The Book

*Australasian Marine Pollution Laws* analyses the international conventions, the Australian and New Zealand legislation and the regulatory structures in both countries relating to the protection and preservation of the marine environment from ship pollution. It concentrates on the important aspects of the marine environment and its protection and preservation in the light of the huge tonnages of vital trade goods carried by many merchant ships to and from the Australasian region.

This second edition sets out: the sources of pollution of the coastal seas; the UN international conventions on the marine environment; the International Maritime Organization conventions; marine salvage; the complexities of the Australian offshore jurisdiction covering the Commonwealth States; the New Zealand offshore jurisdiction; some of the key aspects of regulatory governance and infrastructure; and the status of the IMO conventions on shipping and the marine environment.

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- Introduction and Sources of Marine Pollution
- United Nations Environmental Conventions and Agreements
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- IMO Conventions – Liability and Compensation
- Salvage and Marine Pollution
- Australian Offshore Jurisdictions – Petroleum and Constitutional Settlements
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- Australian Sensitive Marine Areas
- New Zealand Conventions and Laws
- Administrative Machinery for Combating Marine Pollution
- Appendix: Summary of IMO Conventions
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About the Author

Michael White specialises in maritime law and law of the sea, including in marine pollution from ships. After a first career in the Australian Navy in various ships and submarines he obtained degrees in law and commerce. He then practised as a Barrister for many years, becoming a QC in 1988, later becoming a full time academic at the University of Queensland. He was the foundation Executor Director of The Centre for Marine Law (later The Marine and Shipping Law Unit) in the TC Beirne School of Law. His PhD was on marine pollution from ships and he has written widely on issues in maritime law and in history.

He is presently an Adjunct Professor in The Marine and Shipping Law Unit, T.C. Beirne School of Law. He was awarded an OAM in the Australian Honours List January 2016 for his contribution to maritime law and naval history.
Australasian
Marine Pollution Laws
Australasian Marine Pollution Laws

Second edition

Michael WD White

THE FEDERATION PRESS
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Preface

This book outlines the international conventions and Australian and New Zealand legislation on the protection and preservation of the marine environment from ship pollution. My aim has been to write a book from which any person interested in the topic could gain an overall understanding of the relevant international conventions and laws, and regulatory structures for Australia and New Zealand. Of course, they would then need to research the details of the convention, law, guideline or regulation to understand the detail, but the book will give them a good start.

This is the second edition of this book and it replaces my earlier book Marine Pollution Laws of the Australasian Region, published by The Federation Press in 1994. It was, and still is, the only whole book dedicated to Australian and NZ laws on this topic. The second edition has been completely re-written as so much had changed since the first edition was done. I hope that it may prove helpful to my colleagues in law, shipping, regulation, administration, fisheries, defence, marine science and in the many areas of teaching, learning and marine scholarship.

The protection of the marine environment is an important topic as the threats to the environment from pollution are significant and not least amongst these are the threats to the marine aspects of it. The oceans, from one point of view, are the major determinants of the weather and the environmental background for the whole earth. Protecting and caring for them are important. One new player caring for the marine environment is the not-for-profit organisation the Australian Marine Environmental Association (AUSMEPA) which, with its international connections, is a growing force in the shipping and marine environment protection fields. Its details are available on its website at <http://www.ausmepa.org.au/home>.

The book begins with a chapter setting out the background to the topic, including the present sources of pollution of the coastal seas. It then proceeds to deal with the UN international conventions that touch on the marine environment and from there to two chapters on the IMO conventions. A short chapter about marine salvage follows. Then the book addresses the complexities of the Australian offshore jurisdiction before moving on to the Australian Commonwealth laws, followed by the laws of the States, the Northern Territory and New Zealand. Finally, it touches on some of the regulatory governance and infrastructure. There are two appendices, which show the status of the IMO conventions in early 2007 (as shown on its website).
Acknowledgements

It has been an enormous task researching and summarising the huge number of conventions, guidelines, statutes, rules, regulations, articles and books. The hard copies of the research material, if piled up, would stand about two metres high. It has been difficult to compress this amount of material into the one book. I would like to acknowledge the assistance I have had in this task although some of this acknowledgment is also set out in the text in footnotes. The early research assistance came from the University of Queensland scholar Ryan Goss (BA Hons 1st and University Medal; LLB Hons 1st and University Medal; 2007 Queensland Rhodes Scholar) and Nick Luke (BA Hons 1st and University Medal; LLB Hons 1st; 2006 Queensland Rhodes Scholar). Ryan was the 2005 Research Assistant for the Marine and Shipping Law Unit, TC Beirne School of Law and assisted me during most of 2005. Nick assisted at the end of 2005 and early in 2006 with preparing the index and other meticulous aspects of the final research and production. I am most grateful to them both and it was stimulating to work with them. I would also like to acknowledge the assistance of Michael Wells (BA, LLB student) who has been of great assistance with the final research and proofing of the manuscript at the end of 2006 and early 2007.

For the NZ component, I am most grateful to my colleague Professor Paul Myburgh, University of Auckland, and Mr Tim Workman, Maritime NZ, both of whom read a draft of Chapter 10 and made many helpful suggestions about improving and correcting the NZ parts of the script. For careful and most useful appraisals on a number of the Australian chapters I am indebted to Mr Paul Nelson, Australian Maritime Safety Authority, who brought his long experience in this area to bear. This is very much the case, also, with Mr Jeff Hardy, of Maritime Safety Queensland, who has kindly read through most of the manuscript and given me the benefit of his great knowledge of maritime law and indicated many improvements. My indebtedness also extends to Mr James Aston, Project Manager, Shipping, Great Barrier Reef Marine Park Authority for assistance with Chapter 9.

More generally I would like to pay tribute to the professional background support from professional colleagues in the field of marine pollution from ships. Mr Robert Alchin, Commonwealth Department of Transport and Regional Services, and Mr John Kavanagh, Maritime Safety Queensland, have always been reliable and helpful. I am indebted to all of the above and, indeed, to many more of my professional colleagues for their assistance and support.

I thank my colleagues at the Marine and Shipping Law Unit, TC Beirne School of Law, for their intellectual comradeship. We often talk about shipping, law of the sea and international law issues, which discussions are of great assistance. The TC Beirne School of Law provided the
office and facilities during 2005 and early 2006 and the Centre for Marine Studies did likewise during my work in 2006 and 2007. This support has enabled me to have access to support staff and facilities that have allowed me to research and write.

For permission to use the tables, maps and diagrams in this book I would like to acknowledge my thanks to the following:

(a) for the statistics on oil spills in Chapter 1 to the International Tanker Owners Federation Ltd (ITOPF) and, in particular, its managing director Dr Tosh Moller;

(b) for the maps in Chapters 6 and 9 to Geoscience Australia and, in particular, Dr Bill Hirst and its copyright manager Mr Mike Pasfield.

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(c) for the other maps on the Great Barrier Reef in Chapter 9 to the Great Barrier Reef Marine Park Authority; and, in particular, the library manager and staff;

(d) for the two annexes to the International Maritime Organization and, in particular, Mr Aubrey Botsford, the head of its publishing service.

To Mr Chris Holt and Ms Kathy Fitzhenry and others from The Federation Press, I express my thanks for their assistance in preparing the book for publication. I have worked with Chris and Kathy and the Federation Press team over a number of books and dealing with them has always been a pleasure. They are competent, efficient and cheerful and I am glad to have enjoyed a cordial relationship with them over these many years.

Sources

I should say something about the sources for material for my research. I have carefully referred to the relevant international conventions and the legislation for Australia and New Zealand. I have not, however, attempted to deal with the myriad of cases that pour out of the many international and national courts, except where they have been vital to the text. These, as well as the many amendments that come at a great rate
from the IMO, the parliaments and the government departments, all regularly alter the conventions, laws, regulations, rules and guidelines so the situation requires careful research to check for amendments. The overseas scholarly writings are impressive and readers may need to refer to them for their own researches. However, I have mentioned relevant Australian and New Zealand texts in the footnotes where they are appropriate. In relation to overseas scholarly publications, the recent book by my maritime colleague Professor Edgar Gold, *Guard Handbook on Protection of the Marine Environment*, 3rd ed, 2006 is, in some ways, a companion book. Its coverage extends and deepens the international aspects and sets out the United States and United Kingdom situations, which are beyond the compass of my own book. Edgar now lives mainly in Brisbane and I enjoy having such a knowledgeable and helpful colleague nearby.

Finally, this area of the law of the protection of the marine environment, especially from shipping, is one for which I have a particular fondness and it has been a pleasure for me to write about it. It is too much to think that it may be a pleasure but I do hope that its publication may prove of assistance to others.

