

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 244

Issued under the authority of the Minister for Infrastructure, Transport, Regional Development and Local Government

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

Protection of the Sea (Supplementary Fund) Regulations 2009

The *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (the Act) implements two treaties:

- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the 1992 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).

Subsection 47(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Regulations give effect to Article 8 of the Supplementary Fund Protocol and make provision relating to the payment of contributions to the Supplementary Fund. Details of the Regulations are set out in the Attachment.

The 1992 Fund Convention and the Supplementary Fund Protocol establish the second and third tiers of a three tier regime which provides compensation in case of pollution damage resulting from the escape or discharge of persistent oil (that is, crude oil and fuel oil) from an oil tanker.

The first tier of the scheme is established by the International Convention on Civil Liability for Oil Pollution Damage, 1992 (the Civil Liability Convention) which is implemented by the *Protection of the Sea (Civil Liability) Act 1981*. Under the first tier:

- tanker owners are strictly liable for pollution damage resulting from the discharge or escape of persistent oil from their vessels;
- tanker owners may limit their liability, the liability limit depending on the size of the tanker; and
- tankers carrying more than 2,000 tonnes of persistent oil in bulk as cargo must be insured to cover the liabilities of their owners for oil pollution.

The second tier of this scheme, which is governed by the 1992 Fund Convention, applies where the compensation available from the tanker owner is insufficient to pay full compensation costs.

The 1992 Fund Convention establishes the International Oil Pollution Compensation Fund 1992 (the 1992 Fund) to provide compensation for victims of pollution damage who are unable to obtain full compensation under the Civil Liability Convention. The 1992 Fund is financed by contributions levied on any public or private entity who has received more than 150,000 tonnes of persistent oil after sea transport per calendar year in countries to which the 1992 Fund Convention applies. The maximum aggregate amount of compensation payable for one incident under the Civil Liability Convention and the 1992 Fund Convention is about AUD400 million.

The third tier of the scheme is governed by the Supplementary Fund Protocol. The Supplementary Fund Protocol establishes the International Oil Pollution Compensation Supplementary Fund (the Supplementary Fund) to provide compensation for victims who do not obtain full compensation under the first two tiers of the scheme. The maximum aggregate amount of compensation available under the three tiers combined is about AUD1,460 million.

The Supplementary Fund is financed in a similar way as the 1992 Fund, that is, by contributions levied on public or private entities in receipt of more than 150,000 tonnes of persistent oil after sea transport per year in countries to which the Supplementary Fund Protocol applies. An updated list of countries to which the Supplementary Fund Protocol applies can be found on a number of websites, including the websites of the International Maritime Organization and the International Oil Pollution Compensation Funds.

The Act was amended by Schedule 1 of the *Protection of the Sea Legislation Amendment Act 2008* (the 2008 Act) to implement the Supplementary Fund.

Subsection 46H(1) of the Act provides that the regulations may make provision for or in relation to giving effect to Article 8 of the Supplementary Fund Protocol. Article 8 obliges each country to which the Supplementary Fund Protocol applies to make appropriate arrangements so that a judgment awarding compensation for oil pollution damage in accordance with the Protocol is recognised and can be enforced in any other country to which the Supplementary Fund Protocol applies. The effect, in Australia's case, is that judgments awarding compensation that are given by a court in a foreign country to which the Supplementary Fund Protocol applies should be able to be enforced by an Australia court which has appropriate jurisdiction and any judgments given by an Australian court should be able to be enforced by an appropriate court of such a foreign country.

Section 46Q of the Act provides that the regulations may make provision relating to payments to the Supplementary Fund, including the method of payment of contributions and late payment penalties, and the refund of overpayments.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

No formal consultation was undertaken in relation to these Regulations as they are of a minor or machinery nature and do not substantially alter the arrangements set out in the parts of the Act which implement the Supplementary Fund Protocol. There was extensive consultations with industry and the States/Northern Territory during the

development of the Supplementary Fund Protocol and the amendments to the Act which implement the Protocol. There was strong support for the development and implementation of the Supplementary Fund Protocol.

