is calculated in accordance with Annex II of the 2010 HNS Convention, which applies a similar method to that which has just been described but

which also makes certain adjustments to the rate per tonne which take into account the weighted average of the claims-to-volume ratio of the sector over the previous ten calendar years.

70. Each separate account, and each sector of the general account, can only be used to pay compensation for damage caused by the type of HNS to which the separate account or the sector of the general account relates.[69] This means there will be no cross-subsidisation between the different types of HNS covered by the respective accounts and sectors.

Initial contributions to the HNS Fund

71. In addition to the obligation to pay annual contributions to the HNS Fund, receivers that are liable to contribute to the HNS Fund will be required to pay a one-off initial contribution after their State becomes a State Party to the 2010 HNS Convention. The initial contribution will be a fixed rate per tonne of HNS received by the receiver during the previous calendar year (but in this case the fixed rate will be the same for each type of HNS).[70] The purpose of the initial contribution is to cover the establishment costs of the HNS Fund.

Measures to facilitate recovery of compensation across jurisdictional boundaries

72. The 2010 HNS Convention contains provisions facilitating the bringing of actions for compensation against shipowners, their insurers and the HNS Fund. State Parties will be required:

- to ensure that their courts have jurisdiction to deal with actions for compensation that are commenced in accordance with the convention (*ie* in accordance with the rules in paragraph 73 below);[71] and
- to recognise and enforce relevant judgements made by the courts of other State Parties.[72]

73. The rules regarding where actions for compensation against shipowners, their insurers and the HNS Fund can be brought are as follows:

- actions for compensation for HNS incidents occurring in a State Party's territory, including its territorial sea and exclusive economic zone, may be brought only in the courts of that State Party;
- actions for compensation for HNS incidents occurring outside a State Party's territory, including its territorial sea and exclusive economic zone, may be brought only in the courts of:
  - the State Party where the ship is registered or whose flag the ship is entitled to fly;
  - the State Party where the shipowner resides or has its permanent place of business; or
  - the State Party where the shipowner constitutes a fund of an amount equal to the limit of its liability under the convention (the shipowner may constitute such a fund in any State Party where an action may be brought in accordance with the preceding provisions of this paragraph).[73]

[69] Article 16, paragraph 4.
[70] Article 20.
[71] Article 38, paragraph 4.
[72] Article 40.
[73] Article 38, paragraphs 1 and 2, read with Article 9, paragraph 3.

Protection of confidential information held by the HNS Fund

74. The HNS Fund will not be permitted to divulge information relating to individual contributors to third parties, except where strictly necessary to enable it to carry out its functions including bringing and defending legal proceedings.[74]

Relationship between the 2010 HNS Convention and:

- the Civil Liability Convention and IOPC Funds Conventions; and

- the Bunkers Convention

75. The 2010 HNS Convention, the Civil Liability Convention and IOPC Funds Conventions, and the Bunkers Convention are intended to operate in a complementary manner with respect to damage caused by marine oil spills.

76. The definition of HNS under the 2010 HNS Convention includes a wide range of hydrocarbon mineral oils, from crude to refined.[75] However:

- The 2010 HNS Convention *does not cover* pollution damage caused by spills of persistent hydrocarbon mineral oil from oil tankers – this is covered exclusively by the Civil Liability Convention and IOPC Funds Conventions.[76]
- The 2010 HNS Convention *does not cover* pollution damage caused by spills of bunker oil from ships. This is because it only applies to damage arising from the carriage of HNS as cargo.[77] Insofar as bunker oil is not carried as cargo, it is outside the scope of the 2010 HNS Convention. Pollution damage caused by spills of bunker oil is covered exclusively by the Bunkers Convention.[78]
- The 2010 HNS Convention *does cover* damage (not limited to pollution damage but extending to all the kinds of damage covered by the 2010 HNS Convention) caused by:
  - a wide range of hydrocarbon mineral oils which come within the definition of HNS, when they are carried by ships other than oil tankers; and
  - the same wide range of hydrocarbon mineral oils, except persistent hydrocarbon mineral oil, when they are carried by oil tankers.

77. Receivers of more than 150,000 tonnes of IOPC contributing oil in a calendar year will have to pay annual contributions to both the IOPC Funds and the HNS Fund. This might seem like they will be "paying twice" for the same cover. However, as just indicated, the IOPC Funds and the HNS Fund will cover different kinds of damage resulting from the carriage of oil. The

[74] Article 36.
[75] As noted in paragraph 20 above.
[76] As noted in paragraph 30 above.
[77] As noted in paragraph 28 above.
[78] This is subject to one qualification: where pollution damage resulting from a spill of persistent hydrocarbon mineral oil from an oil tanker is covered by the Civil Liability Convention and IOPC Funds Conventions, those conventions will also cover the pollution damage caused by the spilling of the tanker's bunker oil.

contributions paid to the HNS Fund will be for additional cover that is not provided by the IOPC Funds.

Relationship between the 2010 HNS Convention and the LLMC Convention

78. As already noted, the limits of liability in the LLMC Convention (which apply to a wide range of marine claims) are significantly lower than the limits of liability in the 2010 HNS Convention (which apply to claims for damage resulting from the carriage of HNS by ship).

79. To ensure that the higher limits of liability under the 2010 HNS Convention override the lower limits of liability under the LLMC Convention in the case of claims relating to HNS incidents, State Parties to the LLMC Convention can make a reservation excluding from the scope of the LLMC Convention (insofar as the LLMC Convention applies to the State Party) claims for damage that are covered by the 2010 HNS Convention.[79] Australia is in the process of making such a reservation.

Obligation of State Parties to provide information about receivers to the HNS Fund

80. At times specified in the HNS Fund's internal regulations (which will be made by the Assembly after the 2010 HNS Convention has entered into force) State Parties will be required to provide reports to the HNS Fund identifying the receivers who are liable to make contributions and the amounts of bulk HNS cargo received by them in the previous calendar year.[80] If a State Party fails to provide such reports, payments from the HNS Fund for damage resulting from the carriage of HNS by ship in the State Party's territory, including territorial sea and exclusive economic zone, (other than for death or personal injury) will be suspended until the report is provided.[81]

Process for amending the 2010 HNS Convention

81. A conference for the purpose of revising or amending the 2010 HNS Convention may be convened by the IMO, and must be convened by the IMO if requested by six State Parties or by one third of the State Parties, whichever is the higher figure.[82]

82. Special procedural requirements apply to any proposal to amend the 2010 HNS Convention which seeks to:

- amend the liability limits applying to shipowners; or
- amend the maximum amounts of compensation payable from the HNS Fund.[83]

(These kinds of amendments will be referred to as "amendments of the liability or compensation limits".)

---

[79] Article 18, paragraph 1(b) of the LLMC Convention.
[80] Article 21, paragraphs 1 and 2.
[81] Article 21*bis*, paragraphs 2 and 3.
[82] Article 47, paragraphs 1 and 2.
[83] Article 48, paragraph 1.

83. The main elements of the special procedural requirements that apply to proposed amendments of the liability or compensation limits are as follows:

- the proposed amendment must be requested by at least one half, and not less than six, of the State Parties;
- the proposed amendment must be submitted to the Legal Committee of the IMO; all Contracting States of the 2010 HNS Convention (even if not members of the IMO) may participate in the committee's deliberations;[84]
- the proposed amendment needs to be adopted by a two-thirds majority of the Contracting States present and voting in the Legal Committee, provided that at least one half of the Contracting States are present at the time of voting;
- an amendment so adopted comes into force thirty-six months after it is notified by the IMO to Contracting States, unless at least one quarter of the Contracting States give notice within eighteen months after the date of notification that they do not accept the amendment (this is known as the "tacit acceptance" procedure);
- amendments cannot increase the liability or compensation limits by more than a multiple of three or at a rate of 6% or more per annum;
- a proposed amendment cannot be considered:
    - less than five years after the date on which the Protocol became open for signature; or
    - less than five years after the date on which a previous amendment entered into force.[85]

84. Any decisions relating to amending the Protocol or the 2010 HNS Convention will be subject to Australia's domestic treaty process.

Denunciation of the 2010 HNS Convention

85. The Protocol (and hence the 2010 HNS Convention) may be denounced by a State Party at any time after the expiration of one year after the Protocol (and hence the 2010 HNS Convention) comes into force for that State Party, by depositing an instrument of denunciation with the Secretary-General. The denunciation takes effect twelve months after the instrument is deposited, or such later time as is specified in the instrument.[86]

86. Any decision to denounce the Protocol will be subject to Australia's domestic treaty process.

---

[84] A "Contracting State" in relation to a convention is a State that has ratified, acceded to or otherwise expressed its consent to be bound by the convention, irrespective of whether the convention has entered into force for that State. By contrast, a "State Party" in relation to a convention is a State that has ratified, acceded to or otherwise expressed its consent to be bound by the convention and for which the convention has entered into force.

[85] Article 48, paragraphs 2 to 9.

[86] Article 49. Notwithstanding a denunciation by a State Party, the Assembly may decide that certain provisions of the 2010 HNS Convention relating to obligations to pay contributions to the HNS Fund shall continue to apply in respect of payments of compensation relating to an incident which occurs before the denunciation takes effect.

Requirement for States to submit data on bulk HNS receipts when ratifying or acceding to the 2010 HNS Convention

87. When ratifying or acceding to the 2010 HNS Convention, States are required to lodge with the Secretary-General data on the total quantities of bulk HNS carried by ship in respect of which contributions will be payable to the HNS Fund that were received in the State during the previous calendar year.[87] The Secretary-General cannot accept a State's ratification or accession unless it is accompanied by this data.[88] The purpose of the requirement is to enable the Secretary-General to determine:

- whether one of the preconditions for the coming into force of the convention have been met, namely, that a total of 40 million tonnes of bulk HNS in respect of which contributions must be paid to the HNS Fund was received during the previous calendar year by receivers in the States that have ratified or acceded to the convention (see paragraph 5 above); and
- whether the various minimum total annual tonnages of oil, LNG or LPG which trigger the establishment of the oil, LPG and LNG accounts of the HNS Fund have been received by receivers in the States that have ratified or acceded to the convention (see paragraph 68 above).

88. The requirement for States to lodge this data when ratifying or acceding to the 2010 HNS Convention means that the States need to have accurate information not only about the total quantities of bulk HNS received in the State during the previous calendar year but also about the identity of the receivers of the bulk HNS and the quantity of bulk HNS that each receiver received (because contributions are only payable by receivers who receive bulk HNS in excess of the relevant minimum annual tonnage threshold).

89. A State that has ratified or acceded to the 2010 HNS Convention must continue to provide the data relating to total receipts of contributing bulk HNS to the Secretary-General every year until the convention comes into force for that State.[89]

Australia will need to enact legislation facilitating the collection of data about receipts of bulk HNS before Australia can accede to the 2010 HNS Convention

90. At present, the data about total receipts in Australia of contributing bulk HNS, which must be lodged with the Secretary-General when Australia accedes to the 2010 HNS Convention, is not available, for the reasons explained in paragraph 170 below. It will therefore be necessary to include in the legislation implementing the 2010 HNS Convention provisions requiring receivers of quantities of bulk HNS which exceed the relevant minimum annual tonnage threshold to lodge annual returns with AMSA *before* Australia accedes to the convention.

