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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**PROTECTION OF THE SEA (HARMFUL ANTI-FOULING SYSTEMS) BILL 2006**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Transport and Regional Services,  
the Honourable Warren Truss, MP)

## PROTECTION OF THE SEA (HARMFUL ANTI-FOULING SYSTEMS) BILL

### OUTLINE

The Protection of the Sea (Harmful Anti-fouling Systems) Bill 2006 will implement the International Convention on the Control of Harmful Anti-fouling Systems on Ships (the 'AFS Convention'), and be cited as the *Protection of the Sea (Harmful Anti-fouling Systems) Act 2006* (the Act).

The AFS Convention will prohibit the use of harmful organotins in anti-fouling paints used on ships. It will also establish a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems. Amendments to the AFS Convention will be implemented through amendments to the Act.

Under the terms of the AFS Convention, a Party to the Convention is required to prohibit or restrict the use of harmful anti-fouling systems on ships flying its flag, as well as ships not entitled to fly its flag that operate under its authority, and all ships that enter a port, shipyard or offshore terminal of the Party. The definition of ship in the Convention is broad and covers vessels of any type operating in the marine environment including hydrofoil boats, air-cushion vessels, submersibles, floating craft, fixed or floating platforms, floating storage units and floating production storage and offloading units.

Annex 4, Regulation 1 of the AFS Convention stipulates that ships over 400 gross tonnage which are engaged in international voyages (excluding fixed or floating platforms, floating storage units (FSUs) and floating production storage and offloading units (FPSOs)) will be required to undergo an initial survey before the ship is put into service, or before an International Anti-fouling System Certificate is issued for the first time. These ships will also undergo a survey when the anti-fouling systems are changed or replaced.

Annex 4 Regulation 5 of the AFS Convention states that ships of 24 metres or more in length and of less than 400 gross tonnage which are engaged in international voyages (excluding fixed or floating platforms, FSUs and FPSOs) will be required to carry a Declaration on Anti-fouling Systems, signed by the owner or authorized agent. This Declaration will be accompanied by appropriate documentation, such as a paint receipt or a contractor invoice.

The Act will prohibit the application or reapplication of a harmful anti-fouling compound (HAFC) on an Australian flagged ship, or a foreign ship that is in an Australian shipping facility. From 1 January 2008, it will be an offence for an Australian flagged ship that does not comply with the anti-fouling requirements of the Act (excluding a ship that is a pre-2003 exempt platform) to enter or remain in any shipping facility or for a non-compliant foreign flagged ship to enter or remain in an Australian shipping facility.

### Financial impact statement

There are no financial impacts arising from this Bill.

# PROTECTION OF THE SEA (HARMFUL ANTI-FOULING SYSTEMS) BILL

## NOTES ON CLAUSES

### Clause 1: Short Title

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

### Clause 2: Commencement

Sections 1 and 2 will commence on Royal Assent.

The remaining sections (3 to 25) will commence on a day to be fixed by Proclamation. If those sections have not commenced by Proclamation within the 6 month period beginning on the day on which the AFS Convention enters into force for Australia, they will commence automatically on the first day after the end of that 6 month period. In this case, the Minister will be required to announce the commencement by notice published in the *Gazette*.

The AFS Convention will enter into force internationally 12 months after the date on which not less than 25 countries, the combined merchant fleets of which constitute not less than 25% of the gross tonnage of the world's merchant shipping, have become a Party to it. As at 31 May 2006, 16 States, Antigua & Barbuda, Bulgaria, Cyprus, Denmark, Greece, Japan, Latvia, Luxemburg, Nigeria, Norway, Poland, Romania, Saint Kitts and Nevis, Spain, Sweden, and Tuvalu, representing 17.27% of world shipping tonnage, were Parties to the AFS Convention.

### Clause 3: Definitions

Clause 3 defines a number of expressions for purposes of the Bill once enacted.

### Clause 4: Definition: compliance with anti-fouling requirements

Clause 4 provides that a ship *complies with the anti-fouling requirements* if one of the following conditions is met:

- the ship has no harmful anti-fouling compound applied to any part of its hull or external parts or surfaces; or
- any harmful anti-fouling compound applied to any part of its hull or external parts or surfaces has a coating that forms a barrier to the harmful anti-fouling compound leaching into the water.

