

MERCHANT SHIPPING AMENDMENT ACT 2008



BERMUDA

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MERCHANT SHIPPING AMENDMENT ACT 2008

Date of Assent: 10 December 2008

Operative Date: 10 December 2008

ARRANGEMENT OF SECTIONS

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2	Amends section 150	13	Amends section 161
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WHEREAS it is expedient to amend the Merchant Shipping Act 2002 to give effect in Bermuda to the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Short title

1 This Act may be cited as the Merchant Shipping Amendment Act 2008.

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Amends section 150

2 Section 150 of the Merchant Shipping Act 2002 (in this Act referred to as “the principal Act”) is amended —

- (a) in the headnote by deleting “The Liabilities Convention” and substituting ‘ “Bunkers Convention” and “Liability Convention” ’;
- (b) in subsection (1)—
 - (i) by inserting the following definitions in their proper alphabetical positions —

“Bunkers Convention” means the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001;

“Bunkers Convention Country” means a country in respect of which the Bunkers Convention is in force;

“Bunkers Convention State” means a State which is a party to the Bunkers Convention;
 - (ii) in the definition of “Liability Convention State” by inserting “Liability” after the word “the”;
- (c) by deleting subsection (2) and substituting the following subsection —

“(2) If the Minister by Order declares that any State specified in the Order is a party to the Bunkers Convention or the Liability Convention in respect of any country so specified in the Order, the Order shall while in force, be conclusive evidence that, that State is a party to that Convention, as the case may be, in respect of that country.”.

Amends section 151

3 Section 151 of the principal Act is amended—

- (a) by deleting “owner” and “owners” wherever they occur and substituting “registered owner” and “registered owners”, respectively;
- (b) in subsection (2)(b) by deleting the words after “taken” and substituting a full stop;
- (c) by inserting the following subsection next after subsection (2)—

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“(2A) In this Chapter, a threat is a threat referred to in subsection (2) as a relevant threat of contamination.”; and

(d) by repealing subsections (7) and (8).

Inserts section 151A

4 The principal Act is amended by inserting the following section next after section 151—

“Liability for pollution by bunker oil

151A (1) Subject to subsection (3), where, as a result of any occurrence, any bunker oil is discharged or escapes from a ship then (except as otherwise provided by this Chapter) the owner of the ship is liable—

- (a) for any damage caused outside the ship in Bermuda by contamination resulting from the discharge or escape; and
- (b) for the cost of any measures reasonably taken after the discharge or escape for the purpose of preventing or minimising any damage so caused in Bermuda by contamination resulting from the discharge or escape; and
- (c) for any damage caused in Bermuda by any measures so taken.

(2) Subject to subsection (3), where, as a result of any occurrence, there arises a grave and imminent threat of damage being caused outside a ship by the contamination that might result if there were a discharge or escape of bunker oil from the ship then (except as otherwise provided by this Chapter) the owner of the ship shall be liable—

- (a) for the cost of any measures reasonably taken for the purpose of preventing or minimising any such damage in Bermuda; and
- (b) for any damage caused outside the ship in Bermuda by any measures so taken.

(3) There shall be no liability under this section in relation to —

- (a) a discharge or escape of bunker oil from a ship to which section 151 applies; or
- (b) a threat mentioned in subsection (2) arising in relation to a potential discharge or escape of

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bunker oil from such a ship, where that bunker oil is also persistent hydrocarbon mineral oil.

- (4) In the subsequent provisions of this Chapter—
- (a) a discharge or escape of bunker oil from a ship, other than a discharge or escape of oil excluded by subsection (3), is referred to as a discharge or escape of bunker oil falling within subsection (1); and
 - (b) a threat mentioned in subsection (2), other than one excluded by subsection (3), is referred to as a relevant threat of contamination falling within subsection (2).

(5) Where a person incurs a liability under subsection (1) or (2) he shall also be liable for any damage or cost for which he would be liable under that subsection if the references in it to the territory of Bermuda included the territory of any other Bunkers Convention country.