*Michael White*

*University of Queensland*

*February 2007*
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<th>Description</th>
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<tbody>
<tr>
<td>AFZ</td>
<td>Australian Fishing Zone</td>
</tr>
<tr>
<td>AIP</td>
<td>Australian Institute of Petroleum</td>
</tr>
<tr>
<td>AMOSCA</td>
<td>Australian Marine Oil Spill Centre</td>
</tr>
<tr>
<td>AMSA</td>
<td>Australian Maritime Safety Authority</td>
</tr>
<tr>
<td>AQIS</td>
<td>Australian Quarantine and Inspection Service</td>
</tr>
<tr>
<td>CLC</td>
<td>International Convention on Civil Liability for Oil Pollution Damage</td>
</tr>
<tr>
<td>CLCS</td>
<td>Commission on the Limits of the Continental Shelf.</td>
</tr>
<tr>
<td>CMI</td>
<td>Comité Maritime International</td>
</tr>
<tr>
<td>CRISTAL</td>
<td>Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution 1971</td>
</tr>
<tr>
<td>EEZ</td>
<td>Exclusive Economic Zone</td>
</tr>
<tr>
<td>GBR</td>
<td>Great Barrier Reef</td>
</tr>
<tr>
<td>GBRMPA</td>
<td>Great Barrier Reef Marine Park Authority</td>
</tr>
<tr>
<td>GPA</td>
<td>Global Action Plan for the Protection of the Marine Environment from Land-based Activities</td>
</tr>
<tr>
<td>GESAMP</td>
<td>Joint Group of Experts on the Scientific Aspects of Marine Pollution</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>IMCO</td>
<td>International Maritime Consultative Organization (see also IMO)</td>
</tr>
<tr>
<td>IMLI</td>
<td>International Maritime Law Institute</td>
</tr>
<tr>
<td>IMO</td>
<td>International Maritime Organization</td>
</tr>
<tr>
<td>INMARSAT</td>
<td>International Mobile Satellite Organization</td>
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<tr>
<td>ISU</td>
<td>International Salvage Union</td>
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<tr>
<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
</tr>
<tr>
<td>ITOPF</td>
<td>International Tanker Owners Pollution Federation Ltd</td>
</tr>
<tr>
<td>IUA</td>
<td>International Unitisation Agreement for Greater Sunrise</td>
</tr>
<tr>
<td>JPDA</td>
<td>Joint Petroleum Development Area</td>
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<tr>
<td>LLMC</td>
<td>Limitation of Liability for Maritime Claims Convention</td>
</tr>
<tr>
<td>LOF</td>
<td>Lloyd’s Open Form</td>
</tr>
<tr>
<td>MARPOL</td>
<td>International Convention for the Prevention of Pollution by Ships</td>
</tr>
<tr>
<td>MEPC</td>
<td>Marine Environment Protection Committee</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>MPA</td>
<td>Marine Pollution Act 1987 (NSW)</td>
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<tr>
<td>MSA</td>
<td>Maritime Safety Authority of New Zealand (now Maritime New Zealand)</td>
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<td>MSQ</td>
<td>Maritime Safety Queensland</td>
</tr>
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<td>MTA</td>
<td>Maritime Transport Act 1994 (NZ)</td>
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<td>NOO</td>
<td>National Oceans Office</td>
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<td>OILPOL 54</td>
<td>International Convention for the Prevention of Oil Pollution 1954</td>
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<tr>
<td>PIC</td>
<td>Pacific Island Country</td>
</tr>
<tr>
<td>PSC</td>
<td>Port State Control</td>
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<tr>
<td>PSSA</td>
<td>Particularly Sensitive Sea Area</td>
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<tr>
<td>RMA</td>
<td>Resource Management Act 1991 (NZ)</td>
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<td>SAR</td>
<td>Search and Rescue</td>
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<tr>
<td>SCOPIC</td>
<td>Special Compensation Protection and Indemnity Clause</td>
</tr>
<tr>
<td>SCR</td>
<td>Special Casualty Representative</td>
</tr>
<tr>
<td>SDR</td>
<td>Special Drawing Right</td>
</tr>
<tr>
<td>SPREP</td>
<td>South Pacific Regional Environment Programme</td>
</tr>
<tr>
<td>STCW</td>
<td>International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978</td>
</tr>
<tr>
<td>TOMPA</td>
<td>Transport Operations (Marine Pollution) Act 1995 (Qld)</td>
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<tr>
<td>TOMSA</td>
<td>Transport Operations (Marine Safety) Act 1994 (Qld)</td>
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<tr>
<td>TOVALOP</td>
<td>Tanker Owners’ Voluntary Agreement Concerning Liability for Oil Pollution 1969</td>
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<tr>
<td>UCH</td>
<td>UNESCO Convention on Underwater Cultural Heritage 2001</td>
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<tr>
<td>UNCED</td>
<td>United Nations Conference on Environment and Development</td>
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<tr>
<td>UNEP</td>
<td>United Nations Environmental Program</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
</tr>
<tr>
<td>UNTAET</td>
<td>United Nations Transitional Administration in East Timor</td>
</tr>
<tr>
<td>VLCC</td>
<td>Very Large Crude Carrier</td>
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<td>WMU</td>
<td>World Maritime University</td>
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Chapter 1

Introduction and Sources of Marine Pollution

1.1 Introduction

Protection and preservation of the environment are prominent in current world issues and those relating to the marine environment are probably some of the most prominent and the most complex. Environmental issues relating to the air, land and sea are, of course, inter-related so the ocean currents and global warming of the atmosphere are related, but the scientists are unable, as yet, to identify the precise cause and effect. The sea temperatures have definitely risen and it seems likely that they will continue to rise. Sea levels also seem to be rising. In this case the effects will be felt world wide, especially by those nations whose land areas are close to sea level.

Included in the needs for protection and preservation of the marine environment is for protection from pollution from ships. The laws and regulatory structures internationally and in Australia and New Zealand are the main focus of this book. As will be shown later in this chapter, the proportion of the total pollution of the sea from ships is small. Nonetheless, it is a significant problem in areas where ships congregate and usually it is a problem when major shipping casualties occur.

This chapter will set out the background to marine pollution from ships in the Australian and New Zealand regions, including such statistics as are available. This will set the foundation from which the other chapters develop the topic.  

1.2 Background

Australia is a large island located amongst the Pacific, Indian and Southern Oceans and the Timor Sea. The coastline is long, some 61,700

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1 It is not intended to footnote the huge, and growing, list of publications on the conventions and laws about marine pollution from shipping. Suffice for this book to note that the only book dedicated to these Australian and NZ laws and conventions is White M, Marine Pollution Laws of the Australasian Region (Federation Press, 1994) which is now dated and which this current book is intended to replace. Book chapters on the subject may be found in Davies M and Dickey A, Shipping Law (Law Book Co, 3rd ed, 2004) and White M, ‘Marine Pollution from Ships: International Conventions and Australian Laws’ in Lipman Z and Bates G, Pollution Laws in Australia (Lexis Nexis Butterworths, 2002) Chapter 10.
kilometres, and its beaches and coastal seas include many varieties of marine flora and fauna. Under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) with its extended ocean areas in the Exclusive Economic Zone (EEZ), Australia has rights and responsibilities over some 16 million square kilometres of ocean, which is much larger than the Australian land mass itself. The Australian Fishing Zone (AFZ) and EEZ cover some 8.94 million square kilometres and it extends over some 60 degrees of latitude, from Torres Strait in the north to Antarctica in the south, and some 72 degrees in longitude, from Norfolk Island in the east to Cocos Island in the west.

In order to set the background to the legal situation offshore it may be helpful to set out the basic developments in Australian offshore jurisdiction, which is described in more detail in Chapter 6. From the time of British settlement in Australia in 1778 the original Colony of New South Wales, and then the various Colonies as they were founded and separated from it, claimed the same territorial sea as Great Britain (three nautical miles). When the Australian Colonies federated into the Commonwealth of Australia in 1901 the territorial sea was presumed to remain the same. The Commonwealth Parliament did not make an issue of the jurisdiction over the territorial sea until after Australia ratified the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1958 Convention on the Continental Shelf and then enacted legislation to give domestic force to them. In the legislation the Commonwealth Parliament asserted that the territorial seas belonged to it from the low water mark or historic boundaries, which the States challenged and lost in the High Court.

The Commonwealth and the States then entered into the Offshore Constitutional Settlement 1979 in which jurisdiction out to three nautical miles from the low water mark or historic boundaries was granted to the States (and the Northern Territory) in relation to powers and titles. This was given force in legislation by the Commonwealth Parliament and those of the States and the Northern Territory. The result is that there are complexities of jurisdictional questions concerning jurisdiction over the coastal seas that are unresolved.

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3 Done at Montego Bay, Jamaica on 10 December 1982.
4 Australia’s Oceans Policy, above, p 7.
5 This excludes the area off the Australian Antarctic Territory and even excluding this area it is the world’s third largest – Australian Department of Environment, Sport and Territories Our Sea, Our Future: Major Findings of the State of the Marine Environment Report for Australia, Ocean Rescue 2000 Program, Commonwealth of Australia, 1995 (‘SOMER’), p 2.
6 SOMER, p 2. The AFZ is coterminous with Australia’s EEZ.
7 The Seas and Submerged Lands Act 1973 (Cth).
8 New South Wales v Commonwealth (The Seas and Submerged Lands Act Case) (1975) 135 CLR 337.
In these complex jurisdictional waters sail the merchant ships that carry Australia’s trade, which is vital to the Australian economy, the increasing number of ships which carry the cruise liner passengers, the tourist vessels, that bring billions of dollars a year to Australia, and the fishing vessels, that supply a major seafood industry for domestic consumption and export markets. There are also thousands of recreational craft that ply the seas and inland waters. The government and government agency administrators try and regulate these activities to protect and preserve the marine environment and provide for safe ships and safe navigation whilst working within a complex system of international conventions, laws, regulations and policies. All of these aspects are developed later in this book.

For its part, New Zealand is comprised of two main islands, numerous offlying ones and three dependencies (Nieu, Cook Island, Tokelau). It has a population of approximately 4 million people, a coastline of 15,134 kilometres, an estimated coral reef area of 1310 square kilometres and is a party to most of the major maritime and environmental international conventions (but see further in Chapter 10). It has some 70 protected marine areas and receives about 3500 international trading ships each year.\(^9\) It is a party to UNCLOS and has proclaimed a 12 nautical mile territorial sea and a 200 nautical mile EEZ.\(^10\) New Zealand has to address all of the regulatory and legal issues of any responsible sovereign island country but, being a unitary state, it is spared the offshore jurisdictional complexities of a federation such as Australia.

### 1.3 Chronology of Marine Pollution Laws Development

The marine pollution international treaties and domestic laws with which this book is concerned mainly resulted from major maritime casualties giving rise to such a high public outcry that the international and national communities took action. It is appropriate, therefore, to set out a short description of these. It should be mentioned, however, that only a small number of the maritime casualties are mentioned in this section. Other maritime casualties have also had an influence on altering the regulatory and compensatory regime, especially for oil tankers, but these are the main ones.\(^11\)

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\(^9\) Maritime New Zealand website ‘Fact Sheet’, see website, above.
\(^10\) The statistics are available from &lt;www.nationmaster.com/country/nz/Geography&gt; accessed 26 October 2005.
\(^11\) Details of these casualties are contained in many publications, both legal and maritime. In relation to the compensatory regime the International Oil Pollution Compensation Funds booklet, 25 Years: The IOPC Funds’ 25 years of compensating victims of oil pollution incidents (IOPC, London, 2003) has a number of articles which touch on this development; see also the IOPC Funds’ Annual Reports. Website is &lt;www.iopcfund.org&gt;. See also the ITOPF website; &lt;www.itopf.com&gt; ‘Historical Data’.
Whilst there had been some attention paid to protection and preservation of the marine environment from ships before World War II, it was only after the peace in 1945 that serious attention was paid to it.

The United Kingdom commissioned a Royal Commission into oil pollution around its coasts, mainly from tanker operations. The United Kingdom Government followed the Commission’s report by organising an international conference which in turn gave rise to the *International Convention for the Prevention of Oil Pollution* 1954 (OILPOL 54).\(^\text{12}\) It had limited impact. Enforcement lay with the flag states, who made little attempt to have it ratified or enforce its sentiments. Further, there was much opposition to having an international regime which impinged on state jurisdiction and the major oil and shipping nations opposed interference in the manner in which they operated these major industries. The drive for change came about from the first of a series of major shipping casualties which heavily influenced major states into not only accepting international regulation but positively encouraging it.