Clause 3 of the Bill defines *harmful anti-fouling compound* (HAFC) as an organotin compound that acts as a biocide in an anti-fouling system. This definition is consistent with the current definition provided in Annex 1 of the AFS Convention.

### **Clause 5: Approving a body corporate as a survey authority**

Clause 5 provides that the Australian Maritime Safety Authority may approve a body corporate as a survey authority. Survey authorities are competent to undertake surveys of ships' anti-fouling systems at the request of the shipowner or agent and issue compliant ships with an anti-fouling certificate under the Act.

The instrument of approval is not a legislative instrument.

### **Clause 6: Scope of Act**

Clause 6 provides that the Act will extend to the external Territories of Australia and to acts, omissions, matters and things outside Australia

### **Clause 7: Act to bind Crown**

Clause 7 provides that the Act binds the Crown in each of its capacities but neither the Commonwealth, a State or a Territory is liable to be prosecuted for an offence under the proposed Act. However, the exemption from prosecution does not extend to employees or agents of the Commonwealth, States or Territories.

## **Part 2 – Application or use of harmful anti-fouling systems**

### **Clause 8: HAFC not to be applied to a ship**

Clause 8 sets out offences for applying a HAFC to any part of the hull or external parts or surfaces of an Australian ship (irrespective of the jurisdiction in which the application takes place), or applying a HAFC to a foreign ship in an Australian port, shipyard or offshore terminal.

Sub-clause 8(1) provides that if the application or re-application of a HAFC to a ship is caused by the negligent conduct of a person, then that person commits an offence for which the maximum penalty is 2,000 penalty units<sup>1</sup>. This offence is an ordinary offence.

The penalty set under this clause is intended to reflect both the serious risk to human health and the environment that use of HAFCs represents, and to provide an adequate penalty to discourage operations which may seek to minimise their costs by non-compliance with the requirements of the proposed legislation.

Sub-clause 8(2) provides that where such an application occurs, the master and the owner of the ship are each guilty of an offence of strict liability where the maximum penalty is 500 penalty units.

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<sup>1</sup> In accordance with subsection 4AA(1) of the *Crimes Act 1914*, a penalty unit is \$110.

The shipowner and the master of the ship are collectively responsible for ensuring that the provisions of this clause are not contravened, and both the master of the ship and the shipowner commit an offence if this clause is contravened. This clause places collective responsibility on the master of the ship and shipowner because the master of the ship has immediate responsibility for the ship, but is subject to the direction of the shipowner. For this reason it is immensely difficult to establish which party is the most directly responsible for the application of the compound to the ship. In some cases an owner may direct a master not to utilise a compliant paint for economic reasons. Alternatively, it may be the case that the owner has not put in place the appropriate systems or arrangements to facilitate the master's compliance with the Convention requirements. In such cases, although it is the master who has committed the actual act that breached the law, the owner is equally culpable.

The dichotomy of actions and responsibilities between the master and the owner has often been used to avoid prosecutions altogether. Where an offending ship is foreign owned, there is unlikely to be any jurisdictional presence of the owner, which will jeopardise any prosecution against an owner. The arrest of the master may encourage an owner to submit to the jurisdiction in exchange for dropping a prosecution against the master in order to allow the ship to sail.

In order to address these limitations, it has become standard practice in both domestic and international shipping law to utilise collective responsibility in these circumstances. This mechanism allows the prosecution of a Defendant who may have greater culpability and who would otherwise escape liability.

