

These notes refer to the Merchant Shipping (Pollution) Act 2006 (c.8) which received Royal Assent on 30 March 2006

MERCHANT SHIPPING (POLLUTION) ACT 2006

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Merchant Shipping (Pollution) Act 2006 which received Royal Assent on 30 March 2006. They have been prepared by the Department for Transport in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. These notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

SUMMARY

3. Section 1 confers on Her Majesty power to make an Order in Council which will enable the UK to implement revisions of the international arrangements relating to compensation for oil pollution from ships.
4. Section 2 confers on Her Majesty power to make an Order in Council to enable the UK to implement Annex VI of the MARPOL Convention (Regulations for the Prevention of Air Pollution from Ships) by amending section 128(1) of the Merchant Shipping Act 1995 (c.21) ("MSA 1995").
5. Section 3 amends and clarifies section 178(1) of the MSA 1995 relating to the limitation period for claiming compensation from the International Fund for Compensation for Oil Pollution Damage.

BACKGROUND

Section 1

6. Section 1 provides for the United Kingdom to implement the Supplementary Fund Protocol and any new instruments which modify or replace the existing oil pollution compensation regime.
7. Chapters 3 and 4 of Part 6 of the MSA 1995 respectively implement the International Convention on Civil Liability for Oil Pollution Damage 1992 ("the Liability Convention") and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 ("the Fund

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Convention”). These instruments form the basis of the international regime for compensation for oil pollution from ships. Oil is defined in the Liability Convention as meaning any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil. This definition applies throughout the regime. Ships are also defined in the Liability Convention, with the effect that the regime generally applies only to oil tankers.

8. The Liability Convention makes shipowners strictly liable (i.e. liable even in the absence of fault) for pollution damage arising from the carriage of oil in bulk as cargo by sea. The limit of liability ranges from £3.7 million¹ to £74 million depending on the tonnage of the ship. Owners of ships registered in States that are party to the Liability Convention, or operating in waters of such States, and carrying more than 2,000 tons of oil as cargo are required to maintain insurance to meet their limit of liability.

9. The Fund Convention provides additional compensation when the amount available under the Liability Convention is not sufficient to meet the costs of damage arising from an incident. The Fund also provides compensation if liability is not established under the Liability Convention. This additional compensation is paid by major receivers of oil (more than 150,000 tonnes per annum) in the States that are party to the Fund Convention. The Fund is administered by a Director and a Secretariat and its headquarters are situated in London. In many of the 135 incidents in which the Fund has been involved since it was established in 1978 most compensation for eligible claims has been paid without claimants having to take legal action.

10. The overall amount of compensation available through the Liability and Fund Conventions is £166 million per incident. The international regime greatly simplifies the process of obtaining compensation for claimants and in most cases without the need for victims to take legal action. However, in a small number of recent cases, the total cost of damage arising from an incident has exceeded this amount. More frequently, full payment of claims has been delayed because of the need to ensure that the overall amount of compensation available is not exceeded. The total cost of damage arising from an incident may not be known for several years. One of the underlying principles of the regime is that all claims are treated equally. In order to ensure that all claimants receive payment for the same proportion of their claim, compensation is often paid at a reduced rate until the overall cost of the incident is known. Claims from the most recent major spill (the *Prestige*, affecting Spain, France and Portugal in 2002) will greatly exceed the total amount available with the effect that claimants will receive around 30% of the amount claimed.

¹ All references in these notes to compensation limits in sterling are approximate. The exact amount of compensation available through the Conventions used the International Monetary Fund's Special Drawing Rights (SDRs). These notes use the sterling equivalents as at 1 March 2006.

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11. In May 2003 a protocol to the Fund Convention was adopted at the International Maritime Organization. The Protocol, known as the Supplementary Fund Protocol, was published and presented to Parliament as Command Paper 6245. The Protocol provides further compensation, up to an overall total of £614 million, in the event that the costs of damage arising from an incident exceed the compensation available under the Liability and Fund Conventions. This additional compensation will be subject to the same procedural and administrative rules as the underlying regime. States must be party to the underlying regime in order to become a party to the Supplementary Fund Protocol although the Protocol is an optional third tier for those States who feel they need the higher level of compensation and who accept that their contributors may have to meet a supplementary call for levies for compensation payments following major incidents in any State party to the Protocol.

12. The United Kingdom was not among the first phase of ratifying States which brought the Protocol into force in March 2005. The United Kingdom's exposed coastline is vulnerable to spills from tankers and three of the world's worst oil spills have occurred in United Kingdom waters (the *Torrey Canyon*, Isles of Scilly 1967; the *Braer*, Shetland 1993; and the *Sea Empress*, Milford Haven 1996).

13. EU Council Decision 2004/246/EC of 4 March 2004 ("the Council Decision") authorised Member States to ratify the Supplementary Fund Protocol within a reasonable time and if possible before June 2004. Without the power in section 1 of the Act the United Kingdom has been unable to fulfil this obligation. The Government's proposal to implement the Protocol was the subject of a public consultation in 2004 (Copies of that consultation are available on the DfT website www.dft.gov.uk).

