

中国船东互保协会文件

中船保赔字[2013]1号

关于澳大利亚污染法的通函——油污处罚和罚款的赔偿条款

各会员公司：

针对船舶油污造成海洋环境污染，澳大利亚政府通过颁布新法施行越来越严厉的处罚措施。《海事立法 2011 修正案》自 2011 年 12 月 4 日生效，该新法案对澳大利亚《1912 年航海法》和《1983 年海洋保护（防止船舶污染）条例》作了修订。

船舶在澳大利亚水域排放油类或存在排油风险，船东和船长都将面临严格的刑事责任。随着澳大利亚最近的几次法律修订，该责任已扩展到租船人。现在，租船人、船东和船长要为此分别承担刑事责任并被处以罚款。

个人承担的刑事处罚从 500 个罚款单位骤升至 20,000 个罚款单位（合 220 万澳元或 230 万美元）。如果是公司犯罪，则上述罚款金额会乘以五倍，最终达到 1100 万澳元（合 1150 万美元）。

为了引起船东和租船人对该新法案的注意，国际保赔集团在咨询波罗的海航运公会后起草了推荐在租约中使用的油污赔偿条款。该条款的措辞可以广泛应用而不局限于特定的国家，它规定了刑事处罚和民事罚款的特定情形。

国际保赔集团了解到，在此条款公布之前，某些租家试图在租约中使用一些油污赔偿条款，但这些条款因使船东丧失了责任限制的权利以及其它影响承保的规定，而不被各保赔协会所接受。因此我们强烈呼吁会员们在租约中采用新的油污补偿条款。

条款的文本及其注释请参阅附件。



中国船东互保协会

二〇一三年一月十五日

关键词：中船保、澳大利亚、油污、通函

抄送：大连办事处、上海办事处、中国保赔服务（香港）有限公司

中国船东互保协会

2013年1月15日印发

附件：

油污处罚和罚款的赔偿条款

(a) 在船东和租船人签订的租船合同条款下，倘若发生油污事故，应根据适用法律或条例对船舶利益方所提出的要求，由船东全权负责对油污事故作出反应。所谓油污事故，是指任何涉及油料、油性混合物或者油性残留物的排放或构成排放威胁的事故。

(b) 在不影响前述规定的情况下，承租双方在此一致同意：

i. 如果油污事故是由于船东或其受雇人、代理人的过失行为、不作为或者违反本租约的行为所造成的，船东应在此范围内向租家承担由此事故产生或与此事故相关的一切刑事处罚或者民事罚款的责任。

ii. 如果油污事故是由于租船人或其受雇人、代理人的过失行为、不作为或者违反本租约的行为所造成的，租船人应在此范围内向船东承担由此事故产生或与此事故相关的一切刑事罚款或者民事罚款的责任。

但是并不适用于处罚或者罚款尚未施加于应全部或者部分承担过错的一方所提出的赔偿，且本租约所适用的法律并不禁止此类罚款的赔偿。

(c) 本条款的规定不得损害任何一方的追索权，也不得损害任何适用法律下的抗辩权利或者责任限制权利。

(d) 租船人应设法使本条款并入到所有转租合同以及所有根据本租约制定的运输合同当中。

注释

已修订的澳大利亚法律下，租船人可能会因船东的行为或者过失而造成的污染或者污染威胁承担严格责任，并负担罚款和遭受处罚（如航行错误）。同样的，船东也可能会因租家的行为或者过失而造成的污染或者污染威胁承担严格责任，并负担罚款和遭受处罚（如不安全港）。正是因为上述情形超越了船东和租家的控制范围，一个租约推荐条款应运而生，以期在法律允许的范围内达到谁造成污染事故谁承担处罚和罚款的目的。

在此条款下，船东全权负责对油污事故（油料、油性混合物或者油性残留物的排放或构成排放的威胁）作出反应（详见(a)）。这与澳大利亚法律制度和国际赔偿法律制度是符合的。

而(b)规定的赔偿旨在通过并入过错责任（因过失行为、不作为或者违约行为造成排放油污或构成排放威胁的一方负责赔偿）而对船东和租家提供平等的保护。但是，按照新的澳大利亚法律规定，排放油污或排放威胁是由于第三方，而不是船东或者租家造成的，船东或者租家仍然应受到处罚和罚款，这种情形应该如何赔偿，条款里没有规定。

此条款的规定仅仅针对刑事处罚和民事罚款，而不针对民事责任。后者属于油污公约的范围。

任何一方的追索权、抗辩权利和责任限制权利，都在(c)下得以保留。

而(d)旨在确保在租约链下的所有合同方都能适用此条款。

TO THE MEMBERS

15th, Jan. 2013

Dear Sirs

**AUSTRALIAN POLLUTION LAW – OIL POLLUTION INDEMNITY CLAUSE
FOR PENALTIES AND FINES**

The Australian Government introduced increased penalties for pollution from ships and damage to the marine environment by way of new legislation – the Maritime Legislation Amendment Act, 2011 – that came into effect on 4 December 2011. The Act amends the Australian Navigation Act 1912 and the Protection of the Sea (Prevention of Pollution from Ships) Act, 1983.

