TO AUSTRALIAN TOWAGE OPERATORS

July 2008

Dear Sirs

AMENDMENT TO UNITED KINGDOM STANDARD TOWAGE CONDITIONS

The United Kingdom Standard Towage Conditions (the UKSTC) date back to 1933 when UK tug owners first adopted a set of “national” conditions in a standard form contract. The UKSTC were drawn up to protect tug owners and exclude any possible liability which the tug may have towards the tow. The conditions have been amended through successive revisions but are still widely used around the world today.

The position in Australia

Towage operators in Australia have, until recently, been able to rely on the UKSTC to the extent that the owner of the tow is effectively responsible for all liabilities arising during the tow. The tug is exempt even where negligent. However, in April 2007 the Supreme Court of Queensland held that a tug owner was not able to exclude liability for damage to the tow as this would conflict with the Australian Trade Practices Act 1974 (the Act). Under s.74 of the Act there is an implied warranty that services provided during the course of business must be rendered with due care and skill and by virtue of s.68 of the Act, any contractual terms inconsistent with that warranty are rendered void. The Act applies where the cost of the services provided is less than A$40,000.

During their defence of the case (which also dealt with the issue of when the tug was deemed to be ‘towing’) the tug owners maintained that the implied warranty did not apply to the towage contract as the warranty does not apply to contracts for, or in relation to, the transportation of goods. This argument was dismissed by the Supreme Court and the first instance decision was subsequently confirmed by the Queensland Court of Appeal in November 2007. Leave to the High Court of Australia was not granted.

It stands therefore that Members in Australia who are operating under the UKSTC will no longer be able to avail themselves of the liability exclusions contained within Clause 4 if the cost of the tow is less than A$40,000.

Amending the Conditions to limit liability

Although it is not possible to exclude liability for an implied warranty, under s.68A of the Act it is possible to limit liability to the cost of the services provided or alternatively, to providing the services again. This limitation of liability can only be relied on if it can be established that it is fair and reasonable. In determining this, regard will be had to all the circumstances of the case and in particular, the relative strengths of the bargaining positions of each party, whether an inducement was offered and thirdly, whether the buyer knew of the existence and extent of the limitation term.
The recommended limitation of liability clause

Our Australian lawyers have recommended that the following clause is included in all towage contracts that incorporate the UKSTC and which apply Australian law:

‘The Tugowner shall be subject to any implied condition or warranty provided by the Trade Practices Act 1974 (Cth) (the Act) if and to the extent that the Act applies, in which circumstances the Tugowner limits its liability for breach of such implied condition or warranty to supplying the service again or the payment of the cost of having the service supplied again, as determined by the Tugowner.’

Attached to this circular is an example of the recommended wording incorporated as Clause 4 (f) in the revised 1986 UKSTC. Similarly it can be incorporated in other versions of the UKSTC. Importantly, the heading of the UKSTC has been changed to reflect that they have been amended.

Also attached is a suggested letter that can be sent to customers advising them of the amended conditions subject to which towing and other services will be performed.

Why should you amend the UKSTC?

The Club is recommending that Members using the UKSTC make this amendment so as to limit their liability aware that it can no longer be excluded when there has been a breach of a condition or warranty implied by the Trade Practices Act 1974. It is not possible to guarantee that the recommended clause will be effective as it is subject to a fair and reasonable test applied by the Courts. In its absence however, a Member’s exposure is limited by the tonnage of the vessel which, under the 1996 Protocol of the 1976 Limitation Convention, is now substantially increased. For vessels not exceeding 2,000 GT the limit of liability for property damage claims is SDR1 million (approximately A$1,580,000). For personal injury, it is SDR2 million (approximately A$3,161,000).

The increased exposure that Members now face has additionally had a considerable impact on the Club’s underwriting as traditionally we have taken into consideration Members’ ability to exclude liability under their towage conditions. At renewal it will therefore be necessary to take into consideration whether Members have amended their conditions so as to limit, to the extent possible, their liability. Where towage conditions have not been amended increased premiums and possible amendments in terms will need to be considered to reflect the additional exposure.