### 1.3.1 Torrey Canyon 1967

In 1967 the tanker *Torrey Canyon* went aground off the south-west of England and some 100,000 tonnes of cargo oil was spilled into the sea. It spread over coasts in England and France. As a result various active governments wished to establish an international regulation and compensation scheme for clean up costs and to compensate those who suffered loss and damage caused by the spilled cargo oil. The direct result was that the International Maritime Consultative Organization (IMCO)\(^\text{13}\) organised the *International Convention on Civil Liability for Oil Pollution Damage* 1969 (CLC 1969).\(^\text{14}\) This convention was, and is, the origin of one of the most successful insurance schemes in the world. It established a compulsory insurance scheme to compensate for oil spills from tankers which incorporated strict liability, a capping of the upper limit of liability and the right to enforce a claim direct against the insurer if necessary. Details are set out below.

It became clear to the oil and shipping companies that whilst the CLC took its time to come into force it would be best to introduce a voluntary compensation scheme of its own. The shipping insurers, the P&I Clubs,\(^\text{15}\) introduced TOVALOP,\(^\text{16}\) which was an agreement, not a convention, whereby the ship owners entered with it were indemnified

\(^{12}\) OILPOL 1954 came into force in 1958.

\(^{13}\) The name was later changed to the International Maritime Organization (IMO); see description and discussion in Chapter 3.

\(^{14}\) CLC 1969 came into force on 19 June 1975.

\(^{15}\) Protection and Indemnity Clubs.

\(^{16}\) Tanker Owners’ Voluntary Agreement Concerning Liability for Oil Pollution 1969.
for the payments made by the TOVALOP fund. It was ended on 20 February 1997, by which time it was felt that the CLC and the Fund Convention gave adequate cover.

The problem of carriage of bulk oil was not solely a problem for the shipping industry and its insurers, so they argued. It was also the type of cargo, the bulk oil, that was the problem. As a result pressure was placed on the oil industry to contribute, to which it agreed, and IMCO organised the Fund Convention 1971. Its essential provisions were that it was a fund, not insurance cover, which would cover clean up costs and loss and damage from relevant bulk oil from tankers, which would raise the upper limit of the available compensation by a considerable margin, and also apply if, for some reason, the CLC was not applicable. Like the situation with the CLC, to cover the period until the Fund Convention came into force, the oil industry agreed to bring its own voluntary scheme into place, called CRISTAL. This voluntary agreement mirrored the terms of the Fund Convention and was administered by a fund run from London until it was voluntarily wound up, like TOVALOP, on 20 February 1997.

However, there was a further and different issue that arose from the Torrey Canyon casualty. It was a foreign flagged vessel and it went aground beyond the United Kingdom territorial sea. As a result the United Kingdom had no direct right in international law to interfere with the wreck and limit the pollution because it was not of its flag and the ship was aground beyond its jurisdiction (then three nautical miles). After some days it did bomb the wreck to burn the remainder of the oil, but this situation impelled another new convention, this time on jurisdictional rights of coastal states in a similar circumstance. The Intervention Convention 1969 gives a right to a coastal state that is suffering, or is likely to suffer, marine pollution from a ship offshore and otherwise beyond jurisdiction, to deal with the casualty. Details are set out below.

The next development was the International Convention for the Prevention of Marine Pollution from Ships (MARPOL 73) in 1973 which was the first of the many major conventions organised under IMCO. But MARPOL 73 was not favoured with much international support and there were a series of tanker casualties that caused great concern, so the IMCO organised MARPOL 78. This was a protocol to MARPOL 73, but the protocol had such major changes that the original convention became known as MARPOL 73/78. Of late, however, the convention has become widely known by its acronym without the addition of the years, that is,
MARPOL. But the 1978 Protocol, too, looked like languishing until another major shipping casualty occurred, the *Amoco Cadiz*.

### 1.3.2 Amoco Cadiz 1978

The *Amoco Cadiz* was a VLCC\(^{21}\) tanker proceeding north off the coast of France when its steering failed in very heavy weather and it finally broke up and sank, after salvage efforts failed. Nearly all of its cargo was released, some 230,000 tonnes, which mainly washed ashore on the French Atlantic coast. France, which had considered that conventions like MARPOL were mainly for oil and shipping countries, then became a strong supporter of MARPOL and similar conventions. Other states also realised that these conventions were desirable for any state that had a coastline, so support for MARPOL suddenly escalated. A considerable amount of litigation occurred arising from the *Amoco Cadiz* casualty, most of which was conducted in the USA.\(^{22}\)

For much of this period of the 1970s and 1980s the USA had not been an enthusiastic supporter of the international regimes for regulation of pollution from shipping. As one of the largest tanker\(^{23}\) users in the world, it had seen the national interest more as protecting the oil and tanker industries rather than the marine environment. Until, that is, the oil spill from the another casualty, the *Exxon Valdez*.

### 1.3.3 Exxon Valdez 1989

In March 1989 the VLCC *Exxon Valdez* ran aground when sailing fully laden from the oil terminal at Prince William Sound, Alaska. It was a pristine marine wilderness area and the tanker spilled some 40,000 tons (11 million gallons) of crude oil which then spread around the sea and shores. An enormous outcry occurred and the USA, in its inimitable fashion, threw much sound, fury and money into the fray. The legislative result was that, instead of throwing its weight behind the international regimes under the IMO, the USA legislature enacted its own separate scheme in the *Oil Pollution Act* 1990 (OPA 1990). This Act had many innovative features but it severely damaged the international structure for carriage of oil by sea until the adjustments were put in place.

One of the positive aspects of this high profile spill from the *Exxon Valdez* was that the support for the international regulatory and compensatory regime continued strongly at the IMO and elsewhere. Then this support was boosted when another major oil spill occurred 10 years later; the *Erika* in 1999.

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21 Very Large Crude Carrier.
23 The USA terminology prefers ‘tankship’ but for consistency the word ‘tanker’ will be used throughout this book.
1.3.4 Erika 1999

In December 1999 the Maltese-registered tanker *Erika* was proceeding north in the Bay of Biscay when it encountered heavy weather and, in the end, broke in two and sank some 60 nautical miles off the coast of France. About 19,800 tonnes were spilled then more leaked out later, from the bow and the stern sections that had sunk separately. Most of it spread, in very heavy storms, along some 400 kilometres of the French Atlantic coast. Clean-up operations were not completed until about November 2001. The spill impacted on the summer tourist trade as well as on fisheries, maritime and other commercial activities.\(^{24}\) The French Government was furious and determined that action should be taken. The European Union (EU) committed itself to take strong action unilaterally but, after much diplomatic effort, most of that action was channelled through the IMO. A considerable amount of litigation ensued.

Then, just as it seemed that the fallout from the *Erika* was settling down, the *Prestige* casualty occurred.

1.3.5 Prestige 2002

In November 2002 the Bahamas-registered tanker *Prestige* was proceeding north off the coast of Spain (and Portugal) when it began listing and leaking oil cargo. Salvage operations were commenced and the salvors sought permission to shelter the stricken ship in Spanish waters, which was refused. The salvors were required to tow the ship well offshore and, in the end, the *Prestige* broke in two and sank in the Atlantic ocean releasing some 25,000 tonnes of cargo. The two sections sank into very deep water and slowly leaked more oil which then spread over the Spanish and French coasts.\(^{25}\) The governments of both countries were furious, once again, and commenced vigorous action through the European Union. Once again vigorous diplomatic action by the IMO limited the European Union proceeding unilaterally. In the end the European Union did take some unilateral steps and the IMO has met its demands by also taking steps.\(^{26}\) One IMO step was to introduce the optional third tier of compensation under the *Fund Convention* and another was to

\(^{24}\) See IOPC Funds Annual Report 2004, p 74 and following.

\(^{25}\) See IOPC Funds Annual Report 2004, p 92 and following.

\(^{26}\) The EU has pursued its steps in dealing with pollution from tankers. See for example articles such as Nesterowicz MA, ‘European Union Legal Measures in Response to the Oil Pollution of the Sea’ (2005) 29 Tulane Maritime Law Journal 29 (No 1, Winter Edition); Wene J, ‘European and International Regulatory Initiatives due to the *Erika* and *Prestige* Incidents’, Master of Laws dissertation, Marine and Shipping Law Unit, TC Beirne School of Law, University of Queensland, May 2005, unpublished. The EU directive 2005/35/EC of 7 September 2005 on ship-sourced pollution and criminal penalties on sea farers for infringement is subject to an appeal to the European Court of Justice as an infringement of MARPOL.
advance the dates for compulsory use of double hull tankers, see Chapter 3 below.

1.3.6 The Malacca Straits

The major shipping incidents mentioned above all occurred in the USA or European waters. In the Asia Pacific region there is one major maritime situation that should be mentioned, which is a continuing one rather than just the one shipping casualty. This is the dire position of Malaysia, Indonesia and Singapore as the littoral states to the Malacca and Singapore Straits. These straits are the focal point for huge tonnages of tanker cargo being carried from the Middle East region to Japan, Korea and, increasingly, to China. Major casualties and oil spills occur there every few years and less serious ones more frequently.\(^27\) Vigorous steps are being taken to try and bring more control and risk management to these straits.

1.3.7 Australia

For Australia, a major catalyst for debate was the Kirki incident in 1991. The 97,000 tonne Greek-owned tanker Kirki was proceeding fully laden from the Middle East to the Kwinana refinery near Fremantle, Western Australia, when about seven metres of the bow of the vessel worked so much in heavy seas that it broke off and sank.\(^28\) The crew was evacuated, some 16,000 tonnes of oil cargo spilled, and it was only the valiant efforts of the salvors and others, together with particularly fortuitous action by ocean currents, that the ship did not go aground and none of the oil got ashore. The wreck was towed, stern first, for about a week to the northwest coast of Australia where the rest of the cargo was discharged and the Kirki was towed to Singapore.

The Australian psyche was galvanised, major inquiries were held and the National Plan was overhauled. In Australia there were also the Iron Baron\(^29\) and the Laura d’Amato spills, that were very high profile, and a series of groundings, but without oil spills, in the Great Barrier Reef that have kept the issue before the public from time to time.\(^30\)

\(^{27}\) The IOPC Funds Annual Reports give details for those casualties where there have been claims on the fund.

\(^{28}\) For some details on the Kirki, see White, Marine Pollution Laws 1994, above, section 10.5 and Appendix 3; and also the ATSB website, below.

\(^{29}\) Details of shipping casualties may be found on the AMSA website; <www.amsa.gov.au/Marine_Environment_Protection/Major_Oil_Spills_in_Australia>; and also the Australian Safety Transport Bureau website <www.atsb.gov.au/> and follow prompts to marine investigations.

1.3.8 New Zealand
For New Zealand\(^{31}\) the grounding and bunkers spill from the *Jodie F Millenium* has had a similar effect on its national psyche. This occurred in 2002 when the log carrier had to leave Gisbourne Harbour to avoid being alongside on an exposed berth in very bad weather. In departing through the shipping channel it went aground, broached and stuck fast. Oil spilled on the beaches. The salvage operation was highly visible and the New Zealand, and wider, media made much of it.\(^{32}\)

These then are the major maritime casualties that have received a high public profile and each of them moved public concern to a level that required political action. It seems the sad fact that high public concern is a necessary precursor to improvement to the marine environment regulatory structure, including in Australian and New Zealand. It is a mixed blessing as no rational person wishes for a marine casualty but the drive to improve the regulatory structure seems only to arise after they occur.