The penalty is also a penalty of strict liability which means that the fault elements of the offence are not taken into account, so there is no need to consider intention, knowledge, recklessness or negligence. The only defence to a strict liability offence is mistake or ignorance of facts. It is appropriate to use strict liability offences in this context because the shipping industry is an international and labour intensive industry, subject to different levels of regulation and enforcement from multiple sources. The complexity of these shipping arrangements makes the Defendant the best placed person to provide evidence on whether any culpability should attach to the physical offence. The above offences are strict liability offences because the matters contested (the elements of the offence that deal with the intention of the master of the ship or shipowner and whether or not the act was committed as a result of intention or negligence or was the result of an honest and reasonable mistake of fact) will be specifically and exclusively within the Defendant's knowledge, making it significantly easier and less expensive for the Defendant to disprove an unjust charge than for the Prosecutor to make out the fault elements of a just charge. In these circumstances it may be difficult and costly for the Prosecutor to attempt to prove the fault elements for many of the maritime offences in this Bill, and so the effectiveness of the regulatory regime established by the Bill may be undermined if the offences were not offences of strict liability.

The level of the penalty in sub-clause 8(2) has been set at a level deemed to be necessary to discourage the use of HAFCS on ships, and reflects the serious nature of the environmental and health risks posed by HAFCS.

The offences under Clause 8 are based on a two-tier approach with a substantial penalty differential in which strict liability and collective responsibility offences are subject to a lower penalty (500 penalty units for an individual) than the ordinary offences (2000 penalty units for an individual). This approach is consistent with the penalty provisions within the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Great Barrier Reef Marine Park Act 1975*.

It is not intended that this clause would prevail over similar State or Territory legislation. Sub-clause 8(4) provides that there is no offence under this proposed section if the particular conduct would constitute an offence under a law of a State or Territory.

### **Clause 9: Non-complying ships not to enter or remain in shipping facilities**

Clause 9 sets out offences for both Australian and foreign flagged ships that do not comply with the anti-fouling requirements in the proposed Act. Clause 9 does not apply to pre-2003 exempt platforms.

Under sub-clause 9(1) it is an offence for a non-compliant Australian ship to enter or remain in a port, shipyard or offshore terminal, anywhere in the world on or after 1 January 2008.

If the master or owner takes or permits such a ship to enter or remain in a port, shipyard or offshore terminal, then the master or owner commits an offence for which the maximum penalty is 2,000 penalty units.

Under sub-clause 9(2) if the ship remains in a shipping facility the master and the owner are each guilty of an offence for each day that the ship remains, with a maximum penalty of 1000 penalty units per offence.

Under sub-clause 9(3) a person commits an offence if a non-compliant foreign flagged ship enters an Australian port or shipping facility and they are the owner or master of the ship. The penalty for this offence is 2000 penalty units. Similarly a master or owner of a non-compliant foreign flagged ship that remains in an Australian shipping facility commits an offence for each day that the ship remains in the shipping facility. The maximum penalty per offence is 1000 penalty units.

These maximum penalties are set at this level to reflect the risk to human health and the environment that the use of HAFCs represent. The maximum penalty is also set at a level that is deemed to be necessary to counterbalance the potential cost savings which operators may gain by non-compliance with the proposed Act.

Sub-clause 9(5) of the Bill establishes that the master and the owner of a non-compliant Australian ship which enters a shipping facility commit an offence of strict liability. The maximum penalty for this offence is 500 penalty units. Sub-clause 9(6) establishes that the master and the owner of an Australian ship which remains in a shipping facility commit an offence of strict liability for each day that the ship remains in the facility. The maximum penalty per offence is 400 penalty units.

Sub-clause 9(7) provides that the master and the owner of a non-compliant foreign flagged ship commit an offence if the ship enters an Australian shipping facility. The maximum penalty for this offence is 500 penalty units. Sub-clause 9(8) provides that the owner and master each commit an offence for each day that a non-compliant ship remains in an Australian facility. The maximum penalty is 400 penalty units per offence.

It is appropriate to use strict liability for the above offences (sub-clauses (5), (6), (7) and (8)) in this context because the shipping industry is an international and labour intensive industry, subject to different levels of regulation and enforcement from multiple sources. The complexity of these shipping arrangements makes the Defendant the best placed person to provide evidence on whether any culpability should attach to the physical offence. The elements of the offence that deal with the intention of the master of the ship or shipowner and whether or not the act was committed as a result of intention or negligence or was the result of an honest and reasonable mistake of fact) will be specifically and exclusively within the Defendant's knowledge, making it easier and less costly for the Defendant to disprove an unjust charge than for the Prosecutor to make out the fault elements of a just charge. In these circumstances it would be difficult and costly for the Prosecutor to attempt to prove the fault elements for many of the maritime offences in this Bill, and so the effectiveness of the regulatory regime established by the Bill may be undermined if the offences were not offences of strict liability.