The Regulations commence on the commencement of Schedule 1 of the 2008 Act. Schedule 1 of the 2008 Act is expressed to commence on a date to be proclaimed, being a date on or after the Supplementary Fund Protocol enters into force for Australia. The Supplementary Fund Protocol will enter into force for Australia on 13 October 2009, being three months after the date on which Australia's instrument of accession for the Supplementary Fund Protocol was deposited with the Secretary-General of the International Maritime Organization.

**DETAILS OF THE PROTECTION OF THE SEA (SUPPLEMENTARY FUND)
REGULATIONS 2009**

Part 1 Preliminary

Regulation 1 Name of Regulations

Regulation 1 provides that the name of the Regulations is the *Protection of the Sea (Supplementary Fund) Regulations 2009*.

Regulation 2 Commencement

Regulation 2 provides that the Regulations commence on the commencement of Schedule 1 to the *Protection of the Sea Legislation Amendment Act 2008*. That date is a date to be proclaimed.

Regulation 3 Definitions

Subregulation 3(1) defines a number of terms for the purposes of the Regulations. Subregulation 3(2) provides that expressions used in both the Regulations and the Supplementary Fund Protocol have, unless the contrary intention appears, the same meaning as in the Supplementary Fund Protocol when used in the Regulations.

Part 2 Registration and enforcement of judgments

Division 2.1 Overview of Part

Regulation 4 Overview

Regulation 4 makes it clear that Part 2 of the Regulations, for purposes of section 46H of the Act, gives effect to Article 8 of the Supplementary Fund Protocol.

Division 2.2 Jurisdiction

Regulation 5 Jurisdiction of Federal Court and State and Territory Supreme Courts

Regulation 5 gives the following courts jurisdiction for matters arising under Part 2 of the Regulations:

- the Supreme Court of each State;
- the Supreme Court of each internal Territory; and
- the Federal Court of Australia.

The above courts are collectively defined as "Court" in the definition of that term in regulation 3.

Regulation 6 Court fees

This regulation provides that the fees to be paid to a Court in respect of a matter under Part 2 of the Regulations are the fees that are prescribed in relation to that matter under the Rules of the Court.

Division 2.3 How to apply to register judgment

Regulation 7 Application to register judgment

Regulation 7 permits a judgment creditor to apply to a Court to have registered in the Court any parts of a foreign judgment relating to compensation for pollution damage under the Supplementary Fund Protocol. Such an application may be made at any time within six years of the date of the judgment or the finalisation of any appeals relating to the judgment.

Regulation 8 Evidence in support of application to register judgment

Regulation 8 requires an application for registration of a foreign judgment to be supported by an affidavit to which is attached a copy of the judgment certified by the original court. If the judgment is not in English, an authenticated or certified translation must also be attached.

The information that must be contained in such an affidavit is set out in subregulation 8(3). This includes statements relating to the following matters:

- whether compensation payments and costs awarded by the original court have been satisfied;
- whether the judgment creditor can enforce the judgment of the original court in the country in which that court is situated;
- whether the judgment is no longer subject to ordinary forms of review;
- whether the original court had jurisdiction to entertain actions for compensation under the Supplementary Fund Protocol; and
- whether the pollution incident occurred after both Australia and the country in which the original court is situated became countries to which the Supplementary Fund Protocol applies.

Any amounts referred to in the affidavit that are in a foreign currency must be converted to Australian currency using the exchange rate determined by the Reserve Bank of Australia for the date on which the judgment of the original court was made.

Division 2.4 Enforcement of judgment

Regulation 9 Requirement to register judgment

Regulation 9 sets out conditions that are required to be met to enable a Court to make an order to register a foreign judgment. These conditions are that:

- the judgment was given by a court that had appropriate jurisdiction;
- the judgment related to a pollution incident that occurred after both Australia and the country in which the original court is situated became countries to which the Supplementary Fund Protocol applies;

- the judgment is enforceable in the country in which the original court is situated;
- the judgment is no longer subject to ordinary forms of review in the country in which the original court is situated; and
- the application to make the order is in accordance with regulations 7 and 8 of the Regulations.

An order to register a foreign judgment must specify a period within which the judgment debtor may apply to have the order set aside and state when the order takes effect.