As the term ‘marine pollution’ is much used it is appropriate now to devote a section to discussing its meaning.

1.4 Definition of Marine Pollution
Exactly what is pollution and what is not is far from simple. In many cases an introduction of some new substance is pollution. This is reflected in the various international writings on the subject that have made brave attempts at this difficult definition, but a general consensus has emerged. The UNCLOS definition is:

‘[P]ollution of the marine environment’ means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.\(^{33}\)

A few points about this definition are of interest. It is noteworthy that the definition restricts the pollution to introduction by ‘man’, so that the harmful aspects which may be introduced by natural causes are not counted as pollution. Further, the definition extends beyond introduction of ‘substances’ to include ‘energy’. An example of the introduction of


\(^{32}\) For details on the NZ position see Chapter 10.

\(^{33}\) Article 1(4). A very good source of information relating to the environment, including the marine environment, is on the IUCN website; see <www.iucn.org/#menu>.
energy is in warming; one instance being that where water cooling in nuclear reactors is used the sea water coolant is discharged back into the sea somewhat warmer than when it left it.

Whilst many sources of pollution are toxic to the marine environment there is no substance more damaging than a large oil spill, especially one in restricted waters and coastlines. The prevalence of this will be addressed shortly, but the characteristics and behaviour of spilled oil needs some introduction.

1.5 Behaviour of Spilled Oil

Oil is a natural substance and when spilled into water bioremediation will break it down into its constituents in due course. The damage is done to the environment when the spill is large and in a confined area. If a large spill occurs at sea then it does little damage and in a few months no trace of it will remain. Further, little damage is then done to the fauna as bird and sea life are able to avoid the area. The problem occurs when the spill occurs in restricted waters and near the shore or some important installation.34

The density of oil, generally measured as specific gravity, is an important factor in spilled oil. Oil is comprised of hydrocarbons and the range is from very dense oils, such as tar, to quite light ones, such as kerosene or aviation gas. Crude oils have a fairly wide range of characteristics, one of which is their density. Some are heavy crudes and some lighter. Further, some of them contain high levels of contaminants and some do not, which is important to the atmosphere when the oil is burned. When crude oil is refined, which is the process, in effect, of heating the oil and taking the fractions off, and some fractions, in gaseous form, are often burned, which accounts for the flares observed at many oil refineries. The lighter fractions include aviation gas, kerosene and petroleum and the heavier ones include furnace fuel oil and tar. Oil used in diesel engines varies in density but comes somewhere near the middle of the range.

When spilled in large quantities into the water oil spreads and moves on the surface while undergoing a number of chemical and physical changes, called ‘weathering’. The lighter oils tend to evaporate fairly quickly, but the ‘persistent’ oils tend to form a mousse. The basic features are evaporation, oxidation, dispersion into the water column, and spreading over the sea surface. Sediments tend to settle on the seabed, where they damage the environment and its inhabitants. The surface oil

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34 For a good description of the behaviour of spilled oil see the International Tanker Owners Pollution Federation Ltd (ITOPF) website; <www.itopf.com> ‘Fate and Effects’ and an excellent, albeit short, layperson’s explanation is to be found in the ITOPF Handbook, ‘Fate of Marine Oil Spills’, pp 11-12.
often washes ashore where it is subject to clean-up operations, if possible. The saving grace of oil is that it is a natural substance and bioremediates back into its basic elements if left to weather and age. The temperatures of the sea and air and the viscosity of the spilled oil are all important determinants in the behaviour of spilled oil.

1.6 Land Sourced Pollution

The main source of pollution of the coastal seas is from the land and the activities carried on by people on it. The difficulty in addressing the statistics concerning its prevalence is that the pollution varies so much in the various parts of the world. There is a strong correlation between high population densities and pollution of the sea. Most of the land sourced pollution occurs in the inland and coastal seas and the deep water oceans are, in the main, not burdened by it.35

Figures about land sourced pollution that are often mentioned come from a GESAMP Report36 in 1990 which attributed 44% to land sourced pollution direct (run-off and land-based discharges), 33% to atmosphere pollution, 10% to dumping, 12% to maritime transportation and 1% to offshore production.37 In Agenda 21 in 199238 it stated that ‘land-based sources contribute 70% of marine pollution’39 but no detail was given to justify this assertion.

In its updated 2001 Report GESAMP investigated the problem anew and wrote a lengthy report. This was more disciplined and accurate than the 1990 Report and quantified the problem in various parts of the world where it could and identified the main contaminants, which varied from place to place. The essential aspects of the Report are in the Executive Summary, which includes:

- Population pressure, consumption patterns, and increasing demands for space and resources – combined with poor economic performance and the impoverishment of a large part of the global population – undermine the sustainable use of oceans and coastal areas, and of their resources. …
- On a global scale marine environmental degradation has continued and in many places even intensified. …

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35 There is a huge volume of publications on land sourced pollution of the seas.
36 GESAMP is 'Joint Group of Experts on the Scientific Aspects of Marine Pollution'. For the GESAMP website see <http://gesamp.imo.org/>.
38 Agenda 21 was part of the UNCED 1992 in Rio de Janeiro, which is mentioned below in Chapter 2.
39 Paragraph 17.18.
Increasing habitat destruction and ecosystem alteration either by physical … chemical … or biological means … constitutes the most widespread, frequently irreversible, human impact on the coastal zone.\textsuperscript{40}

It should be mentioned that atmospheric pollution of the sea is also significant. In this case the polluted air, mainly from cities and industrial areas, falls on the sea surface and then enters the water column.\textsuperscript{41} This is the reason why the GESAMP Report 1990 cited atmospheric pollution as contributing 33\% of the coastal pollution.

UNCLOS is discussed in Chapter 2, but it is relevant to note that UNCLOS obliges state parties to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources.\textsuperscript{42} It is a difficult issue, however, as land pollution control is entirely a matter for domestic laws and action and the international influence on it is slight. It is regulation of pollution from the land that is the major shortcoming, not regulation of pollution from ships.

In summary, it may be said that the pollution of coastal seas from land, both directly, through the rivers and other waterways, and through atmospheric pollution, is generally thought to be of a high proportion. What that proportion is varies with the locality. If the population density is high the pollution is generally high and vice versa. The figures only apply to the waters nearer the land and the further offshore the water then the less the pollution from land sources.\textsuperscript{43}

### 1.7 Ship Sourced Marine Pollution Statistics

The main sources of pollution from ships into the sea are ships’ waste, ballast water and oil. Statistics on the amount and the effect of pollution from ships by waste and ballast water are not possible. It varies so much from area to area global compilations are not kept. It is otherwise with oil. The main source of oil spill statistics is the International Tankers Owners Pollution Federation (ITOPF), which is based in London. ITOPF has staff with the skills for dealing with oil spills and it publishes its compilation of oil spills from ships.

\textsuperscript{40} GESAMP Reports and Studies Protecting the Oceans from Land-based Activities. Land-based sources and activities affecting the quality and uses of the marine, coastal and associated freshwater environment, IMO/FAO/UNESCO-IOC/WMO/WHO/IAEA/UN/UNEP, 2001, pp 1-2.

\textsuperscript{41} For some discussion on atmospheric pollution see Birnie P and Boyle A, International Law and the Environment (Oxford University Press, 2nd ed, 2002) Chapter 10 ‘Protecting the Atmosphere and Outer Space’.

\textsuperscript{42} Article 207.

The incidence of large spills is dramatic for the areas where they occur and it is heartening that the total number of spills and the total amount of spilled oil has been decreasing for many years. The annual average number of large spills (greater than 700 tonnes) during the early 2000s decreased to about a seventh of those in the 1970s.

**Figure 1. Annual Number of Oil Spills**

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Figure 2. Annual Quantity of Oil Spilled

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<table>
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<th>Quantity (tonnes)</th>
<th>Year</th>
<th>Quantity (tonnes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>206,000</td>
<td>2000</td>
<td>14,000</td>
</tr>
<tr>
<td>1981</td>
<td>48,000</td>
<td>2001</td>
<td>8,000</td>
</tr>
<tr>
<td>1982</td>
<td>12,000</td>
<td>2002</td>
<td>67,000</td>
</tr>
<tr>
<td>1983</td>
<td>384,000</td>
<td>2003</td>
<td>42,000</td>
</tr>
<tr>
<td>1984</td>
<td>28,000</td>
<td>2004</td>
<td>15,000</td>
</tr>
<tr>
<td>1985</td>
<td>85,000</td>
<td>2005</td>
<td>17,000</td>
</tr>
<tr>
<td>1986</td>
<td>19,000</td>
<td>2006</td>
<td>13,000</td>
</tr>
<tr>
<td>1987</td>
<td>30,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td>190,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1989</td>
<td>174,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Total 1,176,000</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
INTRODUCTION AND SOURCES OF MARINE POLLUTION