---

[87] Article 45, paragraph 4.
[88] Article 45, paragraph 5.
[89] Article 45, paragraph 6.

91. Australia is not unique in this regard – other countries have indicated that they will also need to put in place domestic legislation to gather the requisite data before they ratify or accede to the convention.[90]

Choices available to the Australian Government under the 2010 HNS Convention relating to its mode and scope of operation

92. The 2010 HNS Convention gives State Parties choices regarding a number of matters relating to its mode and scope of operation. The choices which the Australian Government proposes to make with regard to those matters are as follows.

Applying the 2010 HNS Convention to a State Party's warships and ships that are used on non-commercial service

93. As noted in paragraph 23 above, a State Party to the 2010 HNS Convention may decide to apply the convention to its warships, naval auxiliary ships or other ships owned or operated by the State Party that are used only on government non-commercial service.

94. Ships used only on government non-commercial service which are owned or operated by the Commonwealth or Commonwealth agencies include:

- the Australian Antarctic Division's leased Antarctic supply ship *Aurora Australis*;
- the CSIRO Marine National Facility's research ship *Southern Surveyor*;
- AMSA's leased emergency towage response ship *Pacific Responder*;
- Australian Customs and Border Protection Service ("Customs") vessels; and
- Australian Fisheries Management Authority vessels.

State and Territory ships in this non-commercial category include port authority vessels and water police vessels.

95. The Australian Government does not propose, at this time, to apply the 2010 HNS Convention to Australian warships, naval auxiliary ships or other ships owned and operated by the Commonwealth or State or Territory governments that are used only on government non-commercial service. The reason is that these ships do not carry cargo on a commercial basis and they meet high standards with regard to design, construction, maintenance and operation; and, in the case of warships, they are not normally subject to port State control. The Commonwealth generally self-insures against liability and has the financial capacity to meet any claims.

Excluding ships of less than 200 gross tonnage that are only carrying packaged HNS between ports of a State Party

[90] It was agreed at a meeting of the HNS Correspondence Group in Ottawa in June 2003, and subsequently endorsed at the group's meeting in Rotterdam in June 2011, that States should implement regulations to establish a reporting system relating to receivers *prior to ratification or accession.* (IMO Legal Committee *Monitoring the Implementation of the HNS Protocol, 2010 – Note by the Secretariat* 16 April 2012, IMO document LEG 99/WP.2, at paragraph 7.)

96. As noted in paragraph 24 above, a State Party to the 2010 HNS Convention can make a declaration excluding from the scope of the convention ships of less than 200 gross tonnage while they are carrying HNS only in packaged form and are engaged on voyages between ports or facilities of that State Party.

97. The Australian Government intends to make a declaration excluding such ships from the scope of the 2010 HNS Convention. Vessels in this category are small and pose a commensurately small risk, and they are very numerous – they include seagoing fishing boats and pleasure craft. The administrative costs of subjecting them to the convention (including issuing and inspecting insurance certificates) would be large, and it is considered that those costs would outweigh the benefits.

Excluding ships of less than 200 gross tonnage that are only carrying packaged HNS between ports of two neighbouring States

98. As noted in paragraph 25 above, the 2010 HNS Convention allows two neighbouring States to make a declaration excluding from the scope of the convention ships of less than 200 gross tonnage while they are carrying HNS only in packaged form and are engaged on voyages between ports or facilities of those States.

99. It is not currently proposed that Australia will enter into such an arrangement with any neighbouring State (such as Papua New Guinea or New Zealand). Any future proposal for Australia to enter into such an arrangement with a neighbouring State will need to be carefully considered.

State Party self-insuring its own ships

100. As noted in paragraph 43 above, the 2010 HNS Convention gives State Parties that self-insure their own ships the option of not obtaining liability insurance cover for the ship but instead providing it with a certificate stating that the State Party itself will meet its liability for damage from HNS carried by the ship, up to the limit of liability specified in the convention.

101. To the extent that the Australian Government self-insures its ships, it will exercise this option in relation to the ships concerned.

Deeming other persons to be "receivers" of HNS

102. As indicated in paragraph 61 above, the 2010 HNS Convention allows a State Party to deem a different person to be the "receiver" of HNS for the purposes of paying contributions to the HNS Fund than the person who meets the primary definition of a "receiver" in the convention.

103. The Australian Government does not propose to exercise the power to deem other persons to be receivers, as it considers that the primary definition of “receiver” in the 2010 HNS Convention is appropriate and expects that it will be workable.

Paying contributions to the HNS Fund in respect of bulk HNS carried between ports of the State Party

104. As indicated in paragraph 64 above, the 2010 HNS Convention allows a State Party to pay contributions to the HNS Fund in respect of bulk HNS cargoes that have been carried between ports or facilities of that State Party, relieving the receivers of those cargoes from having to pay the contributions.

105. The Australian Government does not intend to exercise this option, because it does not consider that the obligation to pay contributions in respect of bulk HNS cargoes that are transported by ship within Australia and the associated annual reporting obligation will be unduly onerous for the receivers of such HNS cargoes, from either a financial or an administrative standpoint. In these circumstances, exercising this option would create an unlevel playing field for receivers of bulk HNS as regards the obligation to pay contributions to the HNS Fund. It would not be efficient to shift the burden of paying the contributions from the receivers to someone else such as taxpayers or industry levy payers.

REGULATORY IMPACT ANALYSIS

THE PROBLEM

Risks posed by the carriage of HNS by ship

106. Modern industrial economies use an extensive range of chemicals and substances, many of which pose risks of fire, explosion, corrosion, contamination or pollution. Each year, hundreds of millions of tonnes of these substances are transported by ship between countries and between different ports within the same country. They are transported both in bulk form (often in specialised chemical tankers or bulk carriers) and in packaged form. It was estimated in 2009 that chemical tankers alone transported approximately 165 million tonnes of chemicals (excluding crude oil and other petroleum-based oils), of which methanol and liquid industrial chemicals accounted for some 46% and palm oil and other vegetable oils for a further 29%; and it was predicted that by 2015 chemical tankers will carry 215 million tonnes of chemicals annually.[91]

107. As is the case with other developed countries that have access to the sea, HNS cargoes are shipped to, from and around Australia in large quantities. By way of example, according to statistics published by Ports Australia, the peak body representing Australian port authorities, in 2010-2011 gas exports from forty-six Australian ports totalled 1,361,878 mass tonnes; and in the same year there were 3,400 calls at those ports by commercial vessels carrying bulk liquids (including LNG and chemicals).[92] Australia's long coastline, numerous ports and vast territorial sea and exclusive economic zone magnify its exposure to the risk of HNS incidents.

108. While HNS also pose risks during transport and storage on land and use in industrial processes on land, their carriage by sea gives rise to additional risks, in particular, risks to the safety of ships, their crews and port facilities, and pollution of the sea and coastline. The latter can cause very extensive harm to the environment and accompanying economic loss.

109. By way of example, when the Italian registered chemical tanker *Ievoli Sun* sank in the English Channel in 2000, the cost of salvaging its cargo of approximately 6,000 tonnes of hazardous chemicals, which included nearly 4,000 tonnes of styrene, was approximately €12 million ($14.9 million).[93] (Styrene poses risks of explosion, fire and toxicity including coma

---

[91] Dr Karen Purnell *Are HNS More Dangerous than Oil Spills – A White Paper for the Interspill Conference and the 4th IMO R&D Forum, Marseilles, May 2009* at page 6.
[92] Ports Australia *Gas Exports (mass tonnes) for 2010-2011* and *Commercial Vessel Calls: Bulk Liquids inc LNG, Chemicals, etc for 2010-2011* (statistical tabulations published on Ports Australia's website).
[93] Based on a conversion rate of 1 euro equals approximately 1.24 Australian dollars (as at 20 September 2012).

and death at high concentrations. It causes animal mortality in the immediate vicinity of a spill, and dissolved styrene is bio-accumulated by fish and crustaceans and causes tainting.)[94]

[94] Centre of Documentation, Research and Experimentation on Accidental Water Pollution (CEDRE) *Ievoli Sun* incident summary (www.cedre.fr/en/spill/ievoli/ievoli.php); Department of Transport (New Zealand) *Four International Maritime Environmental Conventions/Protocols – A Discussion Paper for Public Comment*, November 2007, at paragraph 108.

110. The risks posed by HNS are not limited to pollution. As long ago as 1947, the explosion of the French freighter *Grandchamp* in Texas City, Texas, while being loaded with HNS (ammonium nitrate) devastated the port and left an official death toll of 581 (which is believed to have been significantly understated).[95]

111. Coming to more modern times, during the six-and-a-half year period from January 2006 to June 2011, there were 235 maritime HNS incidents worldwide, involving 247 HNS products. Of the 235 incidents, 123 incidents (52%) involved bulk HNS.[96]

112. As regards HNS incidents in Australia, a database maintained by AMSA lists 51 incident reports involving HNS spills over the past decade. Many of the incidents in the database were minor incidents or unconfirmed reports; the database does not identify the ones that were serious or had the potential to become serious. Fortunately, Australia has so far been spared a major HNS disaster, but there have been near misses. Two such incidents are described in the box:

Golden Georgia

On 5 August 2009 the Panama registered chemical tanker *Golden Georgia*, with a cargo of hazardous and noxious liquids, started taking on water in one of its ballast tanks. Nitric acid, which is highly corrosive to steel, had leaked from a tank and corroded through the double hull of the vessel. At the time of the incident, the vessel was 50 nautical miles outside the Great Barrier Reef, north-east of Gladstone. The shipping company instructed the vessel to head 150 nautical miles outside the reef to transfer the remaining nitric acid to an undamaged tank whilst minimising any environmental risks. By 9 August the vessel had emptied its ballast tanks of the nitric acid solution and entered Botany Bay. Inspections revealed five 20 millimetre holes in the double bottom hull. Had the ship encountered heavy weather and/or the corrosion been more substantial, a significant HNS pollution incident would have resulted.

Pacific Adventurer

On 11 March 2009 the Hong Kong China registered container ship *Pacific Adventurer* lost 31 containers overboard in heavy seas about seven nautical miles east of Cape Moreton, north of Brisbane. The fallen containers caused damage to the ship and resulted in the loss of some 270 tonnes of heavy bunker fuel.

Significant quantities of oil were deposited along eight kilometres of the Moreton Island coastline. Lighter oiling affected approximately 56 kilometres of beaches on Bribie Island and

[95] Bill Minutaglio *City on Fire: The Forgotten Disaster That Devastated a Town and Ignited a Landmark Legal Battle,* Harper Collins, 2003.