If you have any questions about the recommended amendment please contact your broker, local Correspondent or the Club directly.

Yours faithfully

For THE SHIPOWNERS’ PROTECTION LIMITED
(As Managers)
For and on behalf of
The Shipowners’ Mutual Protection and Indemnity Association (Luxembourg)
UK STANDARD CONDITIONS FOR TOWAGE AND OTHER SERVICES (REVISED 1986) AMENDED 2008

1 (a) The agreement between the Tugowner and the Hirer is and shall at all times be subject to and include each and all of the conditions hereinafter set out.

(b) For the purposes of these conditions

(i) ‘towing’ is any operation in connection with the holding, pushing, pulling, moving, escorting or guiding of or standing by the Hirer’s vessel, and the expressions ‘to tow’, ‘being towed’ and ‘towage’ shall be defined likewise.

(ii) ‘vessel’ shall include any vessel, craft or object of whatsoever nature (whether or not coming within the usual meaning of the word ‘vessel’) which the Tugowner agrees to tow or to which the Tugowner agrees at the request, express or implied, of the Hirer, to render any service of whatsoever nature other than towing.

(iii) ‘tender’ shall include any vessel, craft or object of whatsoever nature which is not a tug but which is provided by the Tugowner for the performance of any towage or other service.

(iv) The expression ‘whilst towing’ shall cover the period commencing when the tug or tender is in a position to receive orders direct from the Hirer’s vessel to commence holding, pushing, pulling, moving, escorting, guiding or standing by the vessel or to pick up ropes, wires or lines, or when the towing line has been passed to or by the tug or tender, whichever is the sooner, and ending when the final orders from the Hirer’s vessel to cease holding, pushing, pulling, moving, escorting, guiding or standing by the vessel or to cast off ropes, wires or lines has been carried out, or the towing line has been finally slipped, whichever is the later, and the tug or tender is safely clear of the vessel.

(v) Any service of whatsoever nature to be performed by the Tugowner other than towing shall be deemed to cover the period commencing when the tug or tender is placed physically at the disposal of the Hirer at the place designated by the Hirer, or, if such be at a vessel, when the tug or tender is in a position to receive and forthwith carry out orders to come alongside and shall continue until the employment for which the tug or tender has been engaged is ended. If the service is to be ended at or off a vessel the period of service shall end when the tug or tender is safely clear of the vessel or, if it is to be ended elsewhere, then when any persons or property of whatsoever description have been landed or discharged from the tug or tender and/or the service for which the tug or tender has been required is ended.

(vi) The word ‘tug’ shall include ‘tugs’, the word ‘tender’ shall include ‘tenders’, the word ‘vessel’ shall include ‘vessels’, the word ‘Tugowner’ shall include ‘Tugowners’, and the word ‘Hirer’ shall include ‘Hirers’.

(vii) The expression ‘Tugowner’ shall include any person or body (other than the Hirer or the Owner of the vessel on whose behalf the Hirer contracts as provided in Clause 2 hereof) who is a party to this agreement whether or not he in fact owns any tug or tender, and the expression ‘other Tugowner’ contained in Clause 5 hereof shall be construed likewise.

2 If at the time of making this agreement or of performing the towage or of rendering any service other than towing at the request, express or implied, of the Hirer, the Hirer is not the Owner of the vessel referred to herein as ‘the Hirer’s vessel’, the Hirer expressly represents that he is authorised to make and does make this agreement for and on behalf of the Owner of the said vessel subject to each and all of these conditions and agrees that both the Hirer and the Owner are bound jointly and severally by these conditions.

3 Whilst towing or whilst at the request, express or implied, of the Hirer, rendering any service other than towing, the Master and crew of the tug or tender shall be deemed to be the servants of the Hirer and under the control of the Hirer and/or his agents, and anyone on board the Hirer’s vessel who may be employed and/or paid by the Tugowner shall likewise be deemed to be the servant of the Hirer and the Hirer shall accordingly be vicariously liable for any act or omission by any such person so deemed to be the servant of the Hirer.