Figure 3. Number of Oil Spills over 700 Tonnes

Figure 4. Quantities of Oil Spilled
Figure 5. Selected Major Oil Spills

<table>
<thead>
<tr>
<th>Ship name</th>
<th>Year</th>
<th>Location</th>
<th>Spill (tonnes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlantic Empress</td>
<td>1979</td>
<td>off Tobago, West Indies</td>
<td>287,000</td>
</tr>
<tr>
<td>ABT Summer</td>
<td>1991</td>
<td>700 nautical. miles off Angola</td>
<td>260,000</td>
</tr>
<tr>
<td>Castillo de Bellver</td>
<td>1983</td>
<td>off Saldanha Bay, South Africa</td>
<td>252,000</td>
</tr>
<tr>
<td>Amoco Cadiz</td>
<td>1978</td>
<td>off Brittany, France</td>
<td>223,000</td>
</tr>
<tr>
<td>Haven</td>
<td>1991</td>
<td>Genoa, Italy</td>
<td>144,000</td>
</tr>
<tr>
<td>Odyssey</td>
<td>1988</td>
<td>700 nautical. miles off Nova Scotia, Canada</td>
<td>132,000</td>
</tr>
<tr>
<td>Torrey Canyon</td>
<td>1967</td>
<td>Scilly Isles, UK</td>
<td>119,000</td>
</tr>
<tr>
<td>Sea Star</td>
<td>1972</td>
<td>Gulf of Oman</td>
<td>115,000</td>
</tr>
<tr>
<td>Irene Serenade</td>
<td>1980</td>
<td>Navarino Bay, Greece</td>
<td>100,000</td>
</tr>
<tr>
<td>Urquiola</td>
<td>1976</td>
<td>La Coruna, Spain</td>
<td>100,000</td>
</tr>
<tr>
<td>Hawaiian Patriot</td>
<td>1977</td>
<td>300 nautical. miles off Honolulu</td>
<td>95,000</td>
</tr>
<tr>
<td>Independenta</td>
<td>1979</td>
<td>Bosphorus, Turkey</td>
<td>95,000</td>
</tr>
<tr>
<td>Jakob Maersk</td>
<td>1975</td>
<td>Oporto, Portugal</td>
<td>88,000</td>
</tr>
<tr>
<td>Braer</td>
<td>1993</td>
<td>Shetland Islands, UK</td>
<td>85,000</td>
</tr>
<tr>
<td>Khark 5</td>
<td>1989</td>
<td>120 nautical. miles off Atlantic coast of Morocco</td>
<td>80,000</td>
</tr>
<tr>
<td>Aegean Sea</td>
<td>1992</td>
<td>La Coruna, Spain</td>
<td>74,000</td>
</tr>
<tr>
<td>Sea Empress</td>
<td>1996</td>
<td>Milford Haven, UK</td>
<td>72,000</td>
</tr>
<tr>
<td>Katina P</td>
<td>1992</td>
<td>off Maputo, Mozambique</td>
<td>72,000</td>
</tr>
<tr>
<td>Nova</td>
<td>1985</td>
<td>Off Kharg Island, Gulf of Iran</td>
<td>70,000</td>
</tr>
<tr>
<td>Prestige</td>
<td>2002</td>
<td>Off the Spanish coast</td>
<td>63,000</td>
</tr>
<tr>
<td>Exxon Valdez</td>
<td>1989</td>
<td>Prince William Sound, Alaska, USA</td>
<td>37,000</td>
</tr>
</tbody>
</table>

It may be observed from Figure 5 that the last ship incident shown in the table is that of the Exxon Valdez, which occurred in 1989 in Alaska. It is noteworthy that one of the most notorious spills, that of the Exxon Valdez, is a small one in relation to the quantity of oil spilled in many other casualties. It was so damaging as it was into Alaskan enclosed pristine waters. On the other hand the three largest spills, those of Atlantic Empress, ABT Summer and Castillo de Bellver, caused very little environmental damage as they happened well out to sea.

It may be observed from Figure 6 that no incidents are shown in the China Seas and surrounding areas. This is incorrect as there have been a significant number of oil spills, especially in the Malacca and Singapore Straits and also off Japan.
INTRODUCTION AND SOURCES OF MARINE POLLUTION

Figure 6. Oil Tanker Statistics. Location of Selected Spills

Figure 7. Incidence of Spills < 7 Tonnes by Cause. 1974-2006

- Bunkering 7%
- Other operations 15%
- Collisions 2%
- Fire & Explosions 1%
- Hull Failures 7%
- Fire & Explosions 1%
- Other/Unknown 28%
- Loading / Discharging 37%
It may be observed from Figures 7, 8 and 9 that the causes of the small oil spills is from operations, especially loading and discharging oil cargoes. On the other hand, the source of almost all of the major spills is from accidents of one sort or another. This is not surprising but it can be seen from them that if high marine safety standards are maintained then the marine casualties are less, the oil spills are less consequently and the marine environment benefits.
1.8 **Australian Marine Pollution Statistics**

The collation of statistics for the amount of marine pollution from ships into Australian waters is done by the Australian Marine Safety Authority (AMSA). In its 2004-2005 Annual Report, including for the National Plan, AMSA has set out the oil and chemical spill statistics for that year. There were 288 oil discharge sightings and oil spills reported during 2004-2005 of which National Plan resources were involved in 172 oil spill incidents, as required under National Plan arrangements, and of which 33% were from ships.

![Figure 10. Sources of Reported Oil Spills during 2003-2004](Source for Figure 10: AMSA Annual Report 2003-2004)

Figure 11 indicates the types of vessels from which discharges were reported during 2003-2004. The source of 32 sightings during the period was not identified, although the majority are assumed by AMSA to be ship-sourced.

The AMSA Annual Report also notes that during 2004-2005 there were three ship-sourced chemical spills reported and that, happily, there were no major ship-sourced marine pollution incidents in Australian waters. (Further details on significant incidents that occurred in the States and Northern Territory are also set out in its website.)

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44 AMSA is discussed in Chapter 11.
45 See Chapter 11 for details of the National Plan. The AMSA website is at <www.amsa.gov.au>.
1.9 New Zealand Marine Pollution Statistics

The New Zealand pollution statistics are collected by Maritime New Zealand (formerly the Maritime Safety Authority)\(^46\) and its report reveals that there have been few significant marine oil spills in New Zealand waters.\(^47\) However, on 6 February 2002 the *Jodie F Millenium*, a log carrier berthed in Gisbourne, was subjected to such heavy swells that it had to sail and it went aground leaving Gisbourne Harbour and beached just outside it, which resulted in approximately 25 tonnes of fuel oil being spilled and some eight kilometres of coastline being oiled.\(^48\) The salvage was a major operation but, in the end, was successfully completed. New Zealand has, indeed, been fortunate to have had so few oil spills but then again the tanker and other large ship traffic in New Zealand waters is not heavy by world standards.

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\(^{46}\) Maritime New Zealand material, including its Annual Reports, are on its website on <www.maritimenz.govt.nz>. The 2006 Annual Report and other material provide a good outline of the Maritime New Zealand functions and activities.

\(^{47}\) 1998 – *Don Wong* 529 (400 tonnes of automotive gas); 1999 *Totoma* (seven tonnes oily bilge); 2000 *Sea Fresh* (60 tonnes diesel); 2002 *Jody F Millenium* (25 tonnes); 2002 *Tail Ping* (no oil spilled); Maritime New Zealand website; above.

\(^{48}\) Maritime New Zealand website, above.
1.10 **Australia’s Oceans Policy**

In an attempt to deal with the huge ocean area under its jurisdiction the Australian Commonwealth Government launched its policy initiative in the document ‘Australia’s Oceans Policy’ in 1998. Under the policy the Commonwealth Government established a National Oceans Ministerial Board, the decision-making body regarding Regional Marine Plans, a National Advisory Group, Regional Marine Plan Steering Committees and a National Oceans Office. Coordination was planned amongst the Commonwealth and the States, and also with New Zealand, for the management and protection of the marine environment, development of marine protected areas and other programs including a major south-east regional seafloor mapping project. The National Oceans Office (NOO) was established in Hobart, Tasmania, from which the Oceans Policy initiatives were directed.

However, this structure proved unwieldy and in 2005 the NOO was taken under the direction of the Department of Environment and Heritage and the National Oceans Advisory Group reports only to the one minister. Some groups were disbanded but there is still an Oceans Policy Science Advisory Group. The Regional Marine Planning program came under the *Environment Protection and Biodiversity Conservation Act 1999*, under which a system of marine protected areas was established and managed in the Australian offshore areas (a continuing program). Its present concentration is on the northern seas (North Regional Marine Plan) and the Torres Strait but an Australia-wide scheme is in progress.

In short, the NOO was established in 1998 with much vision but with an unwieldy structure, including reporting to numerous ministers and with a distant head office. Moving it to Canberra was sensible but bringing it under the Department of Environment and Heritage is not necessarily the answer as there are far more aspects to an oceans policy than environment and heritage. The efficacy of the new structure remains to be seen.

One of its initiatives is the development of a network of Australia’s National Representatives System of Marine Protected Areas (MPAs) with the aim of protecting ecosystems and habitats in various sensitive marine areas offshore. Areas off the south-east of Australia (off the Victorian and

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50 Australia’s Oceans Policy, above, Executive Summary p 2.

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21
Tasmanian coasts) are to be the established first and the network will be extended from there.\footnote{33}

1.11 Conclusion

This chapter has attempted to set the background material on which the subsequent chapters can build. It may be seen that the main causes of marine pollution are human activities on the land and the resulting pollution is then carried into the sea through rivers and waterways or through the atmosphere. This, of course, varies in different parts of the world and where there are low populations there is very little marine pollution.

When it comes to marine pollution from ships, the main issue arises with catastrophic oil spills close to the shore. There are reasonable statistics on the number of spills and the amount of oil spilled and the heartening trend is that the number and the amounts are both low and still falling. However, when a major spill does occur it is a serious situation for the affected sea and the coast. In these cases there is a reasonable system to pay for the clean up costs and to compensate those who have suffered clean up costs or loss or damage. The framework for regulating pollution from ships and for compensation when they do pollute is the subject of the next three chapters.

\footnote{33 See Department of Environment and Heritage; website <www.deh.gov.au> and follow links. For discussion on the MPAs and related marine environmental issues, see (2006) 11(3) Waves 1-9.}
Chapter 2

United Nations Environmental Conventions and Agreements

2.1 Introduction

There are numerous environmental conventions and agreements. Some of them apply worldwide and some of them apply regionally. Some are made bilaterally between countries and others are multilateral. It is proposed in this chapter to deal with the main ones for which the United Nations (UN) is responsible that relate to protection and preservation of the marine environment and that have some connection with ships and shipping. Those for which the International Maritime Organization (IMO) is responsible will be dealt with in the next chapter.

The decision on which conventions and agreements were to be included was not easy as there is shading from one into the other. However, the selection was made on the basis of relevance to the marine environment. Perhaps the major international convention that touches on most of the world and most of the issues with which this book is concerned is the United Nations Convention on the Law of the Sea 1982 (UNCLOS or LOSC) to which attention will now be turned.

2.2 UN Convention on the Law of the Sea 1982

Australia became a founding member of the United Nations Convention on the Law of the Sea 1982 in 1994 only some months before it came into force on 16 November 1994. UNCLOS is wide-ranging and it was preceded by four conventions which were agreed in 1958\(^1\) at the first of three UNCLOS conferences; known as UNCLOS I, II and, not surprisingly, III.

UNCLOS I, in 1958, was reasonably successful in that the four conventions mentioned above were agreed, but the important issue of the width of the territorial sea was not. So the UN held UNCLOS II in 1960, which was a failure as it still could not agree on this issue, or anything else of importance for that matter. The issues then lapsed until the UN

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pushed for UNCLOS III, which held major sessions over the period 1973 to 1982, and numerous nations finally agreed on one of the world’s most successful conventions, signed at Montenegro Bay, Jamaica, on 10 December 1982.