- (6) Where—
- (a) as a result of any occurrence, a liability is incurred under this section by the owner of each of two or more ships; and
 - (b) the damage or cost for which each of the owners would be liable cannot reasonably be separated from that for which the other or others would be liable,

each of the owners shall be liable, jointly with the other or others, for the whole of the damage or cost for which the owners together would be liable under this section.

(7) In this Chapter (except in section 168(1)) “owner”, except when used in the term “registered owner”, means the registered owner, bareboat charterer, manager or operator of the ship.”.

Amends section 152

5 Section 152 of the principal Act is amended —

- (a) in the headnote by deleting “in case of other ships” and substituting “in other cases”;
- (b) by deleting “owner” and “owners” wherever they occur and substituting “registered owner”, and “registered owners”, respectively;

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- (c) in subsection (1) —
 - (i) by deleting “Where” and substituting “Subject to subsection (2A)”; and
 - (ii) by deleting “other than a ship to which section 151 applies”;
- (d) in subsection (2)—
 - (i) by deleting “Where” and substituting “Subject to subsection (2A)”;
 - (ii) by deleting “other than a ship to which section 151 applies”; and
 - (iii) in paragraph (b), by deleting the words after “taken” and substituting a full stop;
- (e) by inserting the following subsections next after subsection (2) —
 - “(2A) No liability shall be incurred under this section by reason of —
 - (a) a discharge or escape of oil from a ship to which section 151 applies or a relevant threat of contamination falling within subsection (2) of that section; or
 - (b) a discharge or escape of bunker oil falling within section 151A(1) or a relevant threat of contamination falling within section 151A(2).
 - (2B) In the subsequent provisions of this Chapter—
 - (a) a discharge or escape of oil from a ship, other than one excluded by subsection (2A), is referred to as a discharge or escape of oil falling within subsection (1); and
 - (b) a threat mentioned in subsection (2), other than one excluded by subsection (2A), is referred to as a relevant threat of contamination falling within subsection (2).”; and
- (f) in subsection (5) by inserting after “section”, the words “, except for subsection (2A)”.

Substitutes section 153

6 Section 153 of the principal Act is repealed and the following section is substituted —

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“Exceptions from liability under sections 151, 151A and 152

153 (1) No liability shall be incurred by a person (“the defendant”) under section 151, 151A or 152 by reason of a discharge or escape of oil or bunker oil from a ship, or of a relevant threat of contamination, if the defendant proves that subsection (2) applies.

(2) This subsection applies if the discharge or escape or the relevant threat of contamination (as the case may be) —

- (a) resulted from an act of war, hostilities, civil war, insurrection or an exceptional, inevitable and irresistible natural phenomenon;
- (b) was due wholly to anything done or omitted to be done by another person, not being a servant or agent of the defendant, with intent to do damage; or
- (c) was due wholly to the negligence or wrongful act of a government in exercising its function of maintaining lights or other navigational aids for the maintenance of which it was responsible.”.

Amends section 154

7 Section 154 of the principal Act is amended—

- (a) in the headnote by deleting “oil pollution” and substituting “pollution from oil or bunker oil”;
- (b) in subsection (1)—
 - (i) by repealing paragraphs (a) and (b) and substituting the following paragraphs—
 - “(a)there is a discharge or escape of oil from a ship to which section 151 applies or there arises a relevant threat of contamination falling within subsection (2) of that section; or
 - (b) there is a discharge or escape of oil falling within section 152(1) or there arises a relevant threat of contamination falling within section 152(2),”;
 - (ii) by deleting “owner” and substituting “registered owner”;
- (c) in subsection (2) by deleting “owner” wherever it occurs and substituting “registered owner”;

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(d) by inserting the following subsections next after subsection (2)—

“(2A) Where, as a result of any occurrence—

(a) there is a discharge or escape of bunker oil falling within section 151A(1); or

(b) there arises a relevant threat of contamination falling within section 151A(2),

then, whether or not the registered owner of the ship in question incurs any liability under section 151A—

(i) he shall not be liable otherwise than under that section for any such damage or cost as is mentioned in it; and

(ii) no person to whom this paragraph applies shall be liable for any such damage or cost unless it resulted from anything done or omitted to be done by him either with intent to cause any such damage or cost or recklessly and in the knowledge that any such damage or cost would probably result.