Regulation 10 Judgment in respect of pollution damage and other matters

Regulation 10 provides that an order for a judgment may be registered under regulation 9 only in so far as the judgment relates to compensation for oil pollution damage under the Supplementary Fund Protocol.

Regulation 11 Amount for which judgment may be registered

Regulation 11 provides that the amount for which a judgment may be registered is the total of the four following components:

- unpaid compensation for pollution damage under the Supplementary Fund Protocol;
- unpaid costs awarded by the original court to the judgment creditor;
- amount of interest payable to the judgment creditor under the law of the country in which the original court is situated; and
- amount of reasonable costs of registration by the Court, including the costs of obtaining a certified copy of the judgment from the original court.

Regulation 12 Amount to be expressed in Australian currency

Regulation 12 provides that the amount for which a judgment may be registered must be expressed in Australian currency and, if converted from a foreign currency, must use exchange rates determined by the Reserve Bank of Australia.

Regulation 13 Security for costs

Regulation 13 provides that a Court, in addition to making an order for the registration of a foreign judgment, may also make an order requiring the judgment creditor to give security for costs of the application to have the judgment registered and for costs of any proceedings that may be brought to set aside the order to register the judgment.

Regulation 14 Notice of registered judgment

Regulation 14 requires a Court that has made an order to register a foreign judgment under regulation 9 to give the judgment debtor notice of the order. Such a notice must contain:

- details of the registered judgment and the order to register it;
- the name and address of the judgment creditor or anybody acting on his or her behalf;
- the rights of the judgment debtor to apply to have the order to register the order set aside; and

- the period within which such an application must be made and the judgment debtor's right to seek an extension of that period.

Regulation 15 When order to register judgment takes effect

Regulation 15 specifies that an order under regulation 9 to register a foreign judgment takes effect at the end of the period specified in the order or at the end of any further period determined by the Court (within which either period an application to have the order set aside may be made). However, if an application to set aside an order is unsuccessful, the order will take effect immediately after that application has been determined.

Regulation 16 Effect of order to register judgment

Regulation 16 provides that an order to register a foreign judgment has effect as a judgment of the Court in which it is registered as if it had been entered in that Court on the date of registration. Interest on the amount for which the judgment is registered accrues from the date of registration of the judgment in the same manner as if it was a judgment of the Court in which it is registered.

Division 2.5 How to set aside registered judgment

Regulation 17 Application for order to set aside registered judgment

Regulation 17 allows a judgment debtor to apply to a Court to have an order made under regulation 9 to register a foreign judgment set aside. Such an application must be made before the end of the period specified in the order or the end of any extended period granted by a Court.

Regulation 18 Order on application to set aside registered judgment

Regulation 18 sets out circumstances which would allow a Court to set aside an order to register a foreign judgment. These circumstances are:

- the rights under the judgment are not vested in the person who made the application for registration, that is, that person is not the judgment creditor;
- the person against whom the judgment was ordered to be registered is not the person who is subject to the obligations under the judgment, that is, that person is not the judgment debtor;
- at the date of the application to have the judgment registered:
 - the amount had been paid in full or in part;
 - the judgment was not enforceable in the country in which the original court was situated; or
 - the judgment was subject to ordinary forms of review in that country;
- that, as well as relating to compensation for pollution damage under the Supplementary Fund Protocol, the order relates to matters other than such compensation;
- the judgment was obtained by fraud;
- the judgment debtor was not given reasonable notice of the proceedings in the original court or a fair opportunity to defend them;

- the matter in dispute in the original court was the subject of a judgment in another court, whether Australian or otherwise, before the date of the judgment of the original court; or
- the judgment had not been registered in accordance with the Regulations.

Regulation 19 Stay of execution of order for registered judgment

Regulation 19 provides that a Court may order a stay of execution in relation to the registration of a foreign judgment instead of setting it aside if the Court finds that the only reason the order may be set aside is that the judgment was not enforceable under the law of the country in which the original court is situated or the judgment was still subject to ordinary forms of review.

Division 2.6 Other applications to the Court

Regulation 20 Further applications to register judgment

Regulation 20 provides that, unless the Court has ordered otherwise, a judgment creditor may make a further application to register a foreign judgment where an application to register the judgment has not been granted or an order to register the judgment has been set aside.