The offences that impose collective responsibility on both the shipowner and the master of the ship do so because of the shared responsibilities of the master and owner of the ship and the difficulty in ascertaining who is most directly responsible for the offence. While the master of the ship has immediate responsibility for the ship, he or she is subject to the direction of the owner.

The maximum penalties of these offences reflect the serious impacts on human health and the environment that these offences may have, and is consistent with the penalty provisions in many similar pieces of maritime legislation.

Under sub-clause 9(10) the above penalties do not apply:

- in an emergency situation where a ship enters or remains in a port for the purpose of securing the safety of the ship or for the purpose of seeking urgent medical attention for a person on board the ship;
- where a ship is under the control of a person, such as a Customs Officer, who is exercising powers under an Australian law; or
- to pre-2003 exempt platforms. In accordance with the definitions in clause 3, a ***pre-2003 exempt platform*** is a fixed or floating platform, FSU or FPSO that was constructed before 1 January 2003 and has not been in dry dock on or after that date. This reflects the corresponding Articles of the AFS Convention which recognise that, unlike most other ships, fixed or floating platforms, FSUs and FPSOs are not normally subject to a regular five-year drydocking cycle.

It is not intended that this clause would prevail over similar State or Territory legislation. Sub-clause 9(11) provides that there is no offence under this proposed section if the particular conduct would constitute an offence under a law of a State or Territory.

## **Part 3 – Anti-fouling certificates and anti-fouling declarations**

### **Clause 10: Issue and endorsement of anti-fouling certificates**

Clause 10 requires a survey authority (defined in clause 3 to mean AMSA or a body corporate approved by AMSA) to issue or endorse an International Anti-fouling System Certificate if, following survey of a ship with a gross tonnage of over 400, the survey authority is satisfied that the ship complies with the anti-fouling requirements (as defined by clause 4).

The certificate is not a legislative instrument.

### **Clause 11: Lapsing of anti-fouling certificates**

Clause 11 provides that an anti-fouling certificate ceases to be in force if:

- the ship ceases to be an Australian ship; or
- some time after the certificate was issued or last endorsed, a coating or treatment is applied to the ship, and the ship is taken to sea without the certificate being endorsed in respect of that coating or treatment.

### **Clause 12: Cancellation of anti-fouling certificates**

Clause 12 provides for the cancellation by AMSA of the anti-fouling certificate that is in force in respect of an Australian ship if AMSA believes that the ship does not comply with the anti-fouling requirements or the certificate was issued upon false or erroneous information. A written cancellation notice will take effect when it is served on the owner, agent or master of the ship.

AMSA may also by written notice served on the master, owner or agent of the ship require a cancelled certificate to be given to a specified person and may detain the ship until that requirement has been met.

The notice is not a legislative instrument.

### **Clause 13: Obligation to carry anti-fouling certificate**

Clause 13 sets out offences that apply if, on or after 1 January 2008, an Australian ship with a gross tonnage of 400 or more enters or leaves a port, shipyard or offshore terminal on an international voyage without a current anti-fouling certificate on board. If such a ship is taken, or is permitted to be taken, to or from a port, shipyard or offshore terminal by the master or the owner on an international voyage, then the master or owner commits an offence with a maximum penalty of 1,000 penalty units. If such a ship is taken to or from a port, shipyard or offshore terminal by another person, the master and owner are each guilty of a strict liability offence with a maximum penalty of 400 penalty units.

This clause imposes collective responsibility on both the shipowner and the master of the ship because of the shared responsibility of the shipowner and the master of the ship and the difficulty in ascertaining who is most directly responsible for the offence. While the master of



the ship has immediate responsibility for the ship, he or she is subject to the direction of the shipowner.