During the years of debate over UNCLOS III (1973-1982) a number of important new features emerged, including new offshore zones, archipelagic seas and, of more immediate relevance, major new provisions for the protection and preservation of the marine environment. Then it was a further 12 years until UNCLOS came into force. The main reason for the delay was the opposition by the main shipping and sea-power states to Pt XI, which dealt with the ‘Area’ and its resources being for the ‘common heritage of mankind’. The Area was the seabed and ocean floor and subsoil beyond the ‘limits of national jurisdiction’. In effect, the major states objected to having to expend the huge sums of money to develop technology to exploit the deep seabed resources and then having to share it with the developing states. This opposition was eventually resolved by a separate agreement altering the terms of Pt XI, prior to UNCLOS coming into force. Under its terms the state parties were to implement Pt XI in accordance with the Agreement and they both should be interpreted and applied together as a single instrument with, in event of any inconsistency, the Agreement prevailing. Many of the terms of Pt XI that were objected to were altered in the Agreement (in its Annex).

During this long period from 1982 to 1994 the IMO conventions on shipping and the marine environment were steadily being agreed, entered into force and, often, amended. There was no direct connection between the two sources of conventions about the marine environment, although those with the expertise were alert to the overlap and tried to ensure conformity. As UNCLOS relates mainly to ‘public’ law and as many of the IMO conventions relate to ‘private’ law, this reinforced that many lawyers are knowledgeable in one area without having commensurate skills in the other, which is unfortunate.

From the point of view of marine environmental protection, it is the introduction of the extended offshore zonal system which is important

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2 Article 136.
3 Article 1.
5 Articles 1, 2.
6 An example is the International Law Association Committee work on ‘Coastal State Jurisdiction Relating to Marine Pollution 1991-2000’, which spent years working on the provisions of UNCLOS but did not incorporate any of the IMO conventions; see Franckx E (ed), Vessel-source Pollution and Coastal State Jurisdiction (Kluwer Law International, 2001) pp 70, 137-138. For discussion on this topic also see Molenaar EJ, Coastal State Jurisdiction over Vessel-Sourced Pollution (Utrecht University, 1998).
under UNCLOS. Under these zones the coastal state has decreasing rights and obligations as the distance offshore increases. In the territorial sea the coastal state may, subject to innocent passage, pass laws which passing shipping is bound to obey. In the contiguous zone (12 nautical miles) and the exclusive economic zone (EEZ) (200 nautical miles) the laws relating to protection against marine pollution from ships are general only, see below. In the archipelagic states the zones give jurisdiction over waters where no coastal state jurisdiction previously existed.

In mentioning zones, it should be noted that in Pt VI, ‘Continental Shelf’, provision is made for coastal states to claim the continental shelf beyond the EEZ, where it is part of the coastal states’ natural prolongation of its land territory, to the outer edge of the continental margin, subject to a fairly complex formula laid down in that section. Australia lodged its submission with the Commission making its claim to 10 separate areas on 15 November 2004. The claim is still being processed but much, if not all, of it is likely to be justified. These areas of seabed bring rights to the natural resources (but not the water column resources - fishing), but it also brings obligations to protect and preserve those marine areas.

Australia had announced on 13 November 1990 the extension of the Australian territorial sea from three miles to 12 miles so the zones established under UNCLOS, when the convention came into effect on 16 November 1994, were consistent with the Australian general position in international law. The zones offshore from Australia, both before and after UNCLOS came into effect, are given domestic legislative force under the Commonwealth Seas and Submerged Lands Act 1973, as to which see more below.

UNCLOS is a large and detailed convention, in terms of international conventions, and the reader is referred to the huge volume of literature on its formation, terms and effect. The zones, straits, archipelagic waters, islands, enclosed seas and deep sea bed (the ‘Area’) are dealt with in Pts I to XI, and the convention sets out what activities are permissible by the coastal state and other parties. For present purposes, however, it is Pt XII,

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7 Before UNCLOS, there was merely the one zone, the territorial sea, frequently of only three nm width, but after 1994 there were four zones and the territorial sea was usually 12 nm. Unless stated to the contrary, in this book ‘mile’ and ‘nm’ mean a nautical mile.
8 Whilst mentioning the EEZ, one notes, in relation to fishing, that in 1979 the Australian Fishing Zone (AFZ) was declared offshore from the Australian coast out to 200 nm, so when Australia gave effect to UNCLOS the 200 nm EEZ became coterminous with the former AFZ; see Fisheries Management Act 1991 (Cth) s 4.
9 Article 76.
10 Commission on the Limits of the Continental Shelf (CLCS).
11 The Executive Summary of the submission is available on the UN website; <www.un.org/Depts/los/clcs> and follow the prompts for submissions, new and otherwise.
protection and preservation of the marine environment, that is directly relevant.

UNCLOS Pt XII is comprised of 11 sections, containing some 45 articles, and these provisions are too comprehensive to describe in detail. Some shorter description, however, is warranted.

In Section 1 of Pt XII, the general obligation is set out in Art 192 and this requires member states ‘to protect and preserve the marine environment’. Other general provisions, all in Section 1, are the right to natural resources but only subject to protecting and preserving the marine environment; to take measures to prevent pollution, not to transfer damage or hazards from one area to another, and to take steps to prevent or reduce new technologies that cause significant and harmful changes.

Section 2 requires cooperation on a global and regional basis, which includes notification and exchange of data, planning against pollution, conducting research programs and establishing scientific criteria. This last is important to measurement of pollution of the seas, as without a baseline from which to compare results, scientists are unable to establish what changes, if any, have occurred. Section 3 obliges developed states to give scientific and technical assistance and to give preference to developing states. Section 4 obliges states to monitor pollution and to publish their results.

Section 5 provides that states are to adopt laws and regulations to reduce and control pollution of the marine environment from land-based sources, seabed activities, dumping and through the atmosphere. Article 209 expressly mentions the obligations in the ‘Area’, which is the deep sea bed area established in Pt XI. Section 6 is directed towards ‘Enforcement’ provisions and Section 7 deals with ‘Safeguards’. The balance of Pt XII, Sections 8-11, are short and deal with ice-covered areas, states being responsible and liable for their obligations, sovereign immunity for government non-commercial ships and aircraft and the requirement that obligations under other conventions are also to be observed.

The three preceding paragraphs have given an outline but there are some provisions of Pt XII that do so directly bear on the topic of marine environment pollution that they deserve more detailed mentioned. Article 211 is directed to pollution from vessels. The article is fairly long, with Art 211(1) having the general obligation to ‘prevent, reduce and control pollution of the marine environment from vessels’. This is to be done through laws over vessels flying their flag to the same effect, at least, as generally accepted international rules and standards. In an express power to add to port state control powers, states are required to

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12 As mentioned above, it is Pt XI that was the cause of considerable controversy with and opposition from the developed states and delayed its entry into force until a separate convention altering the effect of Pt XI was agreed. Part XI established that the resources of the Area (deep sea bed) were the ‘common heritage of mankind’ in Art 136 and any successful exploitation of those resources had to be shared under a complex scheme.
make it a condition of entry into their, or other relevant, ports that the ships provide relevant information. Such laws may also be imposed on vessels in the territorial sea, provided they do not hamper innocent passage, and in the EEZ ‘to generally accepted rules and standards’.

These provisions about vessels in the various zones are reinforced and modified in the ‘Enforcement’ section, Section 6. This section obliges relevant laws to be enforced in relation to land-based sources, from seabed activities, in the ‘Area’ and over dumping at sea. Section 6 (Arts 213-222) places a heavy obligation on coastal states and flag states to take and enforce measures to protect the marine environment from ships.

Of course, it has traditionally been the obligation of flag states to ensure compliance by their flagged ships with relevant laws, an obligation which is sadly ignored by most of the flag of convenience countries. UNCLOS provides that they are also obliged, when requested by another state, to investigate any allegation, and, where appropriate, to institute proceedings and bring a prosecution to a lawful conclusion.

The important question of enforcement by port states is also addressed in UNCLOS Pt XII. Port states are empowered and obliged to exercise control of vessels voluntarily within its port or offshore terminal. These include:

- investigating and, if appropriate, prosecuting for pollution damage not only in the port or internal waters, but also in the territorial sea and the EEZ of that state;
- complying with requests of other states about pollution within those states’ waters;
- transmitting relevant records concerning the pollution to the flag or other relevant state;
- preventing the vessel from sailing when it is unseaworthy in such a way that it threatens damage to the marine environment.

Somewhat different rules apply about enforcement by coastal states when foreign flag vessels are transiting their waters in relation to pollution from ships. Subject to some extensive safeguards, to be mentioned shortly, when the suspect vessel is navigating in the territorial sea, the coastal state may undertake physical inspection, which means boarding and even detaining the vessel. As mentioned above, what zone the

13 AMSA regularly refers oil spills by foreign flagged vessels to other states to prosecute for pollution of Australian waters; see the AMSA 2005 Annual Report. See generally about AMSA in Chapter 11.

14 One should note the requirement that the ship be there voluntarily, which precludes these powers being exercised in situations of force majeure and damaged ships seeking refuge.

15 Articles 218, 220(1).

16 Article 218.

17 Article 220(2).
polluting vessel is in at the material time is important. When a vessel in
the EEZ is suspected of polluting, these powers of enforcement are only
allowable when there are 'clear grounds' for so believing, in which case
information can be demanded. If there is a 'substantial discharge' the
coastal state may undertake a physical inspection.\textsuperscript{18} If the discharge
causes or threatens to cause major damage then detention (and prosecu-
tion) is allowable. If a vessel is detained and if an appropriate bond or
other financial security is provided the vessel must be released prompt-
ly.\textsuperscript{19} If there be dispute over the terms of the bond or other financial
security to have the vessel released the flag state may take proceedings in
the International Tribunal for the Law of the Sea (ITLOS) for a decision
on the matter.\textsuperscript{20}

As mentioned in Chapter 1 concerning the \textit{Torrey Canyon} incident,
pollution after a major maritime casualty is a major problem. UNCLOS
provides that the coastal state may take and enforce measures beyond the
territorial sea 'proportionate to the actual or threatened damage' in such
cases.\textsuperscript{21} As was also mentioned in Chapter 1, pollution of the sea from the
atmosphere is a major problem in some areas of the world and in this
regard UNCLOS gives jurisdiction to enforce laws within its airspace and
with regard to its own flagged vessels anywhere.\textsuperscript{22}

Section 7 of Pt XII has some safeguards and facilitations provisions
about prosecution and enforcement of marine pollution prosecutions
against ships. States are to facilitate hearings by other states by making
witnesses available and assistance with production and admission of
evidence. These powers under Pt XII must only be enforced by officials.
It also provides that war or other government ships are to be clearly
marked and identifiable; they should not endanger the suspect vessel or
create any hazard to it and that suspect ships should not be delayed
longer than necessary. A physical inspection is only allowable when
there are 'clear grounds' for believing a relevant offence has been com-
mitted.\textsuperscript{23} Jurisdiction is granted to deal with vessels where they present
an unreasonable threat of damage to the marine environment (normally
due to unseaworthiness) and conditions may be imposed on them (such
as proceeding directly to a shipyard for repairs). Amongst the other
provisions in Section 7 are that there be no discrimination with respect to

\textsuperscript{18} Article 220(5).
\textsuperscript{19} Article 220(6), (7).
\textsuperscript{20} Articles 292, 73; for discussion on the ITLOS decisions on this aspect see White M
\textsuperscript{21} Article 221. If a foreign flagged maritime
casualty is polluting the coastal state
interests then the \textit{Intervention Convention} powers are available to its state parties,
as to which see Chapter 3, below.
\textsuperscript{22} Article 222.
\textsuperscript{23} Articles 223-226.
foreign vessels and flag states are to be notified of action against their flagged vessels. Of particular importance is that states are liable for damages against them if they conduct themselves unlawfully. Article 232 makes this quite clear as it provides:

States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6 when such measures are unlawful or exceed those reasonably required in the light of available information. States shall provide for recourse in their courts for actions in respect of such damage or loss.