[96] IMO *Summary of Incidents Involving HNS and Lessons Learnt* Note by the Secretariat, 20 January 2012 (IMO document number OPRC-HNS/TG 13/5). It should be noted that in compiling these statistics the IMO used the definition of HNS which is contained in the *Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances, 2000*. That definition differs in some respects from the definition of HNS in the 2010 HNS Convention. For statistics on HNS incidents globally, see also IMO *International Shipping Facts and Figures – Information Resources on Trade, Safety, Security, Environment*, Maritime Knowledge Centre, 12 March 2012.

the Sunshine Coast from Kawana to Marcoola. The incident has resulted in claims for damage totalling over $34 million.

The 31 containers contained ammonium nitrate, which is classified as HNS under the 2010 HNS Convention. The hazards posed by ammonium nitrate are: explosion or fire (when dry); toxicity (if inhaled in high concentrations or ingested continually over a period of time); irritation (on prolonged contact with the body); and mild acidity (if dissolved in water).

Expert evaluation determined that the lost containers did not pose a health or pollution hazard at the depth at which they had come to rest on the sea floor, and it was decided not to recover them, as the cost of doing so was considered disproportionately high in the circumstances.

113. Shipping activity is increasing rapidly along the east coast of Queensland, in and around the Great Barrier Reef and surrounding environmentally sensitive areas such as the Torres Strait and Coral Sea. For instance, the Queensland Government has projected that ship visits to Queensland ports will increase from 4,196 in 2011 to 6,818 in 2020.[97] Some of the shipping traffic involves the carriage of HNS cargoes.

114. As is appropriate, the focus of the Australian Government, the Queensland Government, relevant agencies including AMSA, the Great Barrier Reef Marine Park Authority and Maritime Safety Queensland ("MSQ"), and industry stakeholders is on reducing the risk to the marine and reef environment. Numerous initiatives have been or are being taken, including the following:

- In 2008, the Australian Government strengthened the coastal pilotage requirements that apply in the Great Barrier Reef and Torres Strait.[98]
- Following the grounding of the Chinese registered bulk carrier *Shen Neng 1* at Douglas Shoal, Queensland in April 2010, the Government extended the mandatory interactive ship reporting and tracking system known as the Great Barrier Reef and Torres Strait Vessel Traffic Service ("REEFVTS"), which is operated jointly by AMSA and MSQ, to the southern boundary of the Great Barrier Reef Marine Park. The extension of REEFVTS has proven to be effective in reducing shipping incidents associated with navigational and human error.
- Also in 2010, the Australian Government re-established the Great Barrier Reef Shipping Management Group, which is comprised of relevant Australian Government Departments and regulatory agencies, to oversee the management of shipping through the Great Barrier Reef. It has recently been expanded as the North East Shipping Management Group and has been tasked with developing the north east shipping management plan for the north-east shipping area (which includes the Great Barrier Reef, Torres Strait and Coral Sea). The shipping management plan will take into account future risks affecting those sea areas, and is expected to be completed in 2013.

[97] Queensland Government's submission to the United Nations Educational, Scientific and Cultural Organization (UNESCO) monitoring mission to report on the management of the Great Barrier Reef World Heritage Area, as reported in the monitoring mission's *Mission Report* dated 6-14 March 2012, at page 31.
[98] The coastal pilotage requirements are contained in *Marine Order Part 54 (Coastal Pilotage)*, made under the *Navigation Act 1912*.

- In 2011, the Australian Government strengthened the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* by creating a new offence of operating a vessel in a manner that causes pollution and by increasing the penalties for ships that fail to report their position in mandatory reporting areas like the Great Barrier Reef Marine Park and for ships that discharge oil or oil residues in Australian waters.
- In 2012, the Australian Parliament enacted the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, which creates a national scheme regulating the safety of domestic commercial vessels operating in Australia.
- In 2012, the Australian Government and Queensland Government agreed to undertake a comprehensive strategic assessment of the Great Barrier Reef World Heritage Area and adjacent coastal zone, which will involve extensive public consultation.[99] The strategic assessment will develop an effective long-term strategy for protecting the environmental and heritage values of the reef, and will provide certainty by helping to determine the nature and location of sustainable developments and the conditions under which they will be allowed.
- As part of its work program of developing the north east shipping management plan, the North East Shipping Management Group will undertake an environmental risk assessment relating to the transport of chemicals (both bulk and containerised) through the north east shipping area, and will develop guidelines for responding to chemical spills.

115. While the Australian Government and indeed all other relevant stakeholders are committed to ensuring that the Great Barrier Reef, as well as the Torres Strait and Coral Sea, retain their environmental values and continue to be among the best-managed marine areas in the world, if, despite all the efforts directed towards prevention, an HNS incident does occur in one of these environmentally sensitive locations, it will elicit a very intensive and costly response to combat the pollution and to limit and remediate the environmental damage.

Unavailability of adequate compensation for damage resulting from HNS incidents

116. International conventions are already in place which prescribe standards for the safe design and operation of ships (for example, the *International Convention for the Safety of Life at Sea, 1974*) and for preventing or minimising pollution from ships (for example, the *International Convention for the Prevention of Pollution from Ships, 1973*). These conventions operate to reduce the risk of HNS incidents occurring in the first place.[100] Additional measures to prevent incidents occurring in the Great Barrier Reef and surrounding sea areas have been described above.

117. If, despite these measures, a ship carrying HNS is involved in an incident such as a collision, grounding or fire, and the HNS on board causes death or injury, physical damage or

[99] The strategic assessment is being undertaken in accordance with section 146 of the *Environment Protection and Biodiversity Conservation Act 1999*.

[100] These conventions are implemented in Australia principally by the *Navigation Act 2012* (including Marine Orders made under that Act) and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

pollution, there is currently no mechanism for ensuring that adequate compensation will be available for the persons affected.[101]

118. If an HNS incident occurs, the current position is as follows:

- The liability of the shipowner and the ship's charterers, managers, operators and salvors is limited under the LLMC Convention to relatively modest sums, which are insufficient to provide compensation for incidents that cause serious damage or pollution.
- There is no legal obligation on shipowner to have any liability insurance cover in respect of HNS incidents. Most shipowners maintain liability insurance up the liability limits in the LLMC Convention. Shipowners with limited assets (*eg* one-ship companies) have no commercial incentive to maintain liability insurance cover in excess of the LLMC Convention limits. But even if a shipowner maintains a higher level of liability insurance cover, this does not actually result in more compensation being available for an HNS incident involving the ship, because the shipowner's liability for such an incident is limited in accordance with the LLMC Convention.
- There is no international, national or industry compensation fund from which compensation for HNS incidents can be sought.

119. It is widely acknowledged that the liability limits in the LLMC Convention have, with the passage of time, become quite inadequate for incidents that cause serious damage or pollution. The yawning gap between the liability limits in the LLMC Convention and the liability limits in the 2010 HNS Convention is illustrated in paragraph 152 below – the latter are *three to six times higher* than the former. The liability limits in the 2010 HNS Convention are a much more realistic reflection of contemporary costs associated with HNS incidents.

120. In 2010 Australia submitted a proposal to the IMO to amend the liability limits in the LLMC Convention, which was co-sponsored by nineteen other State Parties to that convention.[102] The issue was considered at the 97th and 98th sessions of the Legal Committee of the IMO, and was listed for formal determination at the 99th session, which was held in April 2012. Australia advocated an increase of 6% compounded annually from 1996 (the maximum

---

[101] This is subject to the following limited exceptions (the first two of which have been discussed earlier in this RIS):

- *Spills of hydrocarbon mineral oil from oil tankers*: Adequate compensation for pollution damage caused by such spills (but not for death, injury or other kinds of damage) is provided by the Civil Liability Convention and IOPC Funds Conventions.
- *Spills of bunker oil from ships*: Compensation for pollution damage caused by such spills (but not for death, injury or other kinds of damage) is provided by the Bunkers Convention. However, since the compensation is subject to the liability limits in the LLMC Convention, it is not adequate for serious bunker oil pollution incidents.
- *Any kind of pollution damage caused by very small ships of between 400 and 1,000 gross tonnage*: Part IIIA of the *Protection of the Sea (Civil Liability) Act 1981* requires shipowners of such very small ships to maintain liability insurance cover up to the liability limits in the LLMC Convention in respect of the shipowner's liability for causing pollution damage in Australia.

[102] The co-sponsors of the proposal were Belgium, Canada, Croatia, Finland, France, Germany, Hungary, Jamaica, Latvia, Liberia, Lithuania, Luxembourg, Malaysia, Marshall Islands, Norway, Samoa, Sweden, Syria and the United Kingdom. The proposal was notified to IMO Member States in the IMO Secretariat's circular letter No 3136 dated 6 December 2010. It only sought to increase the liability limits applying to claims relating to death or injury of persons other than passengers and claims relating to general loss or damage.

increase allowed[103]), which equates to a 147% increase to the current liability limits. There was wide agreement on the need to increase the liability limits. However, the size of the proposed increase was opposed by a number of State Parties (particularly those with large merchant shipping fleets), and the proposal failed to attract the required two-thirds majority support at the meeting.[104] Instead, the Legal Committee adopted an alternative proposal by Japan for an increase of 2% compounded annually from 1996, which amounts to a 51% increase to the current liability limits. If this amendment is accepted under the tacit acceptance provisions of the LLMC Convention, it will enter into force on 1 July 2015.[105]

121. The 51% increase in the liability limits falls far short of what is required to provide adequate compensation in respect of serious HNS incidents. When that increase comes into force, the liability limits in the 2010 HNS Convention will still be *two to four times higher* than the (increased) liability limits in the LLMC Convention.[106]

122. The fate of Australia's proposal highlights the political difficulties of securing a significant increase to the liability limits in the LLMC Convention. The chances of securing such an increase are not helped by the requirement that the proposed amendment be adopted by a two-thirds majority vote. Furthermore, under the amendment procedures in the LLMC Convention, there has to be a five year interval between amendments to the liability limits: any new proposal to amend the liability limits will not be able to be considered before 1 July 2020.[107] Having regard to all these matters, it is considered that there is no realistic prospect of securing an increase to the liability limits in the LLMC Convention of the required magnitude within a reasonable timeframe.[108]

Difficulty of establishing legal responsibility for HNS incidents

[103] Article 8, paragraph 6(b), of the *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976* ("the 1996 LLMC Protocol") provides: "(b) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in the Convention as amended by this Protocol increased by six per cent per year calculated on a compound basis from the date on which this Protocol was opened for signature."

[104] The requirement for a two-thirds majority is specified in Article 8, paragraph 4, of the 1996 LLMC Protocol.

[105] The papers submitted by Australia at the 99th session of the Legal Committee (IMO documents LEG 9/4/3, LEG 99/4/4 and LEG 99/4/5) and the Legal Committee's report on the outcomes from that session (IMO document LEG 99/14) are on the IMO documents website (http://docs.imo.org/Default.aspx).

[106] Even if Australia's proposed increase of 147% had been adopted (which was the maximum increase allowed), the liability limits in the 2010 HNS Convention would still have been *one-and-a-half to three times higher* than those in the LLMC Convention.

[107] Article 8, paragraph 6(a) of the 1996 LLMC Protocol provides: "(a) No amendment of the limits under this article may be considered [...] less than five years from the date of entry into force of a previous amendment under this article."