4 Whilst towing, or whilst at the request, either expressed or implied, of the Hirer rendering any service of whatsoever nature other than towing -

(a) The Tugowner shall not (except as provided in Clauses 4 (c) and (e) hereof) be responsible for or be liable for damage of any description done by or to the tug or tender; or done by or to the Hirer’s vessel or done by or to any cargo or other thing on board or being loaded on board or intended to be loaded on board the Hirer’s vessel or the tug or tender or to or by any other object or property; or

(ii) loss of the tug or tender or the Hirer’s vessel or of any cargo or other thing on board or being loaded on board or intended to be loaded on board the Hirer’s vessel or the tug or tender or any other object or property; or
5 The Tugowner shall at any time be entitled to substitute one or more tugs or tenders for any other tug or tender or
conditions shall limit, prejudice, or preclude in any way any right which the Tugowner may have to limit his
benefit of these conditions in every respect expressed or implied herein.

(ii) All claims which arise when the tug or tender, although towing or rendering some service other than

(b) The Hirer shall (except as provided in Clauses 4 (c) and (e)) be responsible for, pay for and indemnify the
Tugowner against and in respect of any loss or damage and any claims of whatsoever nature or however
arising or caused, whether covered by the provisions of Clause 4 (a) hereof or not suffered by or made against
the Tugowner and which shall include, without prejudice to the generality of the foregoing any loss of or damage
to the tug or tender or any property of the Tugowner even if the same arises from or is caused by the negligence
of the Tugowner his servants or agents.

(c) The provisions of Clauses 4 (a) and 4 (b) hereof shall not be applicable in respect of any claims which arise in
any of the following circumstances:-

(i) All claims which the Hirer shall have to prove have resulted directly and solely from the personal failure of
the Tugowner to exercise reasonable care to make the tug or tender seaworthy for navigation at the
commencement of the towing or other service. For the purpose of this Clause the Tugowner's
personal responsibility for exercising reasonable care shall be construed as relating only to the person
or persons having the ultimate control and chief management of the Tugowner's business and to any
servant (excluding the officers and crew of any tug or tender) to whom the Tugowner has specifically
delegated the particular duty of exercising reasonable care and shall not include any other servant of
the Tugowner or any agent or independent contractor employed by the Tugowner.

(ii) All claims which arise when the tug or tender, although towing or rendering some service other than
towing, is not in a position of proximity or risk to or from the Hirer's vessel or any other craft attending
the Hirer's vessel and is detached from and safely clear of any ropes lines, wire cables or moorings
associated with the Hirer's vessel. Provided always that, notwithstanding the foregoing, the provisions
of Clauses 4 (a) and 4 (b) shall be fully applicable in respect of all claims which arise at any time when
the tug or tender is at the request, whether express or implied, of the Hirer, his servants or his agents,
carrying persons or property of whatsoever description (in addition to the Officers and crew and usual
equipment of the tug or tender) and which are wholly or partly caused by or arise out of the presence
on board of such persons or property or which arise at anytime when the tug or tender is proceeding to
or from the Hirer's vessel in hazardous conditions or circumstances.

(d) Notwithstanding anything hereinbefore contained, the Tugowner shall under no circumstances whatsoever be
responsible for or be liable for any loss or damage caused by or contributed to or arising out of any delay or
detention of the Hirer's vessel or of the cargo on board or being loaded on board or intended to be loaded on
board the Hirer's vessel or of any other object or property or of any person, or any consequence thereof, whether
or not the same shall be caused or arise whilst towing or whilst at the request, either express or implied, of the
Hirer rendering any service of whatsoever nature other than towing or at any other time whether before during or
after the making of this agreement.

(e) Notwithstanding anything contained in Clauses 4 (a) and (b) hereof the liability of the Tugowner for death or
personal injury resulting from negligence is not excluded or restricted thereby.