This obligation and liability of states is repeated in Art 235 and, in such matters, sovereign immunity is only available as a defence for ‘warships, naval auxiliary, other vessels or aircraft owned or operated by a state and used, for the time being, only on government non-commercial service’.

The dispute resolution provisions are a major aspect of UNCLOS. They apply to the marine pollution enforcement aspects as much as any other dispute so they need to be mentioned. Part XV provides for a number of methods of dispute resolution between states. Basically, states may, by a declaration lodged with the UN, choose their procedure from amongst submission to the jurisdiction of ITLOS, the International Court of Justice (ICJ), an arbitral tribunal or a special arbitral tribunal. Where states in dispute have not made a choice, or their choices do not coincide, then arbitration is deemed to be the method to be followed. Disputes over the deep sea bed go to the Seabed Disputes Chamber of ITLOS. Where a state declares its election then it is bound unless the declaration expires, or a revocation is lodged (the effect of which is delayed for three months after so lodging). However, in the case of certain limited matters, including sea boundary disputes and disputes concerning military activities, states may completely opt out of the UNCLOS compulsory dispute settlement procedures. Provision is made for appropriate jurisdiction for the various tribunals, for jurisdiction over preliminary proceedings to decide whether it has jurisdiction, for provisional measures (interlocutory orders in common law parlance), exhaustion of local remedies where international law other than in UNCLOS so requires and for prompt release of vessels and crews on posting an appropriate bond.

This section, then, has attempted to set out some of the main provisions in UNCLOS relating to the marine environment and pollution from

24 Article 287.
26 Various articles in Pt XV.
ships. Of course UNCLOS has a massive number of provisions so they have only been touched on. Recourse should be made to the document itself, or to other writing about it, where further detail is sought.

2.3 UNCED, Rio Declaration and Agenda 21 1992

Australia was strongly represented at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil, in 1992 and has ratified the two conventions that came out of it; the United Nations Framework Convention on Climate Change 1992 and the Convention on Biological Diversity 1992. Australia has also agreed to the ‘Rio Declaration on Environment and Development’ and to the much more detailed document known as ‘Agenda 21’. Both documents have major provisions about the protection and preservation of the marine environment and Agenda 21 has a whole chapter devoted to it (Chapter 17 ‘Protection of the oceans, all kinds of seas, including closed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources’).

The Rio Declaration is the basis for worldwide acceptance of the ‘precautionary principle’ and that ‘the polluter pays’.

UNCED 1992 was the second of such conferences sponsored by the UN, as the UN Conference on the Human Development, held in Stockholm in 1972, was one of the starting points for this international action, including to the establishment of the UN Environmental Program (UNEP). The UN action also gave rise to the Johannesburg Declaration on Sustainable Development 2002, which was a development from the Rio Conference 1992. The Johannesburg conference involved large numbers of persons from government and non-governmental organisations. The Declaration at its end was more a recitation of hope than an action plan but it recited the lead up to it and affirmed the commitment of the

27 Principle 15: ‘In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’. For a comment on its use in the NZ context, see Mead SJ, ‘The Precautionary Principle: A Discussion of the Principle’s Meaning and Status in an Attempt to Further Define and Understand the Principle’ (2004) 8 New Zealand Journal of Environmental Law 137.

28 Principle 16: ‘National authorities should endeavour to promote the internationalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment’.


30 The Johannesburg Declaration was dated 4 September 2002.
participating states and non-governmental organisations (NGOs)\textsuperscript{31} to ‘promote human development and achieve universal prosperity and peace’ through the ‘Johannesburg Plan of Implementation’.\textsuperscript{32}

No directly relevant legislation has been passed in any of the Australian parliaments implementing these action plans, as none was ever contemplated, but they have been given effect in government action and their general sentiments and intentions are represented in the legislation.

### 2.4 Basel Convention 1989

Because of the success of the \textit{London Convention}\textsuperscript{33} in regulating dumping of toxic wastes into the sea and equivalent action for land, an international trade in toxic material slowly expanded. The means to avoid the convention was, for a company in a country which enforced the convention, to ship the banned material to a company in a country that was not a party to the convention, which second company then lawfully dumped or incinerated the materials at sea or on the land. The counter to this was the 1989 \textit{Basel Convention}.\textsuperscript{34} The main themes of the \textit{Basel Convention} are that states are to control the export and import of hazardous wastes and they are to compile information about such wastes themselves and inform each other in relation to any transfer or proposed transfer. The \textit{Basel Convention} is not restricted to import, export or control by sea but equally applies to land and air movement of wastes. The wastes to be controlled are listed in Annex I of the convention and those requiring special consideration in Annex II.

### 2.5 CITES 1973

The 1973 \textit{Convention on International Trade in Endangered Species of World Fauna and Flora (CITES)}\textsuperscript{35} is not directly relevant to marine pollution from ships, but it is often mentioned in the context of the marine environment and should be noted. CITES is directed at preventing the trade in endangered species of fauna and flora. Parties are not to allow trade in the specimens of species included in the three appendices without due

\textsuperscript{31} Declaration para 8.
\textsuperscript{32} Declaration paras 25, 36.
\textsuperscript{33} See Chapter 3, below.
\textsuperscript{35} Signed at Washington, DC, USA on 3 March 1973 and entered into force internationally on 1 July 1975; see website <www.cites.org/eng/disc/what>. For discussion on CITES, see Birnie P and Boyle A, \textit{International Law and The Environment} (Oxford University Press, 2nd ed, 2002) p 625 and following.
certification by the import or the export country or, in some cases, both.\textsuperscript{36} To import a specimen of a species listed in Appendix 1 requires a prior grant of a certificate from a management authority of the state from which it is imported, which certificate has to meet the requirements of the convention.\textsuperscript{37}

\section*{2.6 UNESCO Convention on Underwater Cultural Heritage 2001}

Whilst the protection and preservation of underwater wrecks, flooded cities and other sites are only slightly connected to the topic of marine environment and pollution from ships, they feature in such issues and it may be helpful to include a few words about them. The \textit{UNESCO Convention on the Protection of the Underwater Cultural Heritage\textsuperscript{38}} (UCH Convention) was mainly debated and drafted by a group of ‘experts’ in this field and, coming out of the UNESCO\textsuperscript{39} organisation rather than the IMO or Law of Sea arenas, the debates and the drafting of the convention had less input from maritime or international law of the sea skills than is desirable. This is reflected in the drafting and the substance of the convention, which has weaknesses. Despite this, it is directed to an important end.

The \textit{UCH Convention} is comprised of an Introduction, 35 articles and an annex. Its objective is ‘to ensure and strengthen the protection of underwater cultural heritage’ and state parties commit themselves to its protection.\textsuperscript{40} UCH items are defined as items underwater for at least 100 years and excludes pipelines and cables and installations still in use.\textsuperscript{41} The \textit{UCH Convention} provides that state parties direct that the \textit{UCH Convention} rules be applied in their internal waters, archipelagic waters and territorial sea over which waters they have complete sovereignty. They may regulate them in their contiguous zone and, in doing so, shall apply the provisions of the \textit{UCH Convention}.\textsuperscript{42}

The \textit{UCH Convention} is very government oriented and directed and attempts to fairly well exclude the private sector taking any initiative. State parties are to require that their nationals and vessels under their flag shall report all UCH to them and also to the coastal state when the

\begin{itemize}
\item Article II(4). Appendix I lists species threatened with extinction; Appendix II lists species which may become so threatened and Appendix III lists those species identified for the purpose of preventing their undue exploitation.
\item Article II(5).
\item The General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) meeting in Paris from 15 October to 3 November 2001, at its 31st session, agreed on this convention. The convention and its background may be seen from the UNESCO website, at <www.unesco.org>.
\item United Nations Educational, Scientific and Cultural Organization.
\item Article 2(1), (2).
\item Article 1.
\item Articles 7, 8.
\end{itemize}
State parties are to report them to the UNESCO Director-General and the coastal state if the latter has not already been notified. The Convention also provides that ‘no authorization shall be granted for an activity’ in the EEZ or the continental shelf except as provided in the UCH, and goes on to set out that the rules of the UCH shall be applied ‘as provided in international law’ including UNCLOS. There are similar provisions about the ‘Area’. Seizure of the discovered items is the required penalty for UCH items recovered in ‘its territory’ that were not subjected to the UCH rules.

There are quite a number of contentious issues raised by the UCH Convention. One is that it provides that the preservation in situ ‘shall be considered as the first option’ and that UCH items should not be ‘commercially exploited’. This flies in the face of many good arguments to the contrary and that they should both be options only and not directives.

Another anomaly is that the UCH Convention is to be applied and interpreted ‘in a manner consistent with international law’ including UNCLOS but that underwater cultural heritage is not subject to the law of salvage or of finds (derelict) unless it is ‘authorized by the competent authorities’ and conforms to the UCH Convention and ‘ensures that any recovery ... achieves its maximum protection’.

