

NOTICE 353 OF 2009

DEPARTMENT OF TRANSPORT

**PUBLICATION FOR PUBLIC COMMENTS: MERCHANT SHIPPING
(INTERNATIONAL OIL POLLUTION COMPENSATION FUND)
(CONTRIBUTIONS) BILL, 2009**

The Minister of Transport is hereby publishing the abovementioned draft Bill for public comments. Interested persons are requested to submit written comments on the abovementioned draft Bill by not later than 22 May 2009.

Comments should be posted to the Director-General, Department of Transport for the attention of Adv. Adam Masombuka at:

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REPUBLIC OF SOUTH AFRICA

MERCHANT SHIPPING (INTERNATIONAL OIL POLLUTION
COMPENSATION FUND) (CONTRIBUTIONS) BILL, 2009

(As introduced in the National Assembly as a section 77 Bill)

(The English text is the official text of this Bill)

(MINISTER OF FINANCE)

BILL

To impose contributions payable under the 1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, and for related matters.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

PART 1

PRELIMINARY

Definitions

1. (1) In this Act, unless the context indicates otherwise—
- (i) "Authority" means the South African Maritime Safety Authority established by section 2(1) of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998);
 - (ii) "Minister" means the Minister of Transport;
 - (iii) "the Convention" has the meaning it has in section 2 of the Fund Act;
 - (iv) "the Fund" has the meaning it has in section 1 of the Fund Act;

- (v) "the Fund Act" means the Merchant Shipping (International Oil Pollution Compensation Fund) Act, 2009;
- (vi) "the Republic" has the meaning it has in section 1 of the Fund Act;
- (vii) "this Act" includes the regulations made under section 17.

(2) Unless the context indicates otherwise, an expression used in this Act and in the Convention (whether or not a particular meaning is given to it by the Convention) has, in this Act, the meaning it has in the Convention.

Application of Fund Act

2. Sections 3, 4, 5, 6 and 11 of the Fund Act apply in relation to this Act in a corresponding way to the way in which they apply to the Fund Act.

PART 2

CONTRIBUTIONS TO FUND

Division 1—Imposition of contributions

Imposition of contributions

3. Contributions referred to in Article 10 of the Convention and payable to the Fund because of this Part are imposed by this section.

Division 2—Liability to make contributions

Liability to make contributions to Fund

4. (1) Article 10 of the Convention (other than subparagraph 2(b)), in so far as it relates to ports or installations in the Republic, has the force of law as part of the law of the Republic.

(2) For Article 10 of the Convention as applied by subsection (1)—

(a) reference to a port is taken to include reference to any harbour or place;

(b) the person liable to pay contributions to the Fund because of this Part is—

(i) in the case of contributing oil being imported into the Republic, the importer; and

(ii) otherwise, the person receiving the contributing oil; and

(c) a person (***the first person***) is an associated person in relation to another person (***the second person***) if, and only if—

(i) both the first person and the second person are bodies corporate; and

(ii) the first person is a subsidiary of the second person.

(3) In this section—

"body corporate" means a body incorporated under the law of the Republic or another state;

"importer" means the person by whom or on whose behalf the contributing oil in question is entered for customs or excise purposes on importation, and "import" has a corresponding meaning;

"subsidiary", in relation to a body corporate, means a subsidiary within the meaning of section 1(3) of the Companies Act, 1973 (Act No. 61 of 1973), subject, in the case of a body incorporated outside the Republic, to any necessary modifications of that provision.

Amount of contributions

5. Paragraphs 2 and 3 of Article 12 of the Convention, in so far as they relate to the Republic, have the force of law as part of the law of the Republic.

When contributions are due and payable

6. Contributions required to be paid by a person because of this Part are due and payable on the day or days ascertained under paragraph 4 of Article 12 of the Convention and notified to the person by the Fund.

Security for payment

7. The regulations may make provision about requiring a person who is or may be liable to make contributions required to be paid because of this Part to give security for payment to the Fund.

Offence (failing to give security)

8. (1) A person commits an offence if—

- (a) the person is required to give security for payment under regulations made for the purposes of section 7; and
- (b) the person, without reasonable excuse, refuses or fails to give the security.