(2B) Subsection (2A)(ii) applies to—

(a) any servant or agent of the registered owner;

(b) any person not falling within paragraph (a) but engaged in any capacity on board the ship or to perform any service for the ship;

(c) any person performing salvage operations with the consent of the owner of the ship or on the instructions of a competent public authority;

(d) any person taking any such measures as are mentioned in section 151A(1)(b) or (2) (a);

(e) any servant or agent of a person falling within paragraph (c) or (d).”; and

(e) in subsection (3), by deleting “the owner of a ship under section 151 or 152” and substituting “a person under section 151, 151A or 152”.

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Inserts section 154A

8 The principal Act is amended by inserting the following section next after section 154—

“Liability under section 151, 151A or 152: supplementary provisions

154A (1) For the purposes of this Chapter —

- (a) references to a discharge or escape of oil or bunker oil from a ship are references to such a discharge or escape wherever it may occur;
- (b) references to a discharge or escape of oil from a ship include a discharge or escape of oil carried in the bunkers of the ship;
- (c) where more than one discharge or escape of oil or bunker oil results from the same occurrence or from a series of occurrences having the same origin, they shall be treated as one, but any measures taken after the first of them shall be deemed to have been taken after the discharge or escape; and
- (d) where a relevant threat of contamination results from a series of occurrences having the same origin, they shall be treated as a single occurrence.

(2) Subsections (3), (4), (5) and (6) shall apply in relation to any damage or cost for which a person is liable under section 151, 151A or 152, but which is not due to his fault, as if it were due to his fault.

(3) Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.

(4) Subsection (3) shall not operate to defeat any defence arising under a contract; and where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant under subsection (3) shall not exceed the maximum limit so applicable.

(5) Where damages are recoverable by any person under subsection (3) subject to such reduction as is therein mentioned,

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the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

(6) Where, in any case to which subsection (3) applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading the Limitation Act 1984, or any other enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages or contributions from that other person or representative by virtue of the said subsection.

(7) Where any case to which subsection (3) applies is tried with a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.”.

Amends section 155

9 Section 155 of the principal Act is amended —

(a) in subsection (1) —

(i) by deleting “owner” and substituting “registered owner”; and

(ii) by inserting next after the word “contamination”, the words “falling within subsection (2) of that section”; and

(b) in subsection (3), by deleting “owner” and substituting “registered owner”.

Amends section 156

10 Section 156 of the principal Act is amended—

(a) in subsection (1) by deleting “owner” and substituting “registered owner”; and

(b) in subsection (6) by deleting paragraph (a) and substituting the following paragraph—

“(a) by the registered owner or the persons referred to in section 163 as “the insurer” (in relation to any insurance or other security provided as mentioned in subsection (1) of that section); or”.

Amends section 158

11 Section 158 of the principal Act is amended by deleting “owner” wherever it occurs and substituting “registered owner”.

Amends section 160

12 Section 160 of the principal Act is amended —

(a) by inserting the following title before the headnote —

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“Limitation period for claims under this Chapter”; and

(b) by inserting next after “151”, the words “, 151A”.

Amends section 161

13 Section 161(5) of the principal Act is amended by deleting “owner” and substituting “registered owner”.

Inserts section 161A

14 The principal Act is amended by inserting the following section next after section 161 —

“Compulsory insurance against liability for pollution from bunker oil

161A (1) Subject to the provisions of this Chapter relating to government ships, subsection (2) shall apply to any ship having a gross tonnage greater than 1,000 tons calculated in the manner prescribed by an Order made by the Minister under paragraph 5(2) of Part II of Schedule 6.