14. The international oil pollution compensation regime is reviewed and amended from time to time. This can result in the development of new treaties, as in the case of the Supplementary Fund Protocol. Any review would be unlikely to lead to any major alteration in the legal structure that currently exists under the present regime. A review would be likely to consider the balance of financial contribution made under the regime by shipowners and the oil industry. It would also be likely to address a number of specific administrative issues to improve the operation and effectiveness of the Fund.

Section 2

15. Section 2 of the Act provides for the United Kingdom to implement internationally agreed measures to reduce emissions of air pollution from ships.

16. Annex VI was introduced into the International Convention on the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 relating thereto (the MARPOL Convention) by the Protocol of 1997. The object of Annex VI and the Technical Code on Control of Emission of Nitrogen Oxides from Marine Diesel Engines (NO_x Technical Code) referred to in Annex VI is to control, on an

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international basis, emissions to the atmosphere from ships and offshore installations.

17. Annex VI provides for all relevant ships to be certified, maintained and operated in accordance with Annex VI and the NO_x Technical Code. It limits the sulphur content of fuel used on board ships in a Sulphur Oxides Emission Control Area.

18. The MARPOL Convention is an International Maritime Organization treaty. The United Kingdom acceded to the Protocol of 1997 on 5 August 2004 and Annex VI entered into international force in May 2005.

COMMENTARY ON SECTIONS

Section 1

19. Section 1 enables Her Majesty by Order in Council to give effect to revisions of the international arrangements relating to compensation for oil pollution from ships.

20. *Subsection (1)* defines the three instruments which establish the international arrangements relating to compensation for oil pollution from ships. These are the Supplementary Fund Protocol, the Liability Convention and the Fund Convention. The latter two instruments are implemented in Chapters 3 and 4 respectively of Part 6 of the MSA 1995 and so the definitions in this Act use the definitions contained in that Act.

21. *Subsection (2)* contains the enabling powers which provide for implementation, by Order in Council, of:

- a) the Supplementary Fund Protocol
- b) instruments which revise or replace any or all of the three instruments which form the international oil pollution compensation regime (i.e. the Liability Convention, the Fund Convention and the Supplementary Fund Protocol).

22. The power in paragraph (b) will allow the UK to implement any new instrument governing liability or compensation for oil pollution which revises or amends the existing regime. Such instruments may arise out of a review of the existing international oil pollution compensation regime (see paragraph 14 of these notes). Use of this provision will be subject to affirmative resolution procedure (see paragraph 33 of these notes).

23. *Subsection (3)* provides that any provision in an Order in Council under subsection (2) may not come into force until the treaty in question has been ratified by the United Kingdom. But this does not prevent particular implementing provisions coming into force sooner if this is necessary in order for the United Kingdom to be

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able to ratify it. Under the Fund Convention and Supplementary Fund Protocol, States are required to provide information relating to receipts of oil to the Secretary General of the International Maritime Organization at the time of ratification. If future instruments contain similar obligations it may be necessary to make provision for obtaining such information prior to ratification.

24. *Subsection (4)* specifies particular provisions which may be included in an Order in Council under subsection (2).

25. *Paragraph (a)* makes it clear that an Order in Council may require contributions to be paid to either the Supplementary Fund or another fund which may be established under instruments which modify or replace any or all of the Supplementary Fund Protocol, the Liability Convention and the Fund Convention. It is likely that this provision would be used in a similar way to section 173(1) of the MSA 1995, which deals with contributions to the current International Fund

26. *Paragraph (b)* allows an Order in Council to contain provision enabling the Secretary of State to make an order by statutory instrument in an Order in Council under subsection (2). Such a provision may be used to enable the United Kingdom to implement the procedure in Article 24 of the Supplementary Fund Protocol. This procedure is expected to be replicated in any instruments which revise the Liability Convention, the Fund Convention or the Supplementary Fund Protocol. The procedure provides for increases to be made to the limits of liability or compensation as set out in each instrument, without the need to revise or amend the instrument in question. Similar procedures appear in the Liability Convention (Article 15) and the Fund Convention (Article 33).

27. *Paragraph (c)* provides for the delegation of functions that could be exercised under an Order in Council.

28. *Paragraph (d)* provides for an Order in Council to create summary offences and offences which may be tried either summarily or on indictment. Where conviction is on indictment, any term of imprisonment must not exceed two years.

29. *Paragraph (e)* allows for provisions made by or under an Order in Council to apply beyond the territorial sea.

30. *Paragraph (f)* provides for an Order in Council to make provision that applies to or affects the interests of the Crown.