(2) The offence is punishable upon conviction by a fine or by imprisonment for a period not exceeding two years.

Division 3—Recovery of contributions**Late payment penalty**

9. If—

- (a) any annual contribution payable by a person because of this Part remains unpaid after the time when it became due for payment; and

(b) the Internal Regulations of the Fund have fixed, or provided for a method of determining, one or more annual interest rates (*IR rates*) in accordance with paragraph 1 of Article 13 of the Convention, the person is liable to pay to the Fund, by way of penalty, an amount (*late payment penalty*) calculated at the annual percentage rate equal to whichever of the IR rates is applicable to the person's circumstances, on the amount unpaid, computed from that time until payment is made.

Recovery of contributions and late payment penalty

10. (1) These amounts may be recovered by the Fund as if they were recoverable as debts due to the State:

- (a) contributions that are required to be paid because of this Part and that are due and payable;
- (b) late payment penalty that is due and payable.

(2) To avoid doubt, the Fund is not entitled to recover from the State any costs or other expenses it incurs in recovering an amount referred to in subsection (1).

Regulations about recovery of contributions

11. (1) The regulations may make provision about—

- (a) the way in which contributions required to be paid because of this Part may be paid;

- (b) the way in which late payment penalty may be paid; and
- (c) refunds of, or of overpayments of, contributions.

(2) Without limiting paragraphs (a) and (b) of subsection (1), regulations made for the purposes of those paragraphs may make provision about the making of payments using electronic funds transfer systems.

Division 4—Records and returns

Authority to inform Fund

12. (1) Article 15 of the Convention, in so far as it relates to the Republic, has the force of law as part of the law of the Republic.

(2) For paragraphs 1 and 2 of Article 15 of the Convention as so having the force of law, an obligation imposed on the Republic is taken to be imposed on the Authority.

(3) The Authority may inform the Fund of any additional matters relating to contributions that the Authority thinks appropriate.

Record-keeping and returns

13. (1) The regulations may make provision about requiring a person—

- (a) to keep and retain records, if the records are relevant to ascertaining the person's liability to make contributions required to be paid because of this Part;
- (b) to give information and returns to the Authority, if the information or returns are relevant to ascertaining a person's liability to make contributions required to be paid because of this Part; and
- (c) to—
 - (i) produce documents to the Authority; or
 - (ii) make copies of documents and give the copies to the Authority,if the documents are relevant to ascertaining a person's liability to make contributions required to be paid because of this Part.

(2) The regulations may require information or returns given to the Authority in accordance with a requirement covered by subsection (1)(b) to be verified by solemn declaration.

Self-incrimination

14. (1) A person is not excused from giving information or a return or producing a document or a copy of a document under regulations made for the purposes of this Division on the ground that the information or return or the production of the document or copy might tend to incriminate the person or expose the person to a penalty.

(2) However—

- (a) giving the information or return or producing the document or copy;
or
- (b) any information, return, document or thing obtained as a direct or indirect consequence of giving the information or return or producing the document or copy,

is not admissible in evidence against the person in—

- (i) criminal proceedings other than proceedings in terms of section 15 or 16; or
- (ii) proceedings for recovery of an amount of late payment penalty.

Offence (failing or refusing to give information or returns)

15. (1) A person commits an offence if—

- (a) the person is required to give information or a return under regulations made for the purposes of this Division; and
- (b) the person, without reasonable excuse, refuses or fails to give the information or return.

(2) The offence is punishable upon conviction by fine or by imprisonment for a period not exceeding three years.

Offence (false information or returns)

16. (1) A person commits an offence if—

- (a) the person gives information or a return that, to the person's knowledge, is false or misleading in a material particular; or
- (b) the person recklessly gives information or a return that is false or misleading in a material particular; and
- (c) the information or return is given in purported compliance with regulations made for the purposes of this Division.

(2) The offence is punishable upon conviction by a fine or by imprisonment for a period not exceeding five years.