(f) The Tugowner shall be subject to any implied condition or warranty provided by the Trade Practices Act 1974
(Cth) (the Act) if and to the extent that the Act applies, in which circumstances the Tugowner limits its liability for
breach of such implied condition or warranty to supplying the service again or the payment of the cost of having
the service supplied again, as determined by the Tugowner.

6 The Tugowner shall at any time be entitled to substitute one or more tugs or tenders for any other tug or tender or
tugs or tenders. The Tugowner shall at any time (whether before or after the making of this agreement between
him and the Hirer) be entitled to contract with any other Tugowner (hereinafter referred to as 'the other Tugowner')

Tel: +44 20 7488 0911
Fax: +44 20 7489 5806
info@shipowners.co.uk
www.shipownersclub.com
Registered in England No 2067444
at the above address

Nothing contained in these conditions shall limit, prejudice or preclude in any way any legal rights which the
Tugowner may have against the Hirer including, but not limited to, any rights which the Tugowner or his servants
or agents may have to claim salvage remuneration or special compensation for any extraordinary services
rendered to vessels or anything aboard vessels by any tug or tender. Furthermore, nothing contained in these
conditions shall limit, prejudice, or preclude in any way any right which the Tugowner may have to limit his
liability.
7 The Tugowner will not in any event be responsible or liable for the consequences of war, riots, civil commotions, acts of terrorism or sabotage, strikes, lockouts, disputes, stoppages or labour disturbances (whether he be a party thereto or not) or anything done in contemplation or furtherance thereof or delays of any description howsoever caused or arising, including by the negligence of the Tugowner or his servants or agents.

8 The Hirer of the tug or tender engaged subject to these conditions undertakes not to take or cause to be taken any proceedings against any servant or agent of the Tugowner or other Tugowner, whether or not the tug or tender substituted or hired or the contract or any part thereof has been sublet to the Owner of the tug or tender, in respect of any negligence or breach of duty or other wrongful act on the part of such servant or agent which, but for this present provision, it would be competent for the Hirer so to do and the Owners of such tug or tender shall hold this undertaking for the benefit of their servants and agents.

9 The agreement between the Tugowner and the Hirer shall be governed by the laws applicable in the State or Territory in which the service is provided and the Tugowner and the Hirer agree to submit to the non-exclusive jurisdiction of the courts of that State or Territory.
Dear

**Amendment to United Kingdom Standard Conditions for Towage and Other Services [Revised 1986]**

We write to advise you of an important amendment to the above Conditions, subject to which we perform all towage and other services.

The amendment, which relates to the liability of [company name] is contained in a new Clause 4[f].

We enclose a copy of the new Conditions, which include this new Clause and which are named the "United Kingdom Standard Conditions for Towage and Other Services [Revised 1986] Amended 2008". They will take effect immediately, that is as from today [date].

Please read them carefully and, where relevant, notify your principals accordingly.

Also we request that you date and sign, where indicated, the enclosed copy of this letter and return to us as soon as possible.

Yours
Dear

Amendment to United Kingdom Standard Conditions for Towage and Other Services [Revised 1986]

We write to advise you of an important amendment to the above Conditions, subject to which we perform all towage and other services.

The amendment, which relates to the liability of [company name] is contained in a new Clause 4[f].

We enclose a copy of the new Conditions, which include this new Clause and which are named the "United Kingdom Standard Conditions for Towage and Other Services [Revised 1986] Amended 2008". They will take effect immediately, that is as from today [date].

Please read them carefully and, where relevant, notify your principals accordingly.

Also we request that you date and sign, where indicated, the enclosed copy of this letter and return to us as soon as possible.

Yours

We acknowledge receipt of this letter and the enclosed copy of the United Kingdom Standard Conditions for Towage and Other Services [Revised 1986] Amended 2008, subject to which we agree all towage and other services are performed by [company name].

Signature: ______________________
Dated: ______________________

As principals

As agents for and on behalf of ......................................

[Strike out above as appropriate]