[108] Australia has exercised a right of reservation in Article 18, paragraph 1(a), of the LLMC Convention under which it has excluded the application of the LLMC Convention to claims in respect of the raising or removal of wrecked or stranded ships and their contents, including cargo. The effect of the reservation is that the liability of shipowners in respect of claims for the costs of raising or removing their wrecked or stranded ship and its cargo is unlimited in Australia. However, claims for the costs of cleaning up pollution of the sea and coastline that was caused by the wrecking or stranding of the ship and for the costs of undertaking consequent environmental remediation fall outside the scope of the reservation.

123. Currently, if an HNS incident occurs, persons seeking to recover compensation from the shipowner or other persons involved with the management or operation of the ship need to establish that the person concerned is legally responsible for the damage. Establishing legal responsibility generally requires proof of causation and liability under an established legal cause of action, such as negligence, nuisance or breach of statutory duty. Most relevant causes of action are fault-based. The causes of maritime incidents are often complex – they often result from the interplay of a number of factors, *eg* natural phenomena such as severe weather events, actions of the ship's captain and crew, and actions of others such as the captain and crew of other vessels, port authorities, stevedores, and cargo consignors. Unless legal responsibility is admitted, establishing who is liable to pay compensation may require expensive and protracted litigation. Further, if it cannot be proved that anyone was at fault, it might not be possible to recover any compensation at all.

Difficulty of recovering compensation from the insurer

124. "Pay to be paid" clauses, which are often included in marine liability insurance policies, pose another obstacle to the recovery of compensation for HNS incidents. These clauses can be used to prevent persons who have suffered damage as a result of an HNS incident from utilising legislation facilitating the making of claims directly against insurers to recover compensation from the shipowner's insurer without having to pursue their claim against the shipowner to finality.[109]

Difficulty of recovering compensation across jurisdictional boundaries

125. Where the person seeking compensation for damage caused by an HNS incident (the plaintiff) and the person alleged to be responsible for the HNS incident (the defendant) are domiciled or incorporated in different States, the plaintiff might not have the right to commence legal proceedings against the defendant in the defendant's State, or might need to comply with onerous procedural requirements before being able to commence such proceedings.

126. Further, if the plaintiff obtains a court judgement against the defendant in the plaintiff's State, the plaintiff may face legal and procedural obstacles to enforcing the judgement against the defendant in the defendant's State.

127. In view of the global nature of the shipping industry, appropriate multilateral arrangements providing streamlined legal processes for recovering compensation for HNS incidents across jurisdictional boundaries are desirable.

---

[109] Section 48 of the *Insurance Contracts Act 1984* enables third party beneficiaries under insurance policies to bring claims directly against the insurer. Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (New South Wales) has a similar effect. See also section 117 of the *Bankruptcy Act 1966* and section 562 of the *Corporations Act 2001*.

Inappropriate burden-shifting to victims, taxpayers and other businesses due to the lack of adequate compensation for HNS incidents

128. Due to the lack of adequate compensation for HNS incidents as described above, the persons who suffer damage as a result of an HNS incident may have to bear the loss themselves, or may have to rely on government assistance, thereby shifting the cost to taxpayers.

129. Government bodies such as maritime safety agencies, environmental protection agencies, national parks services and local authorities typically undertake pollution clean-up and environmental remediation after maritime disasters. The cost of these activities can easily reach tens of millions of dollars where an incident involves extensive pollution of the sea and the coastline. (For example, the *Pacific Adventurer* incident resulted in claims totalling over $34 million, mostly for pollution clean-up costs.[110]) If the costs of dealing with such incidents cannot be recovered from the person responsible, they will have to be borne by taxpayers or levy payers.[111]

130. As a general principle, it is desirable that the costs of pollution should be borne by the polluter, for a number of reasons ranging from fairness, efficient allocation of resources (there will be an over-allocation of resources to a polluting commercial activity if the costs of the pollution are not included in the price of the relevant product or service) and provision of incentives to reduce the risk of pollution.

131. For similar reasons, those who engage in activities that create risks of other kinds of damage (such as death, injury or property damage) should be required to pay compensation if the risk eventuates.

132. The polluter pays principle is a familiar and salutary principle of public policy. It is enshrined in the *National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances* ("the National Plan"), which establishes a national framework for enabling effective response to marine pollution incidents, which is managed by AMSA. Recently the Australian Government announced its decision to legislate to introduce the polluter pays principle into Australia's offshore petroleum regulatory regime, "to ensure that all the costs of responding to a hydrocarbon spill will be met in full by the polluter."[112]

133. The National Plan is funded by the Protection of the Sea levy, which is imposed under the *Protection of the Sea (Shipping Levy) Act 1981* and the *Protection of the Sea (Shipping Levy*

---

[110] While the pollution from the *Pacific Adventurer* which necessitated the big clean-up effort was caused by the leaking of the ship's bunker oil, there is no reason to think that the discharge into the sea in similar circumstances of a highly polluting type of HNS would not be just as costly to clean up.

[111] As indicated in paragraphs 132 to 139 below, the Protection of the Sea levy might have to be used to recoup the costs incurred by Commonwealth, State and Territory agencies in dealing with pollution caused by HNS incidents where those costs cannot be recovered from the shipowner or its insurer.

[112] Media release by the Minister for Resources and Energy, Martin Ferguson *Montara Recommendations Implementation on Track*, 9 September 2012.

Collection) Act 1981.[113] The Protection of the Sea levy is imposed on the owners and masters of Australian ships and foreign ships visiting Australian ports at a specified rate per ton of the ship's net tonnage (which is the total volume of space on the ship that is devoted to carrying cargo). The shipowner and master are jointly liable to pay the levy.[114] From the point of view of its economic incidence, the levy is (broadly) akin to a volume-based tax on domestic and international cargo transported by ships.

134. The principles governing the funding arrangements for the National Plan are set out in paragraph 21 of the *Inter-Governmental Agreement on the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances* ("the National Plan IGA"), in the following terms:

"i. Preparedness for marine pollution incidents should be funded on the basis of the principle that the potential polluter pays;

ii. Response to marine pollution incidents should be funded on the basis of the principle that the polluter pays; and

iii. Agencies responding to and incurring costs in relation to pollution incidents where the polluter is not identified, or costs are not recoverable, will be reimbursed by AMSA on the basis of the potential polluter pays, as set out in paragraphs 22 to 29 of Schedule 1 to this Agreement."

(Paragraphs 22 to 29 of Schedule 1 of the National Plan IGA provide for the costs of responding to the pollution incidents concerned to be shared between AMSA and the relevant State and Territory agencies, and require the State and Territory agencies to pursue available legal means for recovering the costs from the polluter.)

135. Principle i is given effect to by the Protection of the Sea levy – all ships are "potential polluters" capable of causing marine pollution through discharging polluting cargo or bunker oil.[115]

136. The implementation of principle ii – that the "polluter pays" if a pollution incident occurs – currently depends on the operation of the general law (particularly tort law) and the international conventions that have been discussed. For the reasons indicated in the preceding paragraphs, the current arrangements do *not* ensure that the polluter will provide adequate compensation in the event of a serious HNS pollution incident.

137. Principle iii, under which AMSA and the relevant State or Territory agencies are required to pay or bear the costs of responding to a pollution incident if those costs cannot be recovered from the polluter, constitutes the fall-back position where the existing arrangements fail to give

---

[113] The Protection of the Sea levy is also used to fund related arrangements for the provision of emergency towing vessels which are embodied in the *Inter-Governmental Agreement on the National Maritime Response Emergency Arrangement*.

[114] Sections 5 and 6 of the *Protection of the Sea (Shipping Levy) Act 1981* and section 9 of the *Protection of the Sea (Shipping Levy Collection) Act 1981*.

[115] Industry stakeholders also contribute to preparedness under the National Plan, primarily in the form of providing equipment and training.

effect to the polluter pays principle. It is clearly a sub-optimal outcome; the polluter pays principle represents a fairer and more efficient outcome.[116]

138. The *Pacific Adventurer* incident is a recent instance where the polluter pays principle could not be implemented, due to the fact that the shipowner's liability in respect of the incident was limited to approximately $17.5 million under the LLMC Convention, whereas the incident generated compensation claims of over $34 million. After taking into account the amount paid by the shipowner's liability insurer (which was equivalent to the liability limit under the LLMC Convention) and a further voluntary contribution of just under $7.5 million paid by the shipowner, there remained a shortfall of at least $9 million. As a result, the Australian Government decided to increase the Protection of the Sea levy, on an interim basis, from 11.25 cents per net ton to 14.25 cents per net ton with effect from 1 July 2010, in order to recoup AMSA's costs of combating the oil spill and to reimburse the Queensland Government's costs that were not recoverable from the polluter, as provided for under principle iii in paragraph 21 of the National Plan IGA.[117]

139. Similar unsatisfactory outcomes are likely to eventuate in the future if serious HNS incidents occur.

The desired objectives

140. There is a need to address the problems identified in paragraphs 116 to 139 above.

141. First and foremost, adequate compensation should be available for damage (including pollution) arising from the carriage of HNS by ship. The cost of providing the compensation should be allocated fairly and efficiently. The victims who are directly affected, the general body of taxpayers, and businesses that are not responsible for creating or contributing to the risk should not be left to bear the cost to an inappropriate extent. Compensation arrangements should provide incentives to minimise the risk of HNS incidents occurring.

142. Any measures adopted should also seek to mitigate existing substantive and procedural barriers to recovery of compensation, such as the need to establish legal responsibility for HNS incidents as a precondition to recovering compensation, "pay to be paid" clauses in insurance policies, and the lack of agreed, streamlined processes for obtaining compensation across jurisdictional boundaries.

Options

143. The options that are realistically available for addressing the problem are as follows:

---

[116] This is so as a general rule, for the reasons adverted to in paragraph 130 above. It is not to deny that in certain exceptional types of cases there *may* be valid public policy reasons for not requiring the polluter to bear the cost, or the whole cost, of the pollution.
[117] The increase in the levy was implemented by the *Protection of the Sea (Shipping Levy) Amendment Regulations 2010 (No 1)*.

1. Maintain the status quo (by not acceding to the Protocol and not adopting any alternative measures, such as those in option 3, to address the problem).
2. Accede to the Protocol (thereby agreeing to be bound by the 2010 HNS Convention when it comes into force).
3. Implement a purely domestic solution, which may take either of the following forms:
   - *(a)* a domestic liability and compensation regime with features similar to the liability and compensation regime under the 2010 HNS Convention, which would only operate in Australia; or
   - *(b)* a domestic levy imposed on Australian-registered ships and foreign-registered ships visiting Australia ports, which would operate along similar lines to the Protection of the Sea levy.

Analysis of option 1 (maintain the status quo)

144. Obviously, option 1 does nothing to address the problem of the lack of adequate compensation for HNS incidents, and the consequent inappropriate shifting of the cost burden to victims, taxpayers and/or other businesses (as illustrated by the *Pacific Adventurer* incident, where the Protection of the Sea levy had to be drawn on to cover the damage and the rate of that levy had to be increased as a result).