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

It is appropriate to use strict liability for the offence in sub-clause 13(2) because the Defendant the best placed person to provide evidence on whether any culpability should attach to the physical offence. The elements of the offence that deal with the intention of the master of the ship or shipowner and whether or not the act was committed as a result of intention or negligence or was the result of an honest and reasonable mistake of fact) will be specifically and exclusively within the Defendant's knowledge, making it easier and less costly for the Defendant to disprove an unjust charge than for the Prosecutor to make out the fault elements of a just charge. In these circumstances it would be difficult and costly for the Prosecutor to attempt to prove the fault elements for many of the maritime offences in this Bill, and so the effectiveness of the regulatory regime established by the Bill may be undermined if the offences were not offences of strict liability.

In no cases do these offences apply to "exempt platforms", that is, a fixed or floating platform, FSU or FPSO.

It is not intended that this clause would prevail over similar State or Territory legislation. Sub-clause 13(4) provides that there is no offence under this proposed section if the particular conduct would constitute an offence under a law of a State or Territory.

#### **Clause 14: Obligation to report damage etc. to ship**

Clause 14 requires the master and owner of an Australian ship in respect of which an anti fouling certificate is in force to report to AMSA any thing which affects, or might affect, the ship's compliance with the anti-fouling requirements. Where a report is not made within seven days of such an event, the master and owner are each guilty of a strict liability offence for each day that passes without notice being given. The maximum penalty per offence is 100 penalty units.

This offence imposes collective responsibility on both the shipowner and the master of the ship to ensure that the provisions in this clause are complied with because of the shared responsibilities of the shipowner and master of the ship and the difficulty in ascertaining who is most directly responsible for the offence.

The purpose of setting a low-level but cumulative penalty provision is to encourage the master of the ship and the shipowner to report such incidents promptly, and where an incident is not reported within the time limit granted, to encourage the shipowner and master of the ship to report the incident as a matter of priority and to make the prospect of trying to avoid the late penalty altogether in the hope that the incident will go undetected less attractive. The above offence in sub-clause 14(1) is a strict liability offence because the matters contested (the elements of the offence that deal with the intention of the master of the ship or shipowner

and whether or not the act was committed as a result of intention or negligence or was the result of an honest and reasonable mistake of fact) will be specifically and exclusively within the Defendant's knowledge, making it easier and less costly for the Defendant to disprove an unjust charge than for the Prosecutor to make out the fault elements of a just charge. In these circumstances it would be difficult and costly for the Prosecutor to attempt to prove the fault elements for many of the maritime offences in this Bill, and so the effectiveness of the regulatory regime established by the Bill may be undermined if the offences were not offences of strict liability.

It is not intended that this clause would prevail over similar State or Territory legislation. Sub-clause 14(3) provides that there is no offence under this proposed section if the particular conduct would constitute an offence under a law of a State or Territory.

The notice is not a legislative instrument.

### **Clause 15: Obligation to carry anti-fouling declaration**

Clause 15 sets out offences that apply if, on or after 1 January 2008, an Australian ship of at least 24 metres in length and with a gross tonnage of less than 400 enters or leaves a port, shipyard or offshore terminal on an international voyage without an anti-fouling declaration on board. If such a ship is taken, or is permitted to be taken, to or from a port, shipyard or offshore terminal by the master or the owner, then the master or owner commits an offence with a maximum penalty of 1,000 penalty units. If such a ship is taken to or from a port, shipyard or offshore terminal by another person, the master and owner are each guilty of a strict liability offence with a maximum penalty of 400 penalty units.

The maximum penalty and strict liability provisions within this clause have been developed to discourage shipping operators from attempting to avoid compliance with the proposed Act as a cost saving measure. These provisions are consistent with other penalty provisions in similar maritime legislation. The offence in sub-clause 15(2) is a strict liability offence because the matters contested (the elements of the offence that deal with the intention of the master of the ship or shipowner and whether or not the act was committed as a result of intention or negligence or was the result of an honest and reasonable mistake of fact) will be specifically and exclusively within the Defendant's knowledge, making it easier and less costly for the Defendant to disprove an unjust charge than for the Prosecutor to make out the fault elements of a just charge. In these circumstances it would be difficult and costly for the Prosecutor to attempt to prove the fault elements for many of the maritime offences in this Bill, and so the effectiveness of the regulatory regime established by the Bill may be undermined if the offences were not offences of strict liability.

