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THE PARLIAMENT OF THE COMMONWEALTH OF
AUSTRALIA

SENATE

CARRIAGE OF GOODS BY SEA BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Transport and
Communications, the Honourable
Kim Beazley, MP)

CARRIAGE OF GOODS BY SEA BILL 1991

OUTLINE

This Bill gives effect to major changes to Australia's marine cargo liability regime, announced by the Government in June 1988.

Currently, Australia's marine cargo liability regime is embodied in the *Sea-Carriage of Goods Act 1924* which regulates the extent to which ocean carriers are liable for loss or damage to cargo which occurs while it is in their keeping. This Act is based on the Brussels Convention known as the Hague Rules, which was agreed in 1924.

The Carriage of Goods by Sea Bill 1991 will update Australia's marine cargo liability regime to take account of international developments since 1924. It will repeal the *Sea-Carriage of Goods Act 1924*. However, a "savings clause" will enable the *Sea-Carriage of Goods Act 1924* to continue to operate in relation to contracts entered into prior to the commencement of the Bill.

As a first step the Bill provides for the continued implementation of the substantive provisions of the Brussels Convention, but as amended by the Visby (1968) and SDR (Special Drawing Right) (1979) Protocols (known as the amended Hague Rules), to contracts entered into after the commencement of the Bill. These rules will apply automatically to contracts contained in a bill of lading or other document of title. In addition there is provision for the amended Hague Rules to apply to contracts (entered into after the commencement of the Bill) which are contained in or evidenced by a non-negotiable document where the contract expressly provides that the amended Hague Rules are to govern as if it were a bill of lading. The Visby and SDR Protocols, which have gradually gained international acceptance, increase liability limits, replace the gold standard with the modern IMF currency unit and clarify the meaning of "package or unit" so that liability limits take account of containerisation. The Protocols, however, do not alter the inherent balance of liability between shippers and carriers.

As a second step, provisions known as the Hamburg Rules will apply to govern liability in respect of contracts entered into after the commencement of Part 3 and Schedule 2 of the Bill.

The Hamburg Rules are the substantive provisions of the Hamburg Convention on the Carriage of Goods by Sea (Annex I of the Final Act of the United Nations Conference on the Carriage of Goods by Sea) and Annex II - the Common Understanding adopted by that Conference, done at Hamburg on 31 March 1978. Under the Hamburg Rules carriers are substantially more liable for loss or damage to cargo in their charge. Carrier liability is extended to reflect the different categories of cargo now carried, new technology and loading methods, and other practical problems incurred by shippers such as losses incurred through delays in delivery. The Hamburg Rules also extend carrier liability to cover the time the cargo is on the wharf in addition to the time it is on the vessel.

The Hamburg Rules will be proclaimed at some future unspecified time to be fixed by the Government of the day. The delay in implementation of the Hamburg Rules is necessary as they have not yet come into force internationally and do not provide a viable alternative marine cargo liability regime at this stage. The Hamburg Rules will enter into force one year after the 20th contracting party accedes to the Convention. As at 1 August 1991, 19 countries have acceded to the Hamburg Convention. None of Australia's major trading partners have become contracting States.

Delaying proclamation to a date to be fixed ensures that a future Government retains discretion to examine and to decide upon the appropriateness of implementing the Hamburg Rules, taking into account international acceptance of the Rules and domestic interests. This approach gives a signal to our major trading partners, some of which are considering the application of the Hamburg Rules, of Australia's support for the Hamburg Rules as the appropriate international marine cargo liability regime.

The Bill contains a minor consequential amendment to the *International Arbitration Act 1974*. This amendment will ensure that the provisions of the *International Arbitration Act 1974* will not override the continued operation of section 9 of the *Sea-Carriage of Goods Act 1924* or the operation of the Australian law and jurisdiction provisions contained in clauses 11 and 16 of the Bill.

The Bill does not affect the operation of the relevant parts of the *Navigation Act 1912*, nor the *Limitation of Liability for Maritime Claims Act 1989*. The Bill also prevails over the relevant provisions of the *Trade Practices Act 1974* to the extent of any inconsistency.

FINANCIAL IMPACT STATEMENT

There will be no costs, revenues or savings to the Government arising from the Bill.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short Title

1. This clause provides for the Act to be cited as the *Carriage of Goods by Sea Act 1991*.

Clause 2 - Commencement

2. Sub-clause 2(1) provides that, subject to sub-clause 2(2), the Act commences on the day it receives Royal Assent. Sub-clause 2(2) provides that Part 3 and Schedule 2 of the Act (the Hamburg Rules) commence on a day to be fixed by Proclamation. Proclamation cannot occur prior to the Hamburg Convention coming into force in respect of Australia.