145. Under the current arrangements, adequate compensation will usually be available for HNS incidents where the total compensation bill is less than the applicable liability limit under the LLMC Convention. But even in those situations, the need to prove causation and fault in order to establish legal responsibility, difficulties of recovering indemnity from insurers and difficulties of pursuing compensation claims across jurisdictional boundaries can constitute unreasonable (and completely unmeritorious) obstacles to recovering compensation.

146. It should be noted that even if Australia decides not to become a State Party to the 2010 HNS Convention, if the convention comes into force, State Parties to the convention will require Australian ships that visit their ports to have liability insurance cover in respect of HNS incidents, up to the level of cover mandated by the convention. (See paragraph 40 above.) This means that if Australia does not become a State Party but the convention comes into force, Australia will still be subject to one of the burdens imposed by the convention (namely, Australian-registered ships will be required to have liability insurance at the level mandated under the convention when they visit State Parties to the convention) but will forgo the benefits of being a State Party to the convention (in particular, the right for persons who suffer damage from an HNS incident in Australia to obtain compensation from the HNS Fund).

147. In short, if the 2010 HNS comes into force, option 1 will become even more unattractive.

Analysis of option 2 (accede to the Protocol)

Advantages of an international solution

148. The risks associated with the carriage of HNS cargoes by ship are particularly amenable to being addressed through international rules rather than purely domestic measures. Cargo ships operate internationally, and a ship involved in an HNS incident in a country's waters is often registered and owned in a different country. It would be administratively burdensome and costly for shipowners to have to make special insurance arrangements relating to HNS when their ships visit Australian ports; in a buoyant global shipping market such requirements could deter some ships from participating in the Australian trade or induce them to charge higher freight rates as a condition of doing so, to the detriment of Australian exporters and importers. It is therefore more efficient for all concerned if ships are covered by one set of international rules rather than by different rules when they enter each jurisdiction. This is the rationale underlying the successful track record of the international community in adopting an impressively large number of international maritime treaties governing many aspects of shipping and navigation, through the IMO, which was established as a specialised agency of the United Nations with responsibility for the safety and security of shipping and the prevention of marine pollution by ships.

149. Overall, addressing these issues through an international treaty rather than at individual country level is more conducive to a level competitive playing field in both international trade and international shipping. As the International Chamber of Shipping and the International Shipping Federation have stated in their campaign to promote the ratification of the 2010 HNS Convention and a number of other international maritime conventions:

> "It is crucial that the same regulations governing such matters as safety, environmental protection, liability, and seafarers' working conditions apply to all ships in international trade and that the same laws apply to all parts of the voyage. The alternative would be a web of conflicting rules and regulations that would compromise the efficiency of global trade, around 90% of which is carried by sea."[118]

150. Because the HNS Fund will be available to pay compensation for HNS-related damage occurring not just in Australia (including Australia's territorial sea and exclusive economic zone) but also in the other State Parties to the 2010 HNS Convention, Australian receivers that contribute to the HNS Fund will potentially be contributing to the cost of addressing HNS-related damage occurring in those other State Parties. However, since it is not possible to predict where or when an HNS incident will occur, Australia stands to benefit from the HNS Fund equally to the other State Parties. (Indeed, Australia's long coastline and large area of territorial sea and exclusive economic zone combined with its relatively low population and correspondingly low manufacturing base means that it probably faces a greater risk of damage from HNS incidents in proportion to the amount of its contributions to the HNS Fund than many of the other State Parties – which suggests that over time it might benefit from the HNS Fund *more* than many of the other State Parties.)

---

[118] International Chamber of Shipping and International Shipping Federation *Promoting Maritime Treaty Ratification – Campaign Update*, 2011, at page 2.

Ensuring the availability of a more appropriate level of compensation for damage resulting from HNS incidents

151. The 2010 HNS Convention will make more compensation available to persons who suffer damage as a result of HNS incidents, by substituting new, higher limits of liability that will apply to shipowners in respect of HNS-related claims. The new limits of liability will be set at an appropriately high level commensurate with the amount of damage that can be caused by a serious HNS incident. The convention will also ensure that shipowners maintain liability insurance cover up to that level of liability.[119]

152. The limits of liability under the 2010 HNS Convention are some three to six times higher than the limits of liability under the LLMC Convention, which currently apply in relation to HNS incidents. This is illustrated in the following table, which compares the limits of liability under the two conventions for ships of various indicative gross tonnages:

Ship's gross tonnage	*Limits of liability under the 2010 HNS Convention (for damage resulting from HNS)*	*Limits of liability under the LLMC Convention applying to general loss or damage* *Note that:* • *The limits of liability in relation to death or injury of persons other than passengers are double those specified below.* • *The limit of liability in relation to death or injury of passengers is 175,000 SDRs ($270,000) multiplied by the number of passengers which the ship is authorised to carry.*
10,000 (a very small cargo ship)	25.3 million SDRs ($40.6 million)	4.2 million SDRs ($6.7 million)
25,000	51.2 million SDRs ($82.1 million)	10.2 million SDRs ($16.4 million)
50,000	94.3 million SDRs ($151.3 million)	18.2 million SDRs ($29.2 million)
75,000	104.7 million SDRs ($167.9 million)	25.2 million SDRs ($40.4 million)
100,000	115 million SDRs ($184.5 million)	30.2 million SDRs ($48.4 million)

[119] Paragraphs 35 to 43 above.

125,000 (a very large cargo ship)	115 million SDRs ($184.5 million)[120]	35.2 million SDRs ($56.5 million)

153. Since the higher limits of liability under the 2010 HNS Convention also determine the levels of liability insurance that are mandated by that convention, when that convention comes into force shipowners who used to maintain liability insurance cover only up to the limits of liability under the LLMC Convention will have to increase their insurance cover in respect of HNS incidents by three to six times.[121]

154. Further, where the shipowner's insurance cover is insufficient to cover the damage resulting from an HNS incident, or where, for some other reason, compensation is not available from the shipowner or its insurer, the 2010 HNS Convention will ensure that the HNS Fund will make up the shortfall, up to a maximum limit of 250 million SDRs ($401 million), less the amount of any compensation actually recovered from the shipowner or its insurer.

Establishing legal responsibility for an HNS incident

155. The 2010 HNS Convention will clarify legal responsibility for damage arising from HNS incidents by channelling liability to the shipowner and making the shipowner strictly liable for the damage, subject to narrow exceptions.[122] It will thereby reduce expensive and time-consuming litigation to determine responsibility.

156. Making shipowners strictly liable to compensate persons who suffer damage as a result of the carriage of HNS by their ships is appropriate from a policy point of view: the carriage of HNS by ship is an inherently dangerous commercial activity in respect of which it is reasonable to expect shipowners not only to exercise reasonable care to avoid causing damage but to effectively guarantee that the activity will not cause damage – particularly as shipowners are best placed to ensure that their ships carry HNS cargoes safely. It should be noted that strict criminal liability for various kinds of marine pollution is already imposed on shipowners and masters under the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

Facilitating recovery of compensation from the insurer

157. In addition, the 2010 HNS Convention will enable persons who suffer damage as a result of an HNS incident to make a claim directly against the shipowner's liability insurer, subject to limited defences that are available to the insurer under the convention.[123] This will help to make

---

[120] The limit of liability under the 2010 HNS Convention is 115 million SDRs both for ships of 100,000 gross tonnage and ships of 125,000 gross tonnage because the convention sets an overall cap on liability of 115 million SDRs.

[121] As indicated in paragraph 120 above, in April 2012 the Legal Committee of the IMO adopted a resolution increasing these liability limits in the LLMC Convention by 51%. The increase will come into force on 1 July 2015 (if it is accepted under the tacit acceptance provisions of the LLMC Convention).

[122] Paragraphs 31 to 43 above.

[123] Paragraphs 44 to 46 above.

the recovery of compensation both procedurally and substantively easier; in particular, it will enable claimants to circumvent "pay to be paid" clauses.

Facilitating recovery of compensation across jurisdictional boundaries

158. The 2010 HNS Convention will facilitate the recovery of compensation across jurisdictional boundaries by providing considerable flexibility regarding the jurisdiction where a person may bring an action for compensation against a shipowner or its insurer, and by requiring State Parties to recognise and enforce judgements against a shipowner or its insurer that have been made by a court of another State Party.[124]

Fair and efficient allocation of the costs and risks associated with the carriage of HNS

159. Under the 2010 HNS Convention, the cost of paying compensation for damage resulting from HNS carried by ships is shared between shipowners (through the strict liability and mandatory insurance requirements) and receivers of bulk HNS cargoes (through the requirement to pay contributions to the HNS Fund). This "two-tier" approach to the allocation of the costs entails a departure from the strictest and most direct form of the polluter pays principle, which would require the "polluter", the shipowner, to pay all of the costs. It is the result of a compromise that was reached during the negotiation of the 1996 HNS Convention (modelled on the similar compromise embodied in the Civil Liability Convention and IOPC Funds Conventions), which was designed to address concerns about the possible adverse consequences of placing the whole burden directly on the shipping industry; these concerns included expected difficulties for shipowners of obtaining marine liability insurance up to the high levels of coverage which are to be provided by the HNS Fund (but which would have had to be provided by shipowners and their insurers if the two-tier approach had not been adopted). However, the two-tier approach constitutes a fair and efficient solution, and is consistent with the broader concept of polluter pays. The receivers who will provide the second tier of compensation through contributions to the HNS Fund will generally comprise wholesale suppliers or industrial users of HNS. Insofar as competitive conditions permit, both the shipowners and the receivers will seek to pass on the cost of their liability insurance premiums and contributions to the HNS Fund (respectively) to their customers; ultimately the costs would be sought to be passed down to consumers of HNS-based products. Since the downstream customers and consumers benefit from and drive demand for HNS, it is fair and efficient that they should bear part of the costs of providing compensation for HNS incidents. Such costs can be seen as "negative externalities" of their business activities or choices as consumers. It is consistent with established principles of efficient risk allocation and resource allocation that those responsible for generating negative externalities should pay for them.

160. A key principle of efficient risk allocation is that a risk should be borne by the person who has the capacity to mitigate it. The 2010 HNS Convention gives effect to this principle to the extent that it allocates part of the cost of providing compensation for HNS incidents to shipowners, since shipowners are best placed to take measures to improve the safe transport and

---

[124] Paragraphs 72 and 73 above.

handling of their HNS cargoes, and thereby mitigate the risks. Consignors of HNS cargo (to whom shipowners are likely to pass on their costs of mandatory liability insurance relating to HNS, in the form of freight charges) are also able to contribute to the safe transport and handling of the HNS through careful packaging, labelling and selection of the appropriate mode of shipping.

161. The division of the HNS Fund into four accounts, covering hydrocarbon mineral oils, LNG, LPG, and all other kinds of HNS (respectively), and the further division of the general account into sectors covering up to four kinds of HNS, which have the effect of avoiding cross-subsidisation between the accounts and sectors, is also conducive to efficiency, as the HNS Fund contribution rate that applies in relation to an account or sector will reflect the risks associated with the sea carriage of the type of HNS to which that account or sector relates. As a result of this division, an industry sector dealing with a relevant type of HNS which maintains high levels of safety will be able to benefit from lower contribution rates.