(2) The ship shall not enter or leave a port in Bermuda or arrive at or leave a terminal in the territorial sea of Bermuda nor, if the ship is a Bermuda ship, a port in any other country or a terminal in the territorial sea of any other country, unless there is in force—

- (a) a contract of insurance or other security in respect of the ship satisfying the requirements of Article 7 of the Bunkers Convention; and
 - (b) a certificate complying with subsection (3) showing that there is in force in respect of the ship a contract of insurance or other security satisfying those requirements.
- (3) The certificate must be—
- (a) if the ship is a Bermuda ship, a certificate issued by the Minister;
 - (b) if the ship is registered in a Bunkers Convention country other than Bermuda, a certificate issued by or under the authority of the government of the other Bunkers Convention country; and
 - (c) if the ship is registered in a country which is not a Bunkers Convention country, a certificate issued by the Minister or by or under the authority of the government of any Bunkers Convention country other than Bermuda.

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(4) Any certificate required by this section to be in force in respect of a ship shall be carried on the ship and shall, on demand, be produced by the master to any Customs officer, or the Minister and if the ship is a Bermuda ship, to a proper officer.

(5) If a ship enters or leaves, or attempts to enter or leave a port or arrives at or leaves, or attempts to arrive or leave a terminal, in contravention of subsection (2) by reason of there being no certificate in force as mentioned in that subsection, the master or registered owner is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding \$10,000.

(6) If a ship fails to carry, or the master of a ship fails to produce, a certificate as required by subsection (4), the master is liable on summary conviction to a fine not exceeding \$ 5,000.

(7) If a ship attempts to leave a port in Bermuda in contravention of subsection (2), the ship may be detained.

(8) Notwithstanding any provision in any law pertaining to the service of process on a foreign company, any document required or authorised to be served on a foreign company for the purpose of the institution of (or otherwise in connection with) proceedings for an offence under subsection (5) against that company as the registered owner of a ship shall be treated as duly served on the company if the document is served on the master of the ship.

(9) Any person authorised to serve any document for the purposes of the institution of (or otherwise in connection with) the institution of proceedings for an offence under this section shall, for that purpose, have the right to go on board the ship in question.

(10) In the case of a ship of which, at any relevant time, the tonnage has not been and cannot be ascertained in the manner set out in subsection (1), the best available evidence shall be used in calculating the tonnage of the ship in accordance with any Order under paragraph 5(2) of Part II of Schedule 6.”.

Amends section 162

15 Section 162 of the principal Act is amended —

(a) in subsection (1)—

- (i) by deleting “161” and substituting “161(2)”;
- (ii) by deleting “owner” and substituting “registered owner”;

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- (b) by inserting the following subsection next after subsection (1)—

“(1A) Subject to subsection (2), if the Minister is satisfied, on the application for such a certificate as is mentioned in section 163A(2) in respect of a Bermuda ship or a ship registered in any country which is not a Bunkers Convention country, that there will be in force in respect of the ship, throughout the period for which the certificate is to be issued, a contract of insurance or other security satisfying the requirements of Article 7 of the Bunkers Convention, the Minister shall issue such a certificate to the registered owner.”; and

- (c) by repealing subsection (2) and substituting the following subsection —

“(2) The Minister may refuse the certificate if he is of the opinion that there is a doubt whether—

- (a) the person providing the insurance or other security will be able to meet his obligations thereunder; or
- (b) the insurance or other security will cover the registered owner’s liability under section 151, or the owner’s liability under section 151A, as the case may be.”.