PART 3 MISCELLANEOUS

Regulations

17. (1) The Minister, with the consent of the Minister of Finance, may make regulations prescribing matters—

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) The regulations may prescribe penalties of a fine or of imprisonment for a period not exceeding 12 months for offences in terms of the regulations.

Jurisdiction (offences)

18. (1) An offence in terms of this Act is taken, for purposes in relation to jurisdiction of a court to try the offence, to have been committed within the area of jurisdiction of the court in which the offence is prosecuted.

(2) Despite anything to the contrary in any law, a magistrates' court has jurisdiction to impose any penalty prescribed by this Act.

Short title and commencement

19. (1) This Act is called the Merchant Shipping (International Oil Pollution Compensation Fund) (Contributions) Act, 2009.

(2) This Act commences on a day fixed by the President by proclamation in the *Gazette*, being a day not before the day on which the Convention enters into force for the Republic.

**MEMORANDUM ON THE OBJECTS OF THE MERCHANT SHIPPING
(INTERNATIONAL OIL POLLUTION COMPENSATION FUND)
(CONTRIBUTIONS) BILL**

1 PURPOSE OF BILL

1.1 This is a Money Bill within the meaning of section 77 of the Constitution. It gives effect to the financing (contributions) provisions of 1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (*the Fund Convention*). The Bill forms part of a package of measures designed to give effect to South Africa's obligations under the Fund Convention and the 1992 Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969 (*the Civil Liability Convention*). Parliament has already approved the two protocols under section 231(2) of the Constitution. The full package includes the Merchant Shipping (International Oil Pollution Compensation Fund) Bill (*the Fund Act*) and the Merchant Shipping (Civil Liability Convention) Bill, which gives effect to the Civil Liability Convention.

1.2 The main object of this Bill is to impose, and regulate the payment and recovery of, contributions payable under the Fund Convention.

2 CIVIL LIABILITY AND FUND CONVENTIONS

2.1 The Civil Liability and Fund Conventions were adopted under the auspices of the International Maritime Organization (IMO). They deal with questions of liability and compensation for loss or damage caused by

contamination resulting from the escape or discharge of persistent oil from tankers (i.e. ships constructed or adapted for the carriage of oil in bulk as cargo).

2.2 Under the Civil Liability Convention claimants are entitled to compensation from the registered shipowner (or the provider(s) of financial security for the shipowner's liability) for pollution damage suffered in the territory (including territorial sea) or exclusive economic zone of a Contracting State. The shipowner's liability is strict (only limited exemptions and defences are available), but this liability is subject to limitation in accordance with the provisions of the convention. Where limitation applies, the shipowner's liability is determined with reference to the tonnage of the ship concerned, subject to an overall liability limit of SDR 89,770,000 (\pm ZAR 831,395,878)*.

2.3 Whereas the Civil Liability Convention establishes and regulates the liability of the registered shipowner, the Fund Convention establishes an international fund, called the International Oil Pollution Compensation (IOPC) Fund, the purpose of which is to pay compensation to victims of pollution damage (within the meaning of the Civil Liability Convention) where they have been unable to obtain compensation, or compensation in full, under the provisions of the Civil Liability Convention. The IOPC Fund receives its funds from cargo owners, specifically from persons who receive annually, in the ports or terminal installations of the Contracting

*1 SDR = ZAR 9.261400 (22 March 2005). Source: IMF.

States, more than 150,000 tonnes of contributing oil. The total amount of compensation payable by the IOPC Fund in respect of an incident is currently SDR 203,000,000 (\pm ZAR 1,880,064,200), which, in certain cases, may be increased to SDR 300,740,000 (\pm ZAR 2,785,273,436).

2.4 Because the Fund Convention is supplementary to the Civil Liability Convention, a state cannot become a party to the Fund Convention without, at the same time, also becoming a party to the Civil Liability Convention.

3 SUMMARY OF BILL'S PROVISIONS

3.1 *Clause 1* is a standard provision that defines certain expressions and deals with other matters of interpretation.