Administrative efficiency

162. The most significant administrative component of the 2010 HNS Convention is the collection of annual returns and annual contributions to the HNS Fund from receivers of HNS who are liable to pay contributions. The fact that contributions will only be payable in respect of bulk rather than packaged HNS, and only in respect of quantities of bulk HNS that exceed the specified minimum annual tonnage thresholds, will considerably reduce the administrative burden for both receivers of HNS and AMSA (which will be responsible for administering these requirements), as there are fewer receivers of bulk HNS than receivers of packaged HNS, and bulk HNS shipments are easier to identify and quantify.

163. The fact that the obligation to pay contributions to the HNS Fund does not apply uniformly to all HNS that has been carried by ship but only applies to receipts of bulk HNS that exceed the specified minimum annual tonnage thresholds could conceivably have a mildly distortionary effect on markets relating to the carriage of HNS and the supply of HNS and HNS-based products. However, the distortionary effect (if any) is likely to be extremely minimal in view of the anticipated low contribution rate. Even if such an effect were to eventuate, it would undoubtedly be outweighed by the administrative cost savings to both business and government flowing from the decision to confine the obligation to pay contributions to a limited class of large-volume receivers of bulk HNS.

Costs to owners of ships carrying HNS

164. Shipowners that do not currently maintain the level of liability insurance cover that will be mandated under the 2010 HNS Convention may have to pay a higher premium to obtain the higher cover. The size of any increase in the premium will depend on factors such as the state of the marine insurance market, the risk profile of the ship, and the frequency and severity of HNS incidents.

165. Shipowners that obtain their liability insurance from P & I clubs (the majority of shipowners) are unlikely to see an immediate increase in their insurance costs when the 2010 HNS Convention comes into force, as P & I clubs only make calls on their members to meet actual and anticipated claims arising from known incidents.[125] Calls on the members of a given P & I club would only increase compared to what they would be in the absence of the 2010 HNS Convention if (i) an HNS incident involving a shipowner member occurs, and (ii) the shipowner's liability stemming from that incident exceeds the current limit of liability under the LLMC Convention.

166. The mandatory insurance requirement is not expected to impose very significant additional costs on responsible and prudent shipowners. Shipowners already maintain liability insurance; normally, as a minimum, they maintain cover up to the limit of their liability under the LLMC Convention. Those limits are set at relatively moderate levels consistent with the carriage of non-hazardous cargo. Shipowners who only maintain such minimal levels of cover will have to increase the level of cover in respect of voyages on which their ship carries HNS as cargo, resulting in a possible increase in their insurance premium, as just discussed. However, the higher levels of cover mandated under the 2010 HNS Convention reflect the higher risks associated with the carriage of HNS.

Costs to receivers of HNS – annual contributions to the HNS Fund to fund compensation payments and administration costs

167. As has been indicated, receivers of 20,000 tonnes or more of bulk HNS in a calendar year (or 150,000 tonnes in the case of IOPC contributing oil, and any amount of LNG) will be required to pay an annual contribution to the HNS Fund, calculated at a rate per tonne of the HNS received.

168. It is not possible to predict the contribution rates in any given year, as that will depend on the amount of contributions that will be needed to cover the administration costs of the HNS Fund and the compensation that will have to be paid out of the relevant account or sector of the HNS Fund during the next calendar year in respect of known HNS incidents. The key point to note here is that in the absence of very serious and costly HNS incidents, for which the compensation bill exceeds the shipowner's level of mandatory insurance cover under the 2010 HNS Convention, contributions will be limited to raising an amount needed to cover the HNS Fund's administration costs.

169. To provide some indication of the likely size of the contribution burden, the International Group of P & I Clubs (whose thirteen members are the principal providers of liability insurance for shipping) has advised the Department that, during the period of eight years from 2002 to 2009, there were only three incidents in respect of which compensation would have had to be paid by the HNS Fund (if the 2010 HNS Convention had applied at the time of the incidents); the total amount payable by the HNS Fund over that period would have been approximately 29.9 million SDRs ($48 million). This averages out to 3.74 million SDRs ($6 million) per year. Note

[125] P & I clubs are mutual insurance associations that are owned by their members, who are shipowners. "P & I" stands for "protection and indemnity".

that Australian contributors would only have had to contribute a small fraction of this sum, since Australian contributions will comprise a small fraction of the total contributions to the HNS Fund.

170. It is not feasible at the present time to determine the number of entities in Australia that will be liable to pay contributions to the HNS Fund as receivers of bulk HNS cargoes. The reason is that information about receipts of HNS is not collected by any Australian agency in a form that would enable the total number of receivers in Australia of bulk HNS in excess of the relevant minimum annual tonnage thresholds to be determined without disproportionately costly and time-consuming data sifting and matching. Customs collects data on imports and exports, but many of the classifications of goods and commodities used by that agency do not align with the classifications of HNS that are used under the 2010 HNS Convention; a more significant obstacle is that Customs' data identifies the "importers" of goods and commodities, who frequently do not equate to the "receiver" within the meaning of the 2010 HNS Convention. Australian port authorities collect data about ships' cargoes, but generally do not record who the importers or receivers of those cargoes are. A number of agencies, for example the Australian Bureau of Agricultural and Resource Economics and Sciences ("ABARES"), publish statistics on exports and imports of various kinds of commodities, but they generally do not include information about the importers or receivers of those commodities.

171. Indicative information about imports (and, in the case of LNG, also exports) of some significant categories of HNS follows:

- *IOPC contributing oil*

  Six Australian companies (comprising five oil refiners and one mineral refiner) each received 150,000 tonnes or more of IOPC contributing oil in respect of which contributions were required to be paid to the IOPC Funds in 2012.

- *LNG*

  Australian LNG exports in 2010-11 totalled 20 million tonnes.[126] LNG imports are around one-third of this figure.[127] A number of major offshore gas fields are under development, and LNG exports are predicted to soar to 63 million tonnes in 2016-17.[128]

  As noted in paragraph 63 above, in the case of LNG, the titleholder of the LNG immediately before its discharge from the ship (who is likely to be the producer of the LNG) can agree to assume liability to pay contributions to the HNS Fund.

  Currently there are two major Australian LNG producers: the Karratha LNG plant, operated by Woodside Energy Ltd for the North West Shelf Project, a joint venture between six

---

[126] Bureau of Resources and Energy Economics *Resources and Energy Quarterly – March Quarter 2012*, page 21.
[127] International Energy Agency *Monthly Natural Gas Survey – December 2011*, table 1.1.
[128] Bureau of Resources and Energy Economics *Resources and Energy Quarterly – March Quarter 2012*, page 21.

resource companies;[129] and the Darwin LNG plant, operated by resource company ConocoPhillips Australia Pty Ltd. Four more LNG plants are under construction.[130]

- *LPG*

  Australian LPG imports in 2010-11 totalled 888 megalitres.[131] The three major LPG importers are Origin Energy, Elgas and Wesfarmers.[132]

Other large-scale HNS importers include the chemical industry, fertilizer suppliers and some miners.

172. Based on information obtained from various public sources, Commonwealth agencies and industry bodies, the Department's best estimate is that there are likely to be fewer than one hundred receivers of bulk HNS in Australia that will be required to pay contributions to the HNS Fund (on the basis that they receive 150,000 tonnes or more of IOPC contributing oil, any amount of LNG, or 20,000 tonnes or more of any other kind of bulk HNS per year).

Costs to receivers of HNS – initial contributions to the HNS Fund to fund its establishment costs

173. As noted in paragraph 71 above, receivers of bulk HNS that are liable to contribute to the HNS Fund will be required to pay a one-off initial contribution to the fund after their State becomes a State Party to the 2010 HNS Convention, to cover the establishment costs of the fund. A reliable estimate of the establishment costs is not available, but those costs are not expected to be very significant, particularly having regard to the fact that the HNS Fund and the IOPC Funds will share the same Secretariat.

Costs to receivers of HNS – costs of preparing and lodging annual returns

174. Receivers will incur administrative costs of preparing and lodging annual returns with AMSA containing details about the HNS that they received during the previous calendar year. This is not expected to constitute a significant burden, as the receivers will only be required to report receipts of bulk HNS that exceed the specified minimum annual tonnage thresholds. They should be able to readily extract the relevant data from their business records.

175. The detailed rules relating to annual returns will be contained in the HNS Fund's internal regulations. It is expected that they will be similar to the reporting arrangements adopted by the IOPC Funds. The expected arrangements are as follows:

---

[129] The six companies are BHP Billiton Petroleum (North West Shelf) Pty Ltd, BP Developments Australia Pty Ltd, Chevron Australia Pty Ltd, Japan Australia LNG (MIMI) Pty Ltd, Shell Development (Australia) Pty Ltd and Woodside Energy Ltd.

[130] Reserve Bank of Australia *Bulletin – March Quarter 2011*, pages 6, 7; Woodside Petroleum Ltd website (www.woodside.com.au/Pages/default.aspx); ConocoPhillips Australia Pty Ltd website (www.conocophillips.com.au/EN/Pages/index.aspx).

[131] Bureau of Resources and Energy Economics *Resources and Energy Statistics – December Quarter 2011*, page 33. Weight per litre depends on pressure and composition.

[132] Allen Consulting Group *Review of the appropriateness of the current LPG international benchmark in the setting of domestic LPG prices – report to Australian Competition and Consumer Commission*, October 2009.

- the HNS Fund will develop an annual return form which will seek details of the receiver (name, address and contact person) and the amount of each category of bulk HNS received in the previous calendar year;
- the completed annual return will have to be lodged with AMSA by 1 April each year;
- AMSA will undertake a number of random audits of receivers to ensure the accuracy of the annual returns;
- the annual returns will be signed by an AMSA official to indicate that AMSA is satisfied that the information provided in them is complete and correct;
- the annual returns will then be sent by AMSA to the HNS Fund;
- the HNS Fund will send invoices to the receivers for their contributions;
- interest will be payable on overdue contributions, at a rate specified in the internal regulations of the HNS Fund (the interest rate is yet to be determined).

