

## NATIONAL INTEREST ANALYSIS

### International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention)

#### Executive Summary

1. It is proposed that New Zealand become party to the *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001* (the Bunkers Convention or the Convention) developed by the International Maritime Organization (IMO).
2. The Bunkers Convention establishes strict liability when bunker oil (oil used as fuel for shipping) is released into the marine environment. In this event the shipowner will be strictly liable for reasonable economic costs incurred by any affected party and for reasonable costs of environmental mitigation. Under the Convention the process of making a claim is simpler and more certain than at present, facilitating adequate, prompt and effective compensation.
3. The system of insurance certificates required by the Convention is already in use in New Zealand so the implementation costs would be negligible.

#### Nature and timing of proposed treaty action

4. The Bunkers Convention was concluded by the IMO in 2001. By April 2008, 21 States were party to the Convention. The Convention met the criteria for entry into force (Article 14) on 18 November 2007 and is due to come into force internationally on 18 November 2008. The Convention is attached as Annex 1.
5. It is proposed that New Zealand accedes to the Bunkers Convention by an Instrument of Accession deposited with the IMO once Parliament has considered the Convention and implemented its requirements in domestic law.
6. The government wishes to introduce legislation into Parliament in 2009 (through amendments to the Maritime Transport Act 1994), to permit compliance with the provisions of the Bunkers Convention. If this legislation is passed, New Zealand could complete binding treaty action in 2010. The Convention would then enter into force in respect of New Zealand ninety days after the deposit of an Instrument of Ratification (Article 14).

#### Background

7. Bunker oil is the fuel used to power ships (as opposed to oil carried as cargo), plus lubricating oils and residues. Most larger ships use heavy fuel oil as their primary engine fuel. Heavy fuel oil is viscous, and is persistent and damaging when spilled in the marine environment. In New Zealand the three largest oil spill response operations of the last ten years — the *Dong Won 529* in 1999, and the *Jody F Millennium* and *Tai Ping* (where a prompt response avoided a spill) in 2002 — all involved bunker oil. The aggregate of response costs for these incidents was \$5 million.
8. The Bunkers Convention makes owners of ships of 1000 gross tonnes or larger strictly liable (regardless of fault) for the effects of any release of bunker oil (Article 3). Smaller vessels are not covered by IMO conventions. Compensation is available for costs of reasonable economic loss or reasonable measures undertaken, or to be undertaken, to

mitigate environmental damage. Compensation is available to any affected party, whether an individual, an organisation or government.

9. Liability for pollution damage under the Bunkers Convention is limited in two ways:
  - a) Maximum liability may be capped by any applicable national or international regime, such as the provisions of the LLMC Convention (Article 6 of the Bunkers Convention); and
  - b) Shipowners are not liable for damage arising wholly from acts of war, malicious acts or omissions by a third party, or the negligence of a government authority responsible for maintaining navigation aids (Article 3).
10. At present New Zealand is party to the 1976 LLMC Convention but the government is considering becoming party to the 1996 LLMC Protocol. In this event the effect on the Bunkers Convention will be to more than double the liability cap, for example from about \$NZ5 million to about \$NZ13 million for a typical Cook Strait ferry.

### **Reasons for New Zealand to become a Party to the Convention**

11. Strict liability for pollution from oil tankers was established by the International Convention on Civil Liability for Oil Pollution Damage (CLC, 1992), to which New Zealand is party. However, fuel for ships' own use was not covered. The Bunkers Convention was promulgated to close this gap, using the same principles of strict liability capped at an appropriate level (Preamble, sixth paragraph).
12. The status quo makes it difficult and costly for affected parties to file claims, and creates uncertainty regarding their ability to be recompensed for clean-up costs or economic loss. Affected parties may not receive compensation and clean-up costs may fall on the central and local government agencies that have carried out the clean up operation.
13. Parties to the Bunkers Convention include Germany, Greece, Iceland, Norway, Samoa, Singapore, Spain and the UK. Australia has signed the Bunkers Convention and the Australian government has recently announced its intention to ratify.

### **Advantages and disadvantages to New Zealand of the Convention entering into force and not entering into force**

#### *Advantages of treaty action*

14. The advantages to New Zealand of becoming party to the Bunkers Convention, compared with current arrangements, are given below.
  - a) Shipowners operating in New Zealand waters, and their insurers, have a clear responsibility to carry insurance and the certainty of limited liability (Article 3).
  - b) An insurance certificate scheme (already in operation in New Zealand) gives transparency to the insurance responsibilities of shipowners and their insurers (Article 7).
  - c) Any claims for economic loss or clean-up costs can be made either in New Zealand or in another jurisdiction (Article 10), and can be made against either the shipowner or the insurer (Article 7). This arrangement allows more adequate, prompt and effective compensation. It also substantially increases the probability of a successful claim in the event of the shipowner going into receivership.

- d) Third parties suffering economic loss because of a release of bunker oil have a simpler and more certain remedy available.
- e) Government and regulatory authorities suffering economic loss or facing clean-up costs because of a release of bunker oil have a simpler and more certain remedy available.