Clause 3 - Object of the Act

3. Sub-clause 3(1) sets out the object of the Act, which is to introduce a regime of marine cargo liability that is modern, equitable, efficient and compatible with arrangements existing in countries that are Australia's major trading partners. It also signals the Government's intention to adopt the rules contained in the Hamburg Convention as part of Australian law in due course and for consideration to be given to developments within the United Nations in relation to marine cargo liability arrangements.
4. Sub-clause 3(2) provides that the object of the Act will be achieved in two stages. The first stage will involve replacement of the existing Sea-Carriage of Goods Act 1924 with provisions known as the amended Hague Rules. The second stage will involve replacing the amended Hague Rules with the provisions known as the Hamburg Rules.

Clause 4 - Interpretation

5. This clause defines and makes reference to terms used in the Act. The more significant definitions include:

"Brussels Convention" means the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, done at Brussels on 25 August 1924

"Visby Protocol" means the Protocol amending the Brussels Convention, done at Brussels on 23 February 1968

"SDR Protocol" means the Protocol amending the Brussels Convention, as amended by the Visby Protocol, done at Brussels on 21 December 1979

"Amended Hague Rules" is defined by reference to clause 7 of the Act and means the English translation of Articles 1 to 10 (inclusive) of the Brussels Convention, incorporating the English text of the amendments made to that Convention by Articles 1 to 5 (inclusive) of the Visby Protocol and Article II of the SDR Protocol

"Hamburg Rules" is defined by reference to clause 12 of the Act and means the English text of Articles 1 to 26 (inclusive) of the Hamburg Convention (Annex I of the Final Act of the United Nations Conference on the Carriage of Goods by Sea) and Annex II - the Common Understanding adopted by that Conference.

Clause 5 - Act to bind Crown

6. This clause provides that the Act is to be binding on the Crown in all its capacities.

Clause 6 - Extension to external Territories

7. This clause provides that the Act is to extend to all Australia's external Territories.

PART 2 - APPLICATION OF THE AMENDED HAGUE RULES ETC

Clause 7 - The amended Hague Rules

8. This clause provides that the provisions set out in Schedule 1, the amended Hague Rules, are rules relating to carriage of goods by sea contained in the English translation of Articles 1 to 10 (inclusive) of the Brussels Convention, incorporating the English text of the amendments made by Articles 1 to 5 (inclusive) of the Visby Protocol and Article II of the SDR Protocol.

Clause 8 - The amended Hague Rules to have the force of law

9. This clause provides that, subject to clause 10, the amended Hague Rules have the force of law in Australia. Clause 10 sets out the contracts to which the amended Hague Rules are to apply. The rules are given the force of law in respect of these contracts so that they may operate on the basis that they are the law in Australia and not merely because they have been included in a contract.

Clause 9 - Interpretation

10. This clause provides that, in this Part and in the amended Hague Rules, unless the contrary intention appears, a word or expression has the same meaning as it has in the Brussels Convention as amended by the Visby and SDR Protocols.

Clause 10 - Application of the amended Hague Rules

11. This clause indicates the contracts to which the amended Hague Rules are to apply. The amended Hague Rules will apply to all contracts for the carriage of goods by sea entered into on or after the commencement of Part 2 (Application of the Amended Hague Rules) and before the commencement of Part 3 (Application of the Hamburg Rules). Contracts entered into prior to the commencement of Part 2 will continue to be governed by the provisions of the *Sea-Carriage of Goods Act 1924*.
12. Sub-clause 10(1)(b)(ii) has the effect of applying the amended Hague Rules to bills of lading or similar documents of title for contracts of carriage from a port in Australia to another port in Australia, ie interstate trade.
13. Sub-clause 10(1)(b)(iii) has the effect of applying the amended Hague Rules not only to bills of lading or similar documents of title, but to contracts contained in or evidenced by a non-negotiable document if that contract contains express provision to the effect that the amended Hague Rules are to govern the contract as if it were a bill of lading. This allows parties to the contract to apply the amended Hague Rules on a voluntary basis to non-negotiable documents.
14. With the inclusion of sub-clause 10(1)(b)(iii) and the reference to non-negotiable documents it is clear that the term "contract of carriage" does not have the same meaning as it has in the amended Hague Rules. It means those contracts referred to in the amended Hague Rules plus those referred to in sub-clause 10(1)(b)(iii).
15. Sub-clause 10(2) provides that the amended Hague Rules do not apply to a contract of carriage by sea between ports in the same Australian State or Territory, ie intrastate trade.

Clause 11 - Construction and jurisdiction

16. Sub-clause 11(1) provides that the parties to a bill of lading, similar document of title or non-negotiable document (as referred to in 10(1)(b)(iii)) which deals with the carriage of goods from Australia to a place outside Australia, are taken to have intended to contract in accordance with the laws in force in the place of shipment.
17. Sub-clause 11(2)(a) provides that any agreement which purports to preclude or limit the operation of sub-clause 11(1) is to have no effect to that extent.

18. Sub-clause 11(2)(b) provides that any agreement which purports to preclude or limit the jurisdiction of an Australian court in respect of a bill of lading or other document mentioned in sub-clause 11(1) is to have no effect to that extent.
19. Sub-clause 11(2)(c) provides that any agreement which purports to preclude or limit the jurisdiction of an Australian court in respect of a bill of lading, similar document of title or non-negotiable document (as referred to in clause 10(1)(b)(iii)), relating to the carriage of goods by sea into Australia is to have no effect to that extent.