Regulation 21 Circumstance in which judgment amount has been paid in part

Regulation 21 provides that, if the only reason a Court has set aside an order to register a foreign judgment is because part of the total amount payable under the judgment has in fact been paid, then the Court must, on further application to register the judgment, make an order registering the judgment for the balance payable.

Regulation 22 Circumstance in which judgment provisions relate to supplementary compensation for pollution damage and other matters

Regulation 22 provides that, if the only reason a Court has set aside an order to register a foreign judgment is that, as well as relating to compensation for pollution damage under the Supplementary Fund Protocol, the order relates to matters other than such compensation, then the Court must, on further application to register the judgment, make an order registering the judgment for the provisions of the judgment that relate only to compensation for pollution damage under the Supplementary Fund Protocol.

Regulation 23 Issue of Court documents

Regulation 23 makes provisions to facilitate the registration of an Australian judgment in a foreign court.

Regulation 23 would apply where:

- a judgment has been entered in an Australian court for a claim for compensation for pollution damage under the Supplementary Fund Protocol;

- the person in whose favour the judgment has been entered decides to enforce the judgment in a court in another country to which the Supplementary Fund Protocol applies; and
- that person has applied to the Australian court for the issue of relevant documents.

The Registrar or other proper officer of the Australian court must issue the documents to the person who must pay to the court any fees charged for the issue of court documents.

Part 3 Contributions and late payment penalties

Regulation 24 Recovery of contributions and late payment penalties

Section 46Q of the Act provides that the regulations may make provision relating to payments to the Supplementary Fund, including the method of payment of contributions and late payment penalties, and the refund of overpayments.

Regulation 24 provides that the payment of contributions and late payment penalties may be made by cheque or by an electronic transmission. The contribution or late payment penalty may be paid in Australian currency or the currency of the place where the Supplementary Fund is located.

Part 4 Record keeping and returns

Regulation 25 Records to be kept

Regulation 25 applies to persons who receive after sea transport more than 150,000 tonnes of persistent oil in a calendar year. Such persons must keep records for each calendar year to enable them to make an annual return (as required by regulation 26) setting out the quantity of persistent oil received in the preceding calendar year. Such records must be retained for at least five years.

Failure to keep records is an offence with a maximum penalty of 10 penalty units for an individual and 50 penalty units for a body corporate.

Regulation 26 Copies of records to be given to Authority

Regulation 26 requires persons who receive more than 150,000 tonnes of persistent oil by sea in a calendar year to provide to the Australian Maritime Safety Authority (AMSA) a return by 1 April of the following year stating the quantity of persistent oil received. The return must be in accordance with the form set out in the Schedule to the Regulations.

Failure to provide the required return to AMSA by the required date is an offence with a maximum penalty of 10 penalty units for an individual and 50 penalty units for a body corporate. Strict liability applies to whether a person is required to submit a return and whether the form of the return is in accordance with the requirements of the form in the Schedule.

It is appropriate that strict liability applies to these elements of the offence. The offence is directed at persons (which includes bodies corporate) who receive by sea more than 150,000 tonnes of persistent oil in a calendar year. Such persons could reasonably be expected to be fully aware of the requirements of the legislation and to submit an annual return to AMSA.

Regulation 27 Authority may require documents

Regulation 27 authorises AMSA to require a person to produce to AMSA documents or copies of documents where such documents are relevant to ascertaining the liability of a person to make contributions to the Supplementary Fund.

Failure of a person to comply with a notice from AMSA requiring the production of documents or copies of documents is a strict liability offence with a maximum penalty of 10 penalty units for an individual and 50 penalty units for a body corporate.

It is appropriate that strict liability applies to this offence. It will place persons on notice that they should ensure that they comply with a notice from AMSA to provide documentation. Further, if this was not a strict liability offence, it would be difficult to prosecute as there would be difficulties in proving that a person intended not to comply with a notice from AMSA.

Schedule Return Form

The Schedule sets out the form of the return that, in accordance with subregulation 26(1), is required to be completed by persons who receive more than 150,000 tonnes of persistent oil by sea in a calendar year.