In no cases do these offences apply to "exempt platforms", that is, a fixed or floating platform, FSU or FPSO.

It is not intended that this clause would prevail over similar State or Territory legislation. Sub-clause 14(4) provides that there is no offence under this proposed section if the particular conduct would constitute an offence under a law of a State or Territory.

The Declaration is not a legislative instrument.

## **Part 4 – Inspection and enforcement powers**

### **Clause 16: Inspectors and identity cards**

Clause 16 sets out the categories of persons who are inspectors for purposes of the proposed Act:

- surveyors appointed under the *Navigation Act 1912*;
- members, and special members, of the Australian Federal Police; and
- persons appointed by AMSA for purposes of the proposed Act and to whom AMSA must issue an identity card.

A person who has been issued with an identity card must carry this card at all times while exercising powers of inspection under the proposed Act, and a person who has been issued an identity card and ceases to be an inspector commits an offence if they fail to return the identity card to the issuing authority. The maximum penalty for this offence is one penalty unit. These provisions are intended to ensure that persons who are entitled to exercise powers of inspection under the Act may be easily identified as having the appropriate authorisation by the master of the ship and other parties responsible for the care and security of the ship.

The appointment is not a legislative instrument.

### **Clause 17: Inspection of ships**

Clause 17 sets out the powers that may be exercised by an inspector in relation to a ship in an Australian shipping facility. Those powers may be exercised for the following purposes:

- to ascertain whether the ship complies with the proposed Act;
- to ascertain whether the ship complies with the AFS Convention; and
- to ascertain whether a provision of a law of a country other than Australia giving effect to the AFS Convention is being complied with in respect of the ship.

In exercising his or her powers, an inspector must not act in a manner that is inconsistent with the AFS Convention.

Inspectors are authorised to carry out search and entry inspections on Australian and foreign flagged ships without judicially issued warrants, and in the absence of any reasonable suspicion that a ship may not be compliant with Australian shipping requirements. This is not an unusual circumstance in maritime regulation regimes, and forms part of a coastal State's port State control measures. This provision is consistent with the approach of comparable maritime legislation in Australia, and in that sense the provision merely extends the inspector's current search and entry powers to include the power to analyse substances that may indicate that a HAFC has been used on a ship.

There is a strict liability offence with a maximum penalty of 80 penalty units where a person fails to comply with a requirement of an inspector acting in accordance with the proposed Act.

The offence in sub-clause 17(4) is a strict liability offence because the matters contested (the elements of the offence that deal with the intention of the master of the ship or shipowner and whether or not the act was committed as a result of intention or negligence or was the result of an honest and reasonable mistake of fact) will be specifically and exclusively within the Defendant's knowledge, making it easier and less costly for the Defendant to disprove an unjust charge than for the Prosecutor to make out the fault elements of a just charge. In these circumstances it would be difficult and costly for the Prosecutor to attempt to prove the fault elements for many of the maritime offences in this Bill, and so the effectiveness of the regulatory regime established by the Bill may be undermined if the offences were not offences of strict liability.

. The maximum penalty has been set at a level which is thought necessary to ensure compliance with the Bill, once enacted.

### **Clause 18: Detention of ships**

Clause 18 authorises AMSA to detain a ship in an Australian port, shipyard or offshore terminal if AMSA believes that an offence under the proposed Act has been committed in respect of the ship. As the detention of a ship carries significant financial implications for the shipowner/charterer, sub-clause 18(2) provides a number of circumstances in which the detained ship must be released. These circumstances include if the charge against the shipowner/charterer has been discontinued for any reason or concluded, if AMSA determines that the ship should be released, or if the shipowner has provided satisfactory security for the release of the ship.

The master and owner are each guilty of a strict liability offence with a maximum penalty of 1,000 penalty units if a ship leaves an Australian port, shipyard or offshore terminal while it is still under detention.