PART 3 - APPLICATION OF THE HAMBURG RULES ETC

Clause 12 - The Hamburg Rules

20. This clause provides that a reference to the Hamburg Rules means the provisions set out in Schedule 2 which are the English text of Articles 1 to 26 (inclusive) of the Hamburg Convention and Annex II of the Final Act of the United Nations Conference on the Carriage of Goods by Sea, done at Hamburg on 31 March 1978.

Clause 13 - The Hamburg Rules to have the force of law

21. This clause provides that, subject to clause 15, the Hamburg Rules are to have the force of law in Australia. Clause 15 sets out the contracts to which the Hamburg Rules are to apply. As with clause 9 the provision gives the Rules the force of law in respect of those contracts so that they operate on the basis that they are the law of Australia and not merely because they have been included in a contract.

Clause 14 - Interpretation

22. This clause provides that, in Part 3 and in the Hamburg Rules, unless a contrary intention appears, a word or expression has the same meaning as it has in the Hamburg Convention.

Clause 15 - Application of the Hamburg Rules

23. This clause indicates the contracts to which the Hamburg Rules are to apply. A contract of carriage entered into on or after the commencement of Part 3 (Application of the Hamburg rules) will be governed by the Hamburg Rules while those entered into prior to that date will be covered either by the amended Hague Rules or the Sea-Carriage of Goods Act 1924 depending on the date they were entered into.

24. Whereas the Hamburg Convention is only applicable to international contracts of carriage by sea, sub-clause 15(1)(b)(ii) ensures that interstate contracts of carriage by sea are also subject to the Hamburg Rules.
25. Sub-clause 15(2) provides that the Hamburg Rules do not apply to a contract of carriage by sea between ports in the same Australian State or Territory ie intrastate trade.

Clause 16 - Construction

26. Sub-clause 16(1) provides that all parties to a contract of carriage by sea relating to the carriage of goods from any place in Australia to any place outside Australia are taken to have intended to contract according to the provisions of the Bill.
27. Sub-clause 16(2) provides that any agreement which purports to preclude or limit the operation of sub-clause 16(1) is to have no effect to that extent.

PART 4 - MISCELLANEOUS

Clause 17 - Absolute undertaking to provide a seaworthy ship not implied

28. This clause provides that no contract for the carriage of goods by sea to which Part 2 or Part 3 of this Act applies, will imply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Clause 18 - Act prevails over certain provisions of the Trade Practices Act 1974

29. This clause provides that this Bill prevails over the provisions of Division 2 of Part V of the Trade Practices Act 1974 to the extent of any inconsistency. This is designed to remove the potential for action to be taken against an ocean carrier under the consumer protection provisions of the Trade Practices Act in respect of the loss or damage to cargo by a shipper who is not normally in the cargo shipping business.

Clause 19 - Act not to affect operation of certain provisions

30. Sub-clause 19(a) provides that nothing in this Bill affects the operation of Division 10 of Part IV or Division 2 of Part VIII of the Navigation Act 1912. These provisions of the Navigation Act deal with the carriage of dangerous cargoes. The provision will also preserve the protection enjoyed by shipowners in

respect of liability for fire damage and theft of valuables in certain circumstances.

31. Sub-clause 19(b) provides that nothing in this Bill affects the operation of the *Limitation of Liability for Maritime Claims Act 1989*. This will allow shipowners to continue to limit their total liability from all claims of a certain nature arising on a distinct occasion.

Clause 20 - Repeal of the *Sea-Carriage of Goods Act 1924* etc

32. Sub-clause 20(1) repeals the *Sea-Carriage of Goods Act 1924*.
33. Sub-clause 20(2) provides that the *Sea-Carriage of Goods Act 1924* continues to apply to contracts entered into prior to the commencement of Part 2 of the Bill, where the Act would have applied to those contracts if not for its repeal.

Clause 21 - Repeal of section 2C of the *International Arbitration Act 1974* and substitution of new section 2C - Carriage of Goods by Sea

34. This clause repeals Section 2C of the *International Arbitration Act 1974* and replaces it with a new Section 2C which ensures that the provisions of the *International Arbitration Act 1974* do not override the construction and jurisdiction provisions contained in Section 9 of the *Sea-Carriage of Goods Act 1924* and in clauses 11 and 16 of the Bill.

SCHEDULE 1 - THE AMENDED HAGUE RULES

35. The provisions set out in Schedule 1 are the substantive rules relating to the carriage of goods by sea contained in the Brussels Convention as amended by the Visby and SDR Protocols.

SCHEDULE 2 - THE HAMBURG RULES

36. The provisions set out in Schedule 2 are the substantive rules relating to the carriage of goods by sea contained in the Hamburg Convention (Annex I of the Final Act of the United Nations Conference on the Carriage of Goods by Sea) and Annex II - the Common Understanding adopted by that Conference.



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