As a result of these recent amendments, longstanding criminal liability imposed on owners and masters for oil discharge or threat of discharge in Australian waters has been extended to charterers. Charterers, owners and masters are now severally liable with offences punishable by fines.

The maximum penalty for this criminal offence is increased from 500 penalty units to 20,000 penalty units (AUD 2.2 million (USD 2.3 million)) for an individual. This may be multiplied by a further factor of five for a corporation, taking the maximum penalty to AUD 11 million (USD 11.5 million).

In order to address concerns raised by both owners and charterers in respect of the new law, the International Group has drafted, in consultation with BIMCO, a recommended clause for inclusion in charterparties. The wording of the clause is not country specific and capable of broader application. The clause addresses the specific situation of criminal fines and civil penalties.

The International Group is aware that pending publication of this clause some charterers have sought to use pollution indemnity clauses that do not preserve an owner's right to limit and have other provisions that render the clause uninsurable by Clubs. Members are therefore strongly urged to use this new clause in their charterparties.

The text of the clause and explanatory notes are attached.

Should Members have any questions regarding this clause or its application, they should contact the Managers in the normal way. All Clubs in the International Group of P&I Clubs have issued similar circulars.

Yours faithfully

China P&I Management

China Shipowners Mutual Assurance Association

ANNEX

Oil Pollution Indemnity Clause for penalties and fines

(a) Subject to the terms of this Charterparty, as between Owners and Charterers, in the event of an oil pollution incident involving any discharge or threat of discharge of oil, oily mixture, or oily residue from the Vessel (the "Pollution Incident"), Owners shall have sole responsibility for responding to the Pollution Incident as may be required of the vessel interests by applicable law or regulation.

(b) Without prejudice to the above, as between the parties it is hereby agreed that:

- i. Owners shall indemnify, defend and hold Charterers harmless in respect of any liability for criminal fine or civil penalty arising out of or in connection with a Pollution Incident, to the extent that such Pollution Incident results from a negligent act or omission, or breach of this Charterparty by Owners, their servants or agents,
- ii. Charterers shall indemnify, defend and hold Owners harmless in respect of any liability for criminal fine or civil penalty arising out of or in connection with a Pollution Incident, to the extent that such Pollution Incident results from a negligent act or omission, or breach of this Charterparty by Charterers, their servants or agents,

provided always that such fine or penalty has not been imposed by reason wholly or partly of any fault of the party seeking the indemnity and that the law governing the charterparty does not prohibit recovery of such fines.

(c) Nothing in this clause shall prejudice any right of recourse of either party, or any defences or right to limit liability under any applicable law.

(d) Charterers shall procure that this Clause be incorporated into all sub-charters and contracts of carriage issued pursuant to this Charterparty.

Explanatory Notes

It is understood that under the revised Australian law, charterers can be strictly liable for penalties and fines imposed on them, as a result of a pollution or threat of pollution caused by the act or negligence of the owner (e.g. navigational error). Conversely owners can be strictly liable for penalties and fines imposed on them, as a result of a pollution or threat of pollution caused by the act or negligence of the charterer (e.g. unsafe berth). As this involves circumstances beyond owners' and charterers' control, a charterparty clause is recommended to achieve the effect that whoever causes the Pollution Incident should bear the criminal fines or penalties through indemnification, to the extent permitted by law.

Under the clause owners have overall responsibility for responding to a discharge or threat of discharge of oil, oily mixture or oily residue (subparagraph (a)). This is in line with the Australian legislation and with the international compensation regime.

Further, the indemnity in subparagraph (b) is designed to protect owners and charterers by incorporating an equal indemnity by the party whose negligent act or omission, or breach of the charterparty, causes pollution or threat of pollution. Where the pollution or threat of pollution is entirely caused by a third party's act, without involving any act of the owner or of the charterer, but the owner or charterer still incurs the penalty/fine under the new Australian law, the indemnity in this clause will not respond to such a situation.

The clause only addresses the specific situation of criminal fines and civil penalties, not civil liability which is within the sphere of the Conventions.

Any right of recourse of either party, defences or right to limit is preserved under subparagraph (c).

Subparagraph (d) is designed to ensure that the same recovery and indemnity provisions apply where there is a charterparty chain.