#### *Disadvantages of treaty action*

15. There are no significant disadvantages to New Zealand of becoming party to the Bunkers Convention. The only potential disadvantages identified are additional administration costs and insurance premiums. Both are insignificant, in the one case because there is already an insurance certificate system in place, and in the other because ships are already typically covered to this level by international shipping insurance.

#### *Disadvantages of not taking treaty action*

16. A disadvantage to New Zealand of not becoming party to the Bunkers Convention is that any claims for economic loss or clean-up costs may be difficult and costly to pursue.

#### **Legal obligations that would be imposed on New Zealand by the treaty action**

17. To become party to the Bunkers Convention there would need to be legislative amendments to the Maritime Transport Act 1994. Most of the legislative powers required to comply with the Bunkers Convention are already in place. However, legislation will be required to ensure that all elements of the Convention are implemented, for example:
  - a) Courts have jurisdiction to hear claims and there is clear guidance on where claims for compensation may be taken (Article 9)
  - b) Domestic law is obliged to recognise the final judgments from courts in other state parties in respect of Convention claims (Article 10)
  - c) Domestic legislation aligns with the liability regime established under the Bunkers Convention (Articles 3 and 5)
  - d) Domestic legislation places two requirements on owners of ships of 1000 gross tonnes or more (Article 7):
    - registered owners required to have insurance or other financial security to cover their liability under the Convention; and
    - certificates of insurance issued by a State Party carried on board ships (or available on a web-based system) to verify that insurance exists.
18. The Bunkers Convention does not allow Parties to make a reservation upon ratification.
19. There is no dispute resolution mechanism in the Bunkers Convention.

## **Economic, social, cultural and environmental costs and effects of the treaty action**

### Economic

20. The overall effect of the Bunkers Convention on the New Zealand economy would be negligible. There will be some benefits through improving the speed and efficiency of the compensation process in the event of a spill.

### Environmental

21. The Convention would strengthen the New Zealand Transport Strategy policy objectives of assisting economic development and ensuring environmental sustainability. In the event of a spill, economic development would be supported by the readier availability of compensation and mitigation of environmental damage could be more readily funded.

### Social and Cultural

22. No discernable social or cultural costs or effects are expected as a result of acceding to the Protocol.

## **Costs to New Zealand of compliance with the treaty**

23. No significant compliance costs have been identified.
  - a) New Zealand has anticipated elements of the Convention. New Zealand already has a strict liability regime for bunker oil spills under sections 344 and 345 of the Maritime Transport Act. Marine protection rules made under the Maritime Transport Act already requiring large ships to have liability cover for bunker oil spills. Maritime New Zealand does not expect significant additional costs associated with administering the insurance certificate scheme.
  - b) No significant changes in insurance costs are expected. Liability insurance premiums are set internationally by the Protection & Indemnity clubs based on claims from international shipping incidents. New Zealand becoming party to this Convention will not influence these premiums.
24. Few, if any, New Zealand shipowners will be impacted by the new liability requirements because their insurance cover is already adequate.
25. There would be no significant compliance costs to shipowners or their insurers, who would have the certainty of an upper limit to claims.
26. In the event of an exceptional release of bunker oil, in excess of the liability cap, excess costs would continue to fall on the New Zealand government.
27. No hidden administration costs have been identified.

## **Consultation with the community and parties interested in the treaty action**

28. The following Government agencies were consulted in relation to this paper: the Ministry for the Environment, the Ministry of Economic Development, the Ministry of Fisheries, the Ministry of Agriculture and Forestry, Treasury, New Zealand Customs Service, the Ministry of Civil Defence and Emergency Management, the Department of Internal Affairs, the Ministry of Justice, the New Zealand Defence Forces, the Ministry of Defence, the Department of Conservation, the Department of Labour, the Ministry of Foreign Affairs and

Trade, Te Puni Kōkiri, the Ministry of Tourism, the Environmental Risk Management Agency, Maritime New Zealand, and the New Zealand Fire Service. The Department of Prime Minister and Cabinet was informed.

29. There has been thorough consultation with the maritime transport sector, including local shipping, maritime unions, overseas shipping, shipping users and ports. This included a Maritime Conventions Forum in 2007, and public meetings following the release of the discussion document *Four International Maritime Environmental Conventions/Protocols* (Four Conventions) for public comment in November 2007. Some 420 copies of the discussion document were distributed. By the end of the consultation period, on 18 January 2007, ten public submissions had been received. Eight support the Bunkers Convention and two make no comment.

#### **Subsequent protocols and/or amendments to the treaty and their likely effects**

30. Article 16 of the Bunkers Convention allows the IMO or one third of the State Parties to call a conference to revise or amend the Convention.
31. Amendments to the Convention may be adopted by agreement of a two-thirds majority of the Contracting States to the Convention.
32. No amendments to the Convention are anticipated. Any amendment would be considered on a case-by-case basis and subject to the usual domestic approval process.

#### **Withdrawal or denunciation provision in the treaty**

33. The Bunkers Convention may be denounced (Article 15) at any time after accession. Denunciation comes into force twelve months after deposit of the appropriate instrument.
34. Any decision to denounce the Bunkers Convention would be subject to the normal domestic approvals process.

#### **Adequacy Statement**

35. The Ministry of Transport confirms this National Interest Analysis is adequate and that the principles of the Code of Good Regulatory Practice and the regulatory impact analysis requirements have been met.