Amends section 163

16 Section 163 of the principal Act is amended —

- (a) in subsection (1) —

- (i) by deleting “owner” and substituting “registered owner”;
- (ii) by deleting “161” and substituting “161(2)”;
- (iii) by deleting “(in the following provisions of this section referred to as “the insurer”)”;

- (b) by inserting the following subsections next after subsection (1) —

“(1A) Where it is alleged that the owner of a ship has incurred a liability under section 151A as a result of any discharge or escape of bunker oil occurring, or as a result of any relevant threat of contamination arising, while there was in force a contract of insurance or other security to which such a certificate as is mentioned in section 161A(2) related, proceedings to enforce a claim in

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respect of the liability may be brought against the person who provided the insurance or other security.

(1B) In the following provisions of this section, “the insurer” means the person who provided the insurance or other security referred to in subsection (1) or subsection (1A), as the case may be.”;

(c) in subsection (2) —

- (i) by deleting “owner” and “owner’s” and substituting “registered owner” and “registered owner’s”, respectively;
- (ii) by inserting “in respect of liability under section 151” next after the word “section”;

(d) in subsection (3)—

- (i) by inserting the words “in respect of liability under section 151 which are” next after the word “claims”;
- (ii) by deleting “owner” wherever it occurs and substituting “registered owner”;
- (iii) by inserting the words “under section 155” next after the word “liability” in the second place where it occurs;

(e) in subsection (4)—

- (i) by deleting “owner” and substituting “registered owner”;
- (ii) by inserting “(in relation to liability under section 151)” next after “liability”;

(f) by inserting the following subsections next after subsection (4)—

“(4A) In any proceedings brought against the insurer by virtue of this section in respect of liability under section 151A it shall be a defence (in addition to any defence affecting the owner’s liability) to prove that the discharge or escape, or (as the case may be) the threat of contamination, was due to the wilful misconduct of the owner himself.

(4B) The insurer may limit his liability in respect of claims in respect of liability under section 151A which are made against him by virtue of this section in like manner and to the same extent as the owner may limit his liability by virtue of section 181; but the insurer may do so whether or not the discharge or escape, or (as the

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case may be) the threat of contamination, resulted from any act or omission mentioned in Article 4 of the Convention set out in Part I of Schedule 6.

(4C) Where the owner and the insurer each apply to the court for the limitation of his liability (in relation to liability under section 151A) any sum paid into court in pursuance of either application shall be treated as paid also in pursuance of the other.”; and

(g) in subsection (5) by inserting “or 161A” next after “161”.

Amends section 164

17 Section 164 of the principal Act is amended —

(a) by repealing subsection (2) and substituting the following subsection —

“(2) Where—

(a) there is a discharge or escape of oil from a ship to which section 151 applies, or a discharge or escape of oil falling within section 152(1) which does not result in any damage caused by contamination in Bermuda and no measures are reasonably taken to prevent or minimise such damage in Bermuda; or

(b) any relevant threat of contamination falling within section 151(2) or 152(2) arises but no measures are reasonably taken to prevent or minimise such damage in Bermuda;

no court in Bermuda shall entertain any action (whether in rem or in personam) to enforce a claim arising from any relevant damage or cost

(i) against the registered owner of the ship; or

(ii) against any person to whom section 154(1)(ii) applies, unless any such damage or cost resulted from anything done or omitted to be done as mentioned in that provision.”;

(b) by inserting the following subsections next after subsection (3) —

“(3A) Where—

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- (a) there is a discharge or escape of bunker oil falling within section 151A(1) which does not result in any damage caused by contamination in Bermuda and no measures are reasonably taken to prevent or minimise such damage in Bermuda; or
- (b) any relevant threat of contamination falling within section 151A(2) arises but no measures are reasonably taken to prevent or minimise such damage in Bermuda,

no court in Bermuda shall entertain any action (whether in rem or in personam) to enforce a claim arising from any relevant damage or cost—

- (i) against the owner of the ship; or
- (ii) against any person to whom section 154(2A)(ii) applies, unless any such damage or cost resulted from anything done or omitted to be done as mentioned in that provision.