31. *Subsection (5)* enables an Order in Council made under subsection (2) to provide for various ancillary matters:

- *Paragraph (b)* provides for an Order in Council to modify or apply provisions of other enactments or instruments, including the MSA 1995. It is envisaged that the Order in Council which will give effect to the

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Supplementary Fund Protocol will amend sections in Chapter 4 of Part 6 of the MSA 1995 relating to the Fund Convention. Implementation of any instruments which revise the oil pollution compensation regime are also likely to entail amendment of Chapters 3 and 4 of Part 6 of the MSA 1995 and Schedule 5 to that Act

- *Paragraph (c)* is a standard paragraph providing for other provisions (incidental, supplemental, consequential or transitional) which may be necessary as a result of giving effect to the instruments set out in subsection 2.
- *Paragraph (d)* provides for provisions made under subsection (2) to be extended to British possessions. The usual process when ratifying international agreements is for the United Kingdom to ratify on behalf of the overseas territories and crown dependencies if they wish. Possessions then have a choice as to whether they have the United Kingdom legislation extended to them or whether they implement through their own legislation.

32. *Subsections (6) and (7)* explain the Parliamentary procedure to be followed in respect of an Order in Council made under subsection (2).

33. Under *subsection (6)(a)* an Order in Council which relates to any instrument which revises or replaces the Liability Convention, the Fund Convention or the Supplementary Fund Protocol will be subject to the affirmative resolution procedure.

34. Under *subsection (6)(b)* and *subsection (7)(a)* an Order in Council giving effect only to the Supplementary Fund Protocol will be subject to the negative resolution procedure. This will facilitate the prompt implementation of the Supplementary Fund Protocol.

35. *Subsections (6)(c) and (7)(a)* provide that Orders in Council relating only to the law in British possessions require no formal Parliamentary procedure.

36. Subsection (7)(b) provides that any order made under an Order in Council by virtue of subsection (4)(b) (see paragraph 26 of these notes) is subject to the negative resolution procedure.

37. The intention is to make an Order in Council to implement the Supplementary Fund Protocol as soon as possible. The Supplementary Fund Protocol is already in force in at least 8 States; under Article 21(2), the Protocol will enter into force in respect of the United Kingdom 3 months after the date on which the United Kingdom ratifies the Protocol.

38. Copies of an advanced draft of the Order in Council intended to implement the Supplementary Fund Protocol under section 1 were made available during the

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consideration of the Bill by each House.

Section 2: Power to give effect to Annex VI of the MARPOL Convention

39. Section 2 of the Act enables Her Majesty by Order in Council to implement Annex VI (Regulations for the Prevention of Air Pollution from Ships) of the MARPOL Convention (see paragraphs 15 to 18).

40. *Subsection (2)* inserts a specific reference to Annex VI of the MARPOL Convention in section 128(1) of the MSA 1995. This will enable Annex VI to be implemented using the same powers that have been used to implement the other annexes of the MARPOL Convention.

41. It is expected that Annex VI of the MARPOL Convention will be implemented by regulations after an Order in Council has been made giving the power to make such regulations.

Section 3: Limitation period for claims against the International Fund

42. Section 3 amends section 178(1) of the MSA 1995. Article 6 of the Fund Convention provides that rights to compensation under that Convention shall be extinguished unless an action is brought within 3 years from the date when the damage occurred. The corresponding provision in section 178 of the MSA 1995 provides that no action to enforce a claim shall be entertained by a court in the United Kingdom unless the action is commenced not later than three years after the claim against the Fund arose.

43. While the intention when section 178 was originally enacted was to give effect to Article 6 of the Fund Convention, it is thought that there is a risk that section 178(1) could be read as referring to the time when it is established that full compensation for oil pollution damage cannot be obtained from the shipowner. Under section 175(1) of the MSA 1995, the Fund is only liable if a person suffering damage has been unable to obtain full compensation under section 153 of that Act (i.e. through the shipowner or insurer under the Liability Convention).

44. Section 3 of the Act therefore amends section 178(1) to make it absolutely clear that the time limit contained in the MSA 1995 is consistent with the text of the Convention.

Section 4: Short title, commencement and extent

45. *Subsection (2)* provides for commencement of the Act. Sections 1(2)(b) and 3 will come into force 2 months after the day on which the Act was passed.

46. Sections 1(2)(a) and 2 entered into force on the day on which the Act was passed. This will allow the United Kingdom to implement the Supplementary Fund Protocol and Annex VI to MARPOL promptly.

47. *Subsection (3)* provides for amendments made by section 3 to be extended to

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British possessions under section 315 of the MSA 1995.

HANSARD REFERENCES

48. The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

Stage	Date	Hansard reference
<i>House of Lords</i>		
Introduction	25 May 2005	Vol 672 Col 463
Second Reading	14 June 2005	Vol. 672 Cols. 1126-1150
Committee	11 July 2005	Vol. 673 Cols. 121-134
Report	17 October 2005	Vol. 674 Cols. 576-581
Third reading	26 October 2005	Vol. 674 Cols. 1169-1170
<i>House of Commons</i>		
Introduction	26 October 2005	
Second Reading	25 January 2006	Vol. 441 Col 1445-1476
Committee	7 February 2006	Hansard Standing Committee A
Report and Third Reading	7 March 2006	Vol. 443 Cols. 736-746
Royal Assent	30 March 2006	Commons: Vol 444 Col 1061 Lords: Vol 680 Col 861

TERRITORIAL EXTENT

49. The Act extends to the whole of the United Kingdom.

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4/2006 334180 19585