3.2 *Clause 2* applies sections 3, 4, 5, 6 and 11 of the Fund Act in a corresponding way to the way in which they apply to that Act: section 3 deals with the extent to which the Fund Act binds the State and its organs; section 4 deals with the geographical extent of the Fund Act's application; section 5 recognises the legal personality of the IOPC Fund; section 6 recognises the Fund's Director as its legal representative; and section 11 deals with the way in which certain documentary evidence may be given in legal proceedings involving the Fund.

3.3 *Clause 3* imposes contributions payable under Article 10 of the Fund Convention. Article 10 requires persons who receive annually, in the ports or terminal installations of a Contracting State, more than 150,000 tonnes of contributing oil to pay contributions to the International Oil Pollution Compensation Fund 1992. Contributions are fixed annually by

the Fund in accordance with the provisions of Article 12 of the Fund Convention.

3.4 *Clause 4* gives effect to Article 10 of the Fund Convention; this Article deals with liability to make contributions to the IOPC Fund. Subclause (2) deals with the interpretation of certain provisions in Article 10 and, in particular, gives effect to paragraph 2(b) of that Article.

3.5 *Clause 5* gives effect to paragraphs 2 and 3 of Article 12 of the Fund Convention; these paragraphs deal with the way in which contributions are calculated. The Director of the IOPC Fund calculates the annual contributions for each person liable to make contributions under Article 10. The Director will invoice liable persons directly.

3.6 *Clause 6* gives effect to paragraph 4 of Article 12 of the Fund Convention; this paragraph deals with when contributions are due and payable. Contributions are due and payable on the day fixed in the Internal Regulations of the IOPC Fund, or as otherwise decided by the Assembly of the Fund.

3.7 *Clause 7* allows regulations about requiring security for the payment of contributions to be given to the IOPC Fund.

3.8 *Clause 8* supplements clause 7 by creating an appropriate offence in relation to the duty to give security under clause 7. Failing or refusing to give security is made punishable by a maximum prison term of 2 years and/or by its fine equivalent (ZAR 40,000).

3.9 *Clause 9* gives effect to paragraph 1 of Article 13 of the Fund Convention; this paragraph deals with arrear contributions. Arrear

contributions attract interest that, in the clause, is expressed as late payment penalty. Late payment penalty is calculated with reference to the applicable annual interest rate determined by the IOPC Fund.

3.10 *Clause 10* gives effect to paragraph 3 of Article 13 of the Fund Convention; this paragraph deals with the Director's responsibility to recover amounts owing to the IOPC Fund. The clause allows the Fund to recover contributions and late payment penalty that are due and payable as if they were debts due to the State. Subclause (2) confirms that the State is not liable for costs or other expenses incurred by the Fund in recovering contributions or late payment penalty.

3.11 *Clause 11* allows regulations about the payment of late payment penalty and the payment or refund of contributions.

3.12 *Clause 12* gives effect to Article 15 of the Fund Convention in so far as it relates to the Republic. The clause requires the South African Maritime Safety Authority (SAMSA) to give the IOPC Fund certain information about contributing oil receipts and receivers. It also allows SAMSA to inform the Fund about any other matter relating to contributions that SAMSA considers appropriate.

3.13 *Clauses 13 and 14* supplement clause 12 by allowing regulations about record-keeping and returns. The regulations will enable the South African Maritime Safety Authority to give the IOPC Fund accurate information about contributing oil receipts.

3.14 *Clauses 15 and 16* supplement clause 13 by creating appropriate offences in relation to duties to give information and returns under clause

12. Failing or refusing to give information or a return (clause 15) is made punishable by a maximum prison term of 3 years and/or by its fine equivalent (ZAR 60,000). Giving false information or a false return (clause 16) is made punishable by a maximum prison term of 5 years and/or by its fine equivalent (ZAR 100,000).

3.15 *Clause 17* is a standard provision allowing the Minister of Transport to make regulations under the enactment. Regulations are to be made with the consent of the Minister of Finance.

3.16 *Clause 18* allows an offence to be prosecuted at any place the accused happens to be, regardless of where the offence was committed. It also extends the jurisdiction of the magistrates' courts in matters of punishment.

3.17 *Clause 19* is a standard provision dealing with the enactment's short title and commencement. Subclause (2) requires the President to fix the commencement date by proclamation in the *Gazette*.