(3B) In subsection (3A), “relevant damage or cost” means—

- (a) in relation to any such discharge or escape as is mentioned in paragraph (a) of that subsection, any damage caused in the territory of another Bunkers Convention country by contamination resulting from the discharge or escape, or any cost incurred in taking measures to prevent or minimise such damage in the territory of another Bunkers Convention country;
- (b) in relation to any such threat of contamination as is mentioned in paragraph (b) of that subsection, any cost incurred in taking measures to prevent or minimise such damage in the territory of another Bunkers Convention country; or
- (c) any damage caused by any measures taken as mentioned in paragraph (a) or (b) above;

and section 154(2B)(d) shall have effect for the purpose of subsection (3A)(ii) as if it referred to any person taking any such measures as are mentioned in paragraph (a) or (b).”; and

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(c) by repealing subsection (4) and substituting the following subsections—

“(4) The Judgments (Reciprocal Enforcement) Act (1958) shall apply in respect of the enforcement of any judgment of a court in the UK in respect of any liability incurred under section 151 or 151A or any provision corresponding to section 151 or 151A.

(5) The common law rules of private international law shall apply to the enforcement of any judgment of a court in a Liability Convention country or a Bunkers Convention country other than the UK, in respect of any liability incurred under section 151 or 151A or any provision corresponding to section 151 or 151A.”.

Amends section 165

18 Section 165 of the principal Act is amended—

(a) by repealing subsection (2) and substituting the following subsection—

“(2) In relation to a ship owned by a State and for the time being used for commercial purposes—

(a) it shall be sufficient compliance with section 161(2) if there is in force a certificate issued by the government of that State and showing that the ship is owned by that State and that any liability for pollution damage as defined in Article I of the Liability Convention will be met up to the limit prescribed by Article V of that Convention; and

(b) it shall be sufficient compliance with section 161A(2) if there is in force a certificate issued by the government of that State and showing that the ship is owned by that State and that any liability for pollution damage as defined in Article 1 of the Bunkers Convention will be met up to the limits set out in Chapter II of the Convention in Part I of Schedule 6.”; and

(b) by inserting the following subsection next after subsection (3) —

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“(4) Every Bunkers Convention State shall, for the purposes of any proceedings brought in a court in Bermuda to enforce a claim in respect of a liability incurred under section 151A, be deemed to have submitted to the jurisdiction of that court, and accordingly rules of court may provide for the manner in which such proceedings are to be commenced and carried on; but nothing in this subsection shall authorise the issue of execution against the property of any State.”.

Amends section 166

19 Section 166 of the principal Act is amended—

- (a) in the headnote by inserting next after “section”, the words “151A or”; and
- (b) by inserting next after “section” in the second place where it occurs, the words “151A or”.

Amends section 168

20 Section 168 of the principal Act is amended—

- (a) in subsection (1)—
 - (i) by deleting the definition of “owner” and inserting the following in their proper alphabetical positions—

“bunker oil” means any hydrocarbon mineral oil (including lubricating oil) which is carried by a ship and used or intended to be used for the operation or propulsion of that ship and any residues of such oil;

“owner” has the same meaning as “owner” under section 151A(7);
 - (ii) in the definition of “oil” by inserting next after “oil”, where it first occurs, the words “, except in the term “bunker oil””;
 - (iii) by deleting the definition of “relevant threat of contamination” and substituting the following —

“relevant threat of contamination” includes —

 - (a) a relevant threat of contamination falling within section 151(2) (as defined in section 151(2A));

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- (b) a relevant threat of contamination falling within section 151A(2) (as defined in section 151A(4)); and
 - (c) a relevant threat of contamination falling within section 152(2) (as defined in section 152(2B));
- (b) in subsection (2) —
 - (i) by inserting next after “oil”, the words “or bunker oil”;
 - (ii) by inserting next after “owner” where it first occurs, the words “or the registered owner”;
 - (iii) by inserting next after “owner” in the second place where it occurs, the words “or the registered owner (as the case may be)”; and
- (c) in subsection (3)(b) by inserting next after the word “country” where it first occurs, the words “or Bunkers Convention country”.