The maximum penalty and strict liability provisions within this clause have been developed to discourage shipping operations from attempting to avoid compliance with the proposed Act. The detention of a ship carries significant financial implications for shipowners, so the penalty for failing to comply with the ship's detention must be substantial enough to encourage the shipowner to either provide financial security for the ship or to allow the ship to remain in an Australian shipping facility. If a foreign owned ship leaves the Australian jurisdiction without providing any form of security, then Australian courts will not be able to compel the shipowner or the master of the ship to submit to the findings of Australian courts.

The offence in sub-clause 18(4) is a strict liability offence because the matters contested (the elements of the offence that deal with the intention of the master of the ship or shipowner and whether or not the act was committed as a result of intention or negligence or was the result of an honest and reasonable mistake of fact) will be specifically and exclusively within the Defendant's knowledge, making it easier and less costly for the Defendant to disprove an unjust charge than for the Prosecutor to make out the fault elements of a just charge. In these circumstances it would be difficult and costly for the Prosecutor to attempt to prove the fault elements for many of the maritime offences in this Bill, and so the effectiveness of the regulatory regime established by the Bill may be undermined if the offences were not offences of strict liability.

This is an offence against both the shipowner and the master of the ship because of the shared responsibilities of the master of the ship and shipowner and the difficulty in ascertaining who is most directly responsible for the offence.

These provisions are consistent with other penalty provisions in similar maritime legislation.

#### **Clause 19: Compensation for undue detention or delay**

Clause 19 provides for the payment of reasonable compensation to the owner of a ship if the ship is unduly detained or delayed. This clause is intended to safeguard shipowners against financial loss arising from the inappropriate detention of ships, and reflects the significant financial implications for shipowners in the event a ship is detained.

### **Part 5 – Miscellaneous**

#### **Clause 20: Service of documents on master or owner of ship**

Clause 20 provides that documents served on the master or owner of the ship may be served on the ship's agent. A document served in this manner is deemed to have been served on the master or owner of the ship.

#### **Clause 21: Time limit for prosecution of offences**

Clause 21 provides that there is no time limit for bringing a prosecution for an offence relating to an Australian ship.

Prosecution for an offence relating to a foreign ship must be brought within three years of the commission of the offence. A prosecution shall be suspended or terminated if so required under Article 228(1) of the United Nations Convention on the Law of the Sea. In brief, Article 228(1) requires that, if the flag State of the foreign ship institutes proceeding for an offence against the said ship, prosecution for the particular offence against the said ship in an Australian court must be suspended. When proceeding instituted by the flag State have been brought to a conclusion, prosecution for the particular offence against the said ship in an Australian court must be terminated.

#### **Clause 22: Evidence in terms of the Convention**

Clause 22 is a standard provision to allow the Minister to issue a certificate which is *prima facie* evidence that a document set out in, or attached to the certificate, sets out the terms of the AFS Convention. A certificate under this section is not a legislative instrument

#### **Clause 23: Evidence of analyst**

Clause 23 provides that AMSA may appoint persons to be analysts for purposes of the proposed Act. Analysts may issue a certificate setting out specified information in relation to their investigation and analysis of a substance.

A certificate by an analyst is admissible in proceedings for an offence under the proposed Act so long as the person charged or their barrister or solicitor has been given a copy of the certificate together with a notice of intention to produce the certificate as evidence in the proceedings at least 14 days before seeking to admit the certificate.

If a certificate is admitted in evidence, the person charged may require the analyst who prepared the certificate to be called as a witness for the prosecution and to be subject to cross-examination if reasonable notice or a court order has been given.

The appointment is not a legislative instrument.

#### **Clause 24: Orders**

Clause 24 provides that AMSA may, by legislative instrument, make orders on any matter in respect of which regulations may be made, other than the imposition of penalties for contraventions of the orders.

#### **Clause 25: Regulations**

Clause 25 is a standard regulation-making provision. The Governor-General may make regulations for purposes of the proposed Act, in particular, for or in relation to any provisions of the AFS Convention which the proposed Act does not give effect to. The regulations may prescribe penalties for a breach of the regulations but the maximum penalty in such a case may not exceed 30 penalty units.