176. In order to ensure that all entities that are potentially liable to pay contributions to the HNS Fund are "captured" through the annual reporting requirement, it is proposed to extend the requirement to lodge annual returns to receivers that received somewhat less than the minimum annual tonnage of bulk HNS which determines liability to pay contributions. The reporting thresholds may be set 10% lower than the contribution thresholds, *ie*:

- receipt of 135,000 tonnes of IOPC contributing oil (compared to the contribution threshold of 150,000 tonnes);
- receipt of any amount of LNG (LNG is normally only imported in large quantities);
- receipt of 18,000 tonnes of other bulk HNS (compared to the contribution threshold of 20,000 tonnes).[133]

Costs to Commonwealth agencies

177. If Australia becomes a State Party to the 2010 HNS Convention, Commonwealth agencies will incur certain administrative costs of implementing the convention. Some of those costs will be recovered by user charges or an industry levy. The administrative costs fall into the following categories:

- An appropriate agency will have to verify that ships carrying HNS have the required insurance certificates. AMSA and Customs already carry out checks of ships' documentation, as part of their port State control and border control functions (respectively). Hence they will be able to verify that ships are carrying the required insurance certificates at minimal additional cost.
- AMSA will have the function of issuing insurance certificates for ships registered in Australia and for ships registered in States that are not State Parties to the 2010 HNS Convention whose owners request such a certificate. AMSA will charge a prescribed cost-based charge for issuing the certificates. (For comparison, the prescribed charges for issuing or renewing an

[133] The HNS Correspondence Group which met in Ottawa in June 2003 and subsequently in Rotterdam in June 2011 agreed that State Parties' domestic laws should specify lower reporting thresholds for receipts of bulk HNS than the contribution thresholds in the 2010 HNS Convention. (IMO Legal Committee *Monitoring the Implementation of the HNS Protocol, 2010 – Note by the Secretariat* 16 April 2012, IMO document LEG 99/WP.2, at paragraph 7.)

insurance certificate for a ship for the purposes of the Civil Liability Convention are $70 and $40, respectively.[134])

- AMSA will have to collect annual returns from receivers of bulk HNS who exceed the minimum annual tonnage thresholds, and pass on the returns to the HNS Fund to enable it to issue invoices for contributions. AMSA's administrative costs will be covered by the Regulatory Functions levy, which is paid by Australian ships and foreign ships visiting Australian ports, based on the ship's net registered tonnage.[135] It is not possible to quantify AMSA's costs at this stage, as those costs will be sensitive to the number of receivers liable to pay contributions, and that number has not yet been ascertained.[136] (AMSA already has functional familiarity with this role as it performs a similar role in collecting annual returns from Australian receivers of IOPC contributing oil under the *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993*.)
- The Department and AMSA will participate in the governance of the HNS Fund, including attendance at the meetings of the Assembly. AMSA's attendance will be funded from the above-mentioned levy, while the Department's attendance will be funded from the Department's annual appropriations.

Consultation with stakeholders

178. The Department undertook stakeholder consultation about whether Australia should accede to the 2010 HNS Convention. No stakeholders expressed opposition. Details about the stakeholder consultation are provided under the heading "Consultation" below (paragraphs 198 to 209).

Analysis of option 3 (implement a purely domestic solution)

Advantages and disadvantages of option 3(a) (a domestic liability and compensation regime)

179. The 2010 HNS Convention addresses the problems that have been identified. Australia actively participated in the negotiation of the convention, thereby helping to shape its content. As a result, the convention is compatible with Australia's needs and national interests.

180. These considerations mean that there is no pressing need to devise an alternative domestic liability and compensation regime that is specially tailored to meet Australia's requirements.

181. While it would be possible to devise various kinds of domestic liability and compensation regimes modelled on the 2010 HNS Convention which would address the problems that have

---

[134] Regulation 9 of the *Protection of the Sea (Civil Liability) Regulations 1983*.
[135] The levy is imposed under the *Marine Navigation (Regulatory Functions) Levy Act 1989* and the *Marine Navigation (Regulatory Functions) Levy Collection Act 1989*.
[136] As indicated in paragraph 172 above, the number of receivers liable to pay contributions is expected to be less than one hundred.

been identified, the convention has the advantage that it provides an international solution, which is more efficient and less trade-distorting than a domestic regime, and does not pose any potential risks to the supply of international shipping services to Australia which could materialise if Australia unilaterally implemented a domestic regime. (This advantage is discussed in paragraphs 148 and 149 above.)

182. The fact that shipping services to and from Australia amount to a very small part of the global shipping market is likely to be problematic for a domestic liability and compensation regime. Shipowners might find it more difficult to obtain the special liability insurance cover for voyages to and from Australia which would be required under a domestic liability and compensation regime (which would have to cover the shipowners against strict and channelled liability, up to a higher limit of liability than the limit applying under the LLMC Convention), due to the reluctance of marine liability insurers to provide special country-specific cover unless the country concerned is a major shipping destination (such as the United States). This could increase the cost of international shipping services in Australia.

183. A domestic compensation fund operating on similar lines to the HNS Fund would be at a relative disadvantage compared to the HNS Fund in that it would have a much smaller contribution pool. This would be likely to produce greater volatility in the contribution rates – long periods of low or no contributions, then, when a serious HNS incident occurs in Australia, contribution rates would have to increase sharply to meet the cost. Also, the domestic fund would have less capacity to spread the risk in accordance with the principles of insurance. The inability to spread the risk among multiple States would produce a "lottery" scenario where, if Australia were unlucky enough to experience a succession of serious HNS incidents, it could end up as a significant net loser compared to a counter-factual where Australia is a State Party to the 2010 HNS Convention.

184. These considerations counterbalance any potential benefits that Australia might gain from opting for a domestic liability and compensation regime in lieu of becoming a State Party to the 2010 HNS Convention.

Advantages and disadvantages of option 3(b) (a domestic shipping levy)

185. A domestic shipping levy directly modelled on the Protection of the Sea levy would overcome the main problem that has been identified, namely the unavailability of adequate compensation for damage resulting from serious HNS incidents. Nonetheless, it would be a blunt policy instrument, because it would apply in relation to all cargo, rather than HNS cargo.[137] A domestic shipping levy targeted at HNS cargo would be better in this regard.

186. However, either kind of levy would still have many shortcomings compared to the liability and compensation regime under the 2010 HNS Convention. For instance:

[137] Obviously, if it were decided that the Protection of the Sea levy is an appropriate model, there would be no need to legislate to create a new levy – the simpler solution would be to increase the Protection of the Sea levy as necessary.

- A levy would not distribute part of the cost of serious HNS incidents to receivers of HNS (via the obligation to pay contributions to the HNS Fund) but would place the entire burden on shipping – which might not be a good idea for a country as dependent on shipping as Australia.
- There would be greater volatility in the levy compared to the volatility of insurance premiums for mandatory liability insurance under the 2010 HNS Convention, as the levy rate would have to increase sharply if a serious HNS incident occurred in Australia, whereas the risk under the liability insurance policies would be spread across numerous countries. (It is noteworthy that in 2009 a single incident, namely the *Pacific Adventurer* incident, resulted in a 27% increase in the Protection of the Sea levy – and the increase would have been even higher but for the fact that the shipowner made a voluntary contribution of $7.5 million.)[138] Unpredictable volatility in the costs faced by shipping operators does not do anything to encourage the provision of shipping services.
- A levy would be less capable of providing incentives for shipowners to improve their safety standards than mandatory liability insurance, as the same levy rate would apply to shipowners irrespective of their claims history or the standard or condition of their ships. By contrast, insurers can tailor their premiums to take account of insureds' risk profiles and to encourage risk reduction by insureds.[139]
- As the shipping industry is already subject to three levies (the Protection of the Sea levy, the Regulatory Functions levy and the Marine Navigation levy[140]) it could see an additional levy as being burdensome – particularly in the context of the current weak global shipping market.[141]

187. For these reasons, a domestic solution taking the form of a shipping levy would be an inferior solution compared to the 2010 HNS Convention.

Implementing a purely domestic solution could harm Australia's international reputation

188. Australia is an active participant in the IMO, including in the development of international standards and conventions. While Australia, like every other State that participated in the negotiation of the 2010 HNS Convention, is free to decide not to accede to the convention if it considers that it is not in Australia's national interests, a decision to "go it alone" and implement a purely domestic solution notwithstanding that the convention meets Australia's national interests would risk diminishing Australia's reputation and ultimately its influence at the IMO.

[138] As detailed in paragraph 138 above.
[139] Theoretically, the levy could be designed to vary depending on a range of risk characteristics associated with particular categories of ships and/or shipowners, but in practice such a finely targeted levy would probably be too difficult and costly to administer.
[140] The Marine Navigation levy is used to fund navigation aids and is imposed under the *Marine Navigation Levy Act 1989* and the *Marine Navigation Levy Imposition Act 1989*. The other two levies have already been mentioned (in paragraphs 133 and 177 above.
[141] *Eg* Fitch Ratings *Global shipping industry woes continue as BDI collapses*, media release, 7 February 2012.

An interim domestic solution might need to be considered if the 2010 HNS Convention does not come into force

189. Should it become evident that efforts to bring the 2010 HNS Convention into force have stalled indefinitely, consideration may need to be given to implementing domestic solutions, possibly along the lines of those discussed here. It should be noted, however, that this does not gainsay the fact that accession to the 2010 HNS Convention is the preferred option.

Conclusion and recommended option

Option 2 best addresses the problems that have been identified

190. The 2010 HNS Convention addresses the problems that have been identified, meets reasonable standards of fairness, efficiency and practicality, and is compatible with Australia's needs and national interests (as discussed above).

191. Option 3(a) (a domestic liability and compensation regime) would be able to replicate, in the domestic sphere, most of the positive features of the liability and compensation regime established under the 2010 HNS Convention. However, it is inferior to option 2 (accede to the Protocol) in that it will not promote a level competitive playing field in international shipping and international trade in HNS, and could conceivably have a negative impact on the supply of international shipping services in Australia if it affects the relative cost of providing those services here to a greater extent than the regime established under the 2010 HNS Convention.

192. Because the regime under option 3(a) would only operate in Australia, contribution rates relating to receipts of bulk HNS would potentially be more volatile.

193. Option 3(b) (a domestic shipping levy) would be more limited in scope and would be a blunter policy tool than either option 2 or option 3(a). It would enable recovery of the costs of HNS incidents from shipowners or operators, but would not meet a reasonable standard of fairness or efficiency as it would spread the cost across the entire shipping industry rather than targeting the ship that caused the damage (in accordance with the polluter pays principle); also, it would place the entire burden on the shipping industry rather than providing for receivers of HNS to share part of the burden through contributions to the HNS Fund. It would create problems of volatility as the rate of the levy would fluctuate in accordance with the occurrence of HNS incidents in Australia. It would not be welcomed by the shipping industry which is already subject to three levies and which is currently having to cope with a weak economic environment. Apart from enabling recovery of the costs of HNS incidents from the shipping industry, it would not address the other problems that have been identified.

194. Options 2 and 3(a) and (b) are all superior to option 1 (maintain the status quo). Option 1 does not address any of the problems that have been identified. The only things that can be said in favour of option 1 are, firstly, that it provides adequate compensation for less serious HNS incidents, and secondly, that because Australia has so far been fortunate enough to be spared a really serious HNS incident, the deficiencies of option 1 have not yet been starkly exposed.

Recent incidents such as the *Pacific Adventurer* have demonstrated the insufficiency of the compensation available under the LLMC Convention; and the outcome of the meeting of the IMO's Legal Committee in April 2012 demonstrates the difficulty of achieving an increase in the liability limits under the LLMC Convention of the required magnitude.

Option 2 is based on a successful precedent

195. Similar problems to those identified in paragraphs 116 to 139 above have already been addressed internationally in relation to one particular type of maritime risk. In response to the foundering of the supertanker *Torrey Canyon* off the English coast in 1967, the IMO developed the Civil Liability Convention and the IOPC Funds Conventions, which established a liability and compensation regime in respect of pollution damage caused by oil spills from oil tankers which operates along similar lines to the 2010 HNS Convention. 105 States, comprising all of the world's significant maritime nations, are State Parties to the Civil Liability Convention and Fund Convention (with the exception of the United States, which has its own national regime), and 27 of these States have also become State Parties to the Supplementary Fund Protocol 2003.

196. The Civil Liability Convention and IOPC Funds Conventions are widely acknowledged as having worked successfully. The regime they establish is conceptually straightforward and provides certainty for stakeholders, particularly the shipping sector and the oil importing/refining sector (which pays contributions to the IOPC Funds). The IOPC Funds have dealt with 143 oil pollution incidents of varying sizes all over the world (up to the end of 2011), and most claims have been settled out of court.[142] The limits of liability of shipowners and the maximum amounts of compensation payable by the IOPC Funds have been increased over time. The Fund Convention and the Supplementary Fund Protocol 2003 now afford total compensation of up to 750 million SDRs ($1.203 billion) per incident, less any amount recovered from the shipowner or its insurer.

The recommended option

197. For the foregoing reasons, option 2 (accede to the Protocol) is the recommended option.

CONSULTATION

The May 2011 consultation

Description of the consultation

198. The Department sent a discussion paper on the 2010 HNS Convention to the stakeholders listed below in May 2011. The discussion paper invited submissions about whether Australia

[142] IOPC Funds *Annual Report 2011*, page 4.

should become a State Party to the convention, as well as about a number of specific issues arising under the convention.

Council of Australian Governments (COAG)

- Australian Maritime Group

Commonwealth Departments and agencies

- Department of Resources, Energy and Tourism
- Australian Pesticides and Veterinary Medicines Authority
- National Industrial Chemicals Notification and Assessment Scheme (Department of Health and Ageing)
- Therapeutic Goods Administration (Department of Health and Ageing)
- Great Barrier Reef Marine Park Authority

State and Territory Departments and agencies

- NSW Maritime
- Transport Safety Victoria
- Maritime Safety Queensland
- Department for Transport, Energy and Infrastructure (South Australia)
- Department of Transport (Western Australia)
- Department of Primary Industries, Parks, Water and Environment (Tasmania)
- Department of Lands and Planning (Northern Territory)

Joint government/industry organisation

- Management Committee, National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances

Peak business associations

- Business Council of Australia
- Australian Chamber of Commerce and Industry
- NSW Business Chamber
- Victorian Employers' Chamber of Commerce and Industry
- Chamber of Commerce and Industry Queensland
- Council for International Trade and Commerce South Australia Inc
- Chamber of Commerce and Industry Western Australia
- Chamber of Commerce Northern Territory

Industry associations – chemicals/minerals/substances

- Australian Institute of Petroleum
- Australian Petroleum Production and Exploration Association Ltd
- Plastics and Chemicals Industries Association
- National Bulk Commodities Group
- Minerals Council of Australia
- LPG Australia
- Australian Aerosol Association Inc
- Surface Coatings Association Australia Inc
- Pharmaceuticals Industry Council
- Australian Paint Manufacturers Federation

- Avcare (National Association for Crop Production and Animal Health)

Industry associations – shipping/logistics

- Australian Shipowners Association
- Shipping Australia Ltd
- Australian Peak Shippers Association
- Ports Australia
- Australian Logistics Council
- Logistics Association of Australia
- Supply Chain and Logistics Association of Australia

Industry participants

- North West Shelf Australia LNG
- Australia Pacific LNG
- CMA CGM & ANL Agencies (Australia) Pty Ltd

199. Two stakeholders, namely the Great Barrier Reef Marine Park Authority and National Bulk Commodities Group Inc, made submissions in response to the discussion paper.

Great Barrier Reef Marine Park Authority's submission

200. The Authority expressed strong support for Australia becoming a State Party to the 2010 HNS Convention.

201. Specifically, the Authority submitted that the 2010 HNS Convention should apply to the widest possible range of vessels, including to non-seagoing vessels operating in a State Party's internal waters.

202. The Australian Government's position on this proposal is as follows:

- Firstly, non-seagoing vessels are not within the scope of the 2010 HNS Convention (see paragraph 22 above). The convention would have to be amended to bring such vessels within its scope, and it seems unlikely that a sufficient number of State Parties would support such an amendment.
- Secondly, the administrative costs and burden of applying the convention to non-seagoing vessels would be disproportionate to the benefits, particularly as such vessels are generally quite small and hence pose a correspondingly small risk.

203. The Authority submitted that Australia should not make a declaration excluding from the scope of the 2010 HNS Convention ships of less than 200 gross tonnage while they are carrying HNS only in packaged form and are engaged on voyages between Australian ports or facilities. It noted that small vessels such as barges carrying HNS to ports and communities within the Great Barrier Reef Marine Park can cause damage to the reef and therefore should be covered by the convention. For the reasons indicated in paragraph 97 above, the Australian Government intends to make such a declaration.

204. The Authority also submitted that Australia should not exercise the option in the 2010 HNS Convention to enter into an agreement with a neighbouring State to exclude from the scope of the convention ships of less than 200 gross tonnage while they are carrying HNS only in packaged form and are engaged on voyages between Australia and the neighbouring State. As indicated in paragraph 99 above, the Australian Government does not propose to enter into such an agreement with a neighbouring State.

National Bulk Commodities Group's submission

205. National Bulk Commodities Group is an industry association representing Australia's dry bulk commodity shippers and consignees (some of whom will be receivers of bulk HNS cargoes).

206. National Bulk Commodities Group expressed support for Australia becoming a State Party to the 2010 HNS Convention –

> "because our national interests are at risk should a major incident occur and it is fair and reasonable that the cost of mitigation/remedial work be the responsibility of the parties (receivers) participating in the trade."

207. National Bulk Commodities Group agreed with the exclusion of non-seagoing vessels from the scope of the 2010 HNS Convention (by virtue of the definition of "ship"), and expressed the view that Australia should exclude from the scope of the convention ships under 200 gross tonnage carrying HNS only in packaged form between two Australian ports or between an Australian port and a port of a neighbouring State.

Earlier consultations

208. In 2009-2010 a similar list of stakeholders was consulted about the Protocol, prior to the diplomatic conference convened by the IMO to consider the Protocol which was held in London from 26 to 30 April 2010 (where the Protocol was adopted). None of the stakeholders indicated any objections in relation to the Protocol.

209. Consultation also took place before the 1996 HNS Convention was adopted.

IMPLEMENTATION AND REVIEW

Implementing actions

210. The implementation of option 2 will involve the following steps:

- The proposal for Australia to accede to the Protocol will be considered and reported on by the Australian Parliament's Joint Standing Committee on Treaties ("JSCOT").

- Subject to any recommendations made by JSCOT and any response by the Australian Government, the Australian Government will introduce a package of five Bills in Parliament which will implement the 2010 HNS Convention as part of Australian law. (Five Bills are needed to address the requirement in section 55 of the Constitution that laws imposing taxation must deal only with the imposition of taxation; the Bills will treat the obligations that will be imposed on receivers of bulk HNS to pay contributions to the HNS Fund as potentially constituting a general tax, a customs duty and an excise.) The Bills may need to make consequential amendments to existing legislation. The Bills will provide for some subsidiary matters to be prescribed by regulations, in particular: the form of an application for an insurance certificate; the form of an insurance certificate; and the cost-based fees that will be payable to AMSA for a new or renewed insurance certificate. The timing of the introduction of the Bills will depend on the Government's legislative priorities.
- After the Bills have received Royal Assent, the Australian Government will lodge with the Secretary-General:
  - an instrument signifying Australia's accession to the Protocol;
  - information about the total quantities of bulk HNS in respect of which contributions will be payable to the HNS Fund that were received in Australia during the previous calendar year (see paragraph 87 above); and
  - a declaration excluding from the scope of the 2010 HNS Convention, insofar as it applies to Australia, ships of less than 200 gross tonnage while they are carrying HNS only in packaged form and are engaged on voyages between Australian ports or facilities (see paragraphs 96 and 97 above).

Timing for the coming into force of the 2010 HNS Convention

211. As noted in paragraph 6 above, the Protocol (and hence the 2010 HNS Convention) has not yet come into force. For that to happen, the eight States that have signed the Protocol so far need to complete the process of ratification or accession, and four more States need to ratify or accede to the Protocol.

212. At the present time,[143] it is not possible to predict when the Protocol (and hence the 2010 HNS Convention) will come into force, but there are grounds for optimism that it may happen in the near future. The representatives of several States that have not yet signed the Protocol have indicated that their State is considering doing so.[144] Efforts to encourage more States to sign and ratify the Protocol are continuing. The matter will be discussed at the margins of the IOPC Funds annual meeting that will be held during the week beginning on 15 October 2012. The Legal Committee of the IMO and the Secretariat of the IOPC Funds have convened a workshop

---

[143] As at 20 September 2012.

[144] In 2002 the Council of the European Union made a decision authorising the Member States of the Union to ratify or accede to the 1996 HNS Convention and directing them to use their best endeavours to ensure that the convention is amended to allow the European Union to become a Contracting Party to the convention: *Council Decision of 18 November 2002 authorising the Member States, in the interests of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996* (2002/971/EC).

to be held in London on 12 and 13 November 2012 which will seek to facilitate States' ratification or accession, particularly through developing reporting guidelines. Participation in the workshop is open to all IMO Member States and to inter-governmental and non-governmental organisations that have consultative status with the IMO. To assist in the development of the reporting guidelines, the Secretariat has devised a questionnaire for industry stakeholders covering a broad range of reporting issues, and in August 2012 it commenced consultations with the chemical industry on reporting procedures.[145]

213. The timing for the coming into force of the Protocol (and hence the 2010 HNS Convention) for Australia is as follows:

- If Australia accedes to the Protocol before the preconditions for its coming into force have been met, it will come into force for Australia when it comes into force generally (that is, eighteen months after the preconditions for its coming into force have been met).[146]
- If Australia accedes to the Protocol after the preconditions for its coming into force have been met, it will come into force for Australia three months after Australia's accession or when it comes into force generally (whichever is the later).[147]

Review

214. The 2010 HNS Convention does not provide for formal reviews. However, the annual meetings of the Assembly will provide a forum for the State Parties to review the operation of the HNS Fund and, more broadly, to review how effectively the convention is working, discuss any issues that have been identified, and propose changes or amendments to the convention or to the regulations or procedures of the fund.

[145] Details about the workshop and stakeholder consultation are provided in *Preparation for entry into force of the 2010 HNS Protocol – Note by the Secretariat*, 24 August 2012, IOPC Funds document IOPC/OCT12/8/4.
[146] Article 46, paragraph 1. The preconditions for the Protocol's coming into force are specified in subparagraphs (a) and (b) of that paragraph, and are also set out in paragraph 5 above.
[147] Article 46, paragraph 2.