On the other hand UNCLOS provides that objects of archaeological and historical nature in the ‘Area’ (the deep sea bed) should be ‘preserved or disposed of for the benefit of mankind’. But note that this is a provision restricted to the ‘Area’, which is extremely deep water, whereas most of the accessible underwater heritage is in the shallower waters. There is already a bureaucratic structure established for the Area so another may not be warranted. UNCLOS also provides that states have a duty to ‘protect objects of archaeological and historical nature’ and that they shall cooperate and they may assume, to control traffic in them, that removal from the contiguous zone without approval could result in an infringement of their laws and regulations (applying in their territory or territorial sea). Further and most importantly, UNCLOS expressly

43 Articles 9, 10.
44 Articles 11, 12.
45 Article 2(5), (7), and Annex Rule 1.
46 Articles 2(5), 3.
47 ‘Finds’ is the USA term for derelict in English maritime law, which occurs with a wreck being recovered in whole or part where there is no owner. Salvage occurs where there is an owner. For a description of the law of salvage, see White M (ed), *Australian Maritime Law* (Federation Press, 2nd ed, 2000) Chapter 9; and Davies M and Dickey A, *Shipping Law* (Law Book Co, 3rd ed, 2004) Chapter 20.
48 Article 4.
49 Article 149.
provides that these provisions do not affect the ‘rights of identifiable owners, the law of salvage or other rules of Admiralty, or of laws and practices with respect to cultural changes’. 50

In short, the shortcomings that arise from the provisions of the UCH, that are relevant for present purposes, are:

(a) that the existing laws of salvage were ignored, or insufficiently reflected, in the UCH Convention. In particular the UCH Convention provides that the first option is to keep the items in situ, that other international conventions and laws including UNCLOS are to be respected, when the two are inconsistent. Salvage of suitable underwater objects is desirable in many circumstances and this fundamentally differs from leaving the object in situ;

(b) the UCH Convention provision that items ‘shall not be commercially exploited’ is too wide. On its ordinary and natural meaning it prevents any commercial advantage in finding and developing any underwater cultural heritage objects, or even the sale from one museum or government agency to another. Commercial exploitation is encouraged in many cultural heritage areas on land and it is desirable that it be so under the sea. It should be one of the options and, in suitable cases, actively encouraged. The UNCLOS provision relating to ‘control of traffic’ is to be preferred as it gives more flexibility to meet the various situations;

(c) the drafting of the many provisions that are in conflict with international law relating to wrecks in the EEZ and continental shelf of coastal states is unfortunate. No rights seem to be attributed to owners of such items but an assumption made that ownership does not lie with the true owner or any sufficient rights attach to the finder. This may well be counter-productive in that it will probably drive certain types of salvors and treasure seekers into clandestine activity and, if this happens, have the opposite effect to that intended. Further, those salvors and treasure seekers who would otherwise abide by the UCH Convention may well be deterred from spending money to find heritage wrecks which, as a result, may never be found.

These shortcomings, however, do not detract from the worthwhile aim of protecting underwater cultural heritage, including from irresponsible and predatory practices of some salvors. It is suggested that a revision of the UCH Convention is advisable and, this time, that the salvors, international maritime lawyers and the diplomats should be given a major part to play in it.

50 Article 303.
2.7 Global Plan of Action; UN Environment Program

In discussing the general UN conventions and activities relating to the marine environment, the Global Action Plan for the Protection of the Marine Environment from Land-based Activities 1995 (GPA) should be mentioned. As the majority of the pollution of the seas comes from the land and as the land-sourced pollution is much less regulated than that from ships, it obviously requires attention from a GPA. Over 100 countries have adopted the GPA at and since the Washington Declaration in 1995 and the United Nations Environment Program (UNEP) is the designated secretariat. The action under UNEP has included regional workshops, establishment of an information clearing house in The Hague, Holland, and steps by GESAMP to produce a global assessment of land-based activities contributing to marine pollution and also to produce an assessment of the state of the marine environment.

Thanks to a financial contribution from the Netherlands, the UNEP GPA Coordination office is housed in The Hague with its basic funding from the UNEP (Environment Fund). There is a UNEP Program based in the Philippines, which is active in various ways in the Asia Pacific region, including producing regular reports and newsletters.

2.8 SPREP 1993

The South Pacific Regional Environment Programme 1993 (SPREP) is an important regional program in the Pacific Island region. It is composed of some 22 Pacific Island Countries (PICs) and four developed countries (Australia, France, New Zealand and the USA). It has developed from its origins in a small program in the South Pacific Commission in the 1980s and became an autonomous body under its own convention from 1993, which came into force in 1995.

Not surprisingly, as PICs are, in the main, low lying and vulnerable to sea level rises, the major programs under SPREP are directed to environmental programs and regional coordination. The four main areas

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51 Generally see the GPA website at <www.gpa.unep.org>. For some discussion from an Australasian point of view, albeit now somewhat dated, see Crawford J and Rothwell DR (eds), The Law of the Sea in the Asia Pacific Region: Developments and Prospects (Martinus Nijhoff Publishers, 1995).
52 The GPA website states that some 80% of the pollution load of the sea comes from land-based activities, but see Chapter 1 for discussion on, and some doubt about, this figure.
53 Group of Experts on the Scientific Aspects of Marine Environmental Protection; comprised of the IMO, FAO, International Oceanographic Commission, WMO, International Atomic Energy Agency, UN and UNEP.
54 Details are available on the GPA website at <www.gpa.unep.org>. The site also gives details of the international conventions of which SPREP is a member.
55 Done at Apia on 16 June 1993.
56 Generally see the SPREP website <www.sprep.org>.
are regional coordination, environmental monitoring, climate change, waste and pollution management and future environment planning. The Agreement on SPREP establishes the SPREP Meeting as the plenary body, a secretariat and director with the Government of Samoa as the depositary and its head office in Apia, Samoa. It can be seen that it is not a body directed solely towards the marine environment but, because of the importance of the sea to the PICs, marine environment protection and preservation plays a major role. Fortunately, as the populations of the various SPREP members is small and as the amount of shipping is fairly minor by world standards, the environmental pollution of the Pacific Island waters is low.

2.9 Conclusion

It may be seen from the UN managed environmental conventions, agreements and programs mentioned in this chapter that there are a number of overlapping entities. As well as those with a marine environment focus there are numerous other international agreements and programs that deal with other aspects of the environment but touch on the protection and preservation of the marine environment. The major international conventions that relate to the regulation and protection of the marine environment from ships are, however, those under the management of the IMO and it is these to which the next chapter is directed.

57 Articles 3-7, 10.
Chapter 3

IMO Conventions – Marine Pollution

3.1 Introduction

Chapter 2 dealt with the UN conventions touching on this subject and this chapter deals with the international conventions, resolutions and regulatory structures for which the IMO is responsible. The IMO is one of the most powerful international agencies in the marine area. It is a UN agency, and is very successful in dealing with the international aspects of shipping, shipping casualties and the marine environment. The next chapter deals with those conventions for which the IMO is responsible that relate to compensation for clean up costs or loss or damage caused by discharges of oil and, if the **HNS Convention** ever comes into force, other cargo discharges as well. The purpose of this chapter is to give a brief summary of the provisions in other conventions. Because most of them are long and because there are so many of them only a summary is possible and it is necessary for readers to go to the actual conventions for their express terms.  

3.2 Role of the IMO

The International Maritime Organization (IMO) is a UN organ. It was established at an international conference in Geneva in 1948 adopting a convention creating the Inter-Governmental Maritime Consultative Organization (IMCO). It was called the ‘Consultative’ organisation as there was much opposition to it having any power and so its role was to

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1 The **International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances** 1996; see Chapter 4.

2 The IMO has a policy of not publishing its conventions on its website, which is done to increase its revenue from its sale of the hard copies. This restriction is most inconvenient to its users. However, both Australia and NZ have the treaties to which they are a party on their respective websites and there are many other institutions that publish the full texts of these conventions. The status of the IMO conventions at time of printing is set out in Appendices 1 and 2 of this book. Updates are available from the IMO website on <www.imo.org> and follow prompts.

3 The source of the following paragraphs on the IMO is the information on its website <www.imo.org/>, and the many IMO publications available from its library; website <www.imo.org/library>. The newsletter **IMO News** is a valuable source of information from the IMO and is available on request.
be consultative only. This was because the powerful maritime nations were concerned at any derogation of their sovereignty. Because of this opposition, the convention did not attract sufficient support to enter into force until 1958 and the new Organization met for the first time early the following year. This opposition abated over the years and the name was changed and the word 'Consultative' was dropped from the title in 1982, so it then became the IMO.

The aims of the original IMO were modest, involving mainly intergovernmental cooperation relating to shipping. One of its first tasks was to adopt a new version of the existing International Convention for the Safety of Life at Sea (SOLAS), the most important of all treaties dealing with maritime safety. This was achieved in 1960. IMO then turned its attention to such matters as the facilitation of international maritime traffic, load lines and the carriage of dangerous goods.

The growth in the amount of oil being transported by sea and in the size of oil tankers was of particular concern. Pollution prevention was not part of IMO's original mandate but in the late 1960s a number of major tanker accidents resulted in further and more urgent action being taken. Foremost amongst these tanker casualties was the Torrey Canyon, which was discussed in Chapter 1. The international concerns about marine pollution resulted in:

(a) the IMO establishing the Marine Environment Protection Committee (MEPC);
(b) raising the status of the Legal Committee, the Technical Cooperation Committee and, later, the Facilitation Committee;
(c) amending the IMO aims in Art 1 to include the 'prevention and control of marine pollution from ships'.

Whilst these changes to the administration of the IMO were occurring there were also many substantive activities. Important amongst these measures was to garner support for the International Convention for the Prevention of Pollution from Ships, MARPOL 73/78; see the next section. In the 1970s the IMO became the lead agency for a global search and rescue system. The 1970s also saw the establishment of the International Mobile Satellite Organization (INMARSAT) which has greatly improved radio and other communication with shipping. A further advance was made when the Global Maritime Distress and Safety System became operative in 1999. As a result any ship that is in distress anywhere in the world can virtually be guaranteed assistance, even if its crew is not able to radio for help, as the message will be transmitted automatically.

Other measures introduced by IMO have related to the safety of containers, bulk cargoes, liquefied gas tankers and other ship types. Special

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4 Article 1 of the IMCO Convention as it then stood.
5 These historical developments are summarised in various places, amongst the most convenient of which is the IMO website (<www.imo.org>).
attention has been paid to crew standards, including the adoption of a special convention on standards of training, certification and watch keeping (STCW). The IMO works closely with the International Labour Organization (ILO)\(^6\) on matters to do with safety and welfare of maritime crews.

The adoption of maritime safety regulation and protection of the marine environment are the IMO's main responsibility. Around 40 conventions and protocols have been adopted under its guidance and most of them have been amended on several occasions to keep them up to date. As mentioned, details of the status of the IMO conventions are set out in Appendices 1 and 2 of this book (at time of printing).

To assist countries to implement the relevant conventions, the IMO has developed a technical cooperation program which is designed to assist governments that lack the required technical knowledge and resources that are needed to regulate a shipping industry. The emphasis of this program is very much on training and education. In this regard, the IMO is instrumental in governing the World Maritime University in Malmö, Sweden (WMO) and the International Maritime Law Institute in Malta (IMLI).

With a staff of some 300 people the IMO is one of the smallest of all UN agencies. However, it has achieved considerable success in achieving its aim of ‘safer shipping and cleaner oceans’. The rate of serious casualties at sea fell appreciably during the 1980s and the pollution statistics show that oil pollution from ships has been dramatically reduced since the IMO conventions took effect; see Chapter 1.

The present structure of the IMO is that membership follows from a state becoming a member of the IMO Convention, which brings an entitlement to vote and participate. The governance is that there is an Assembly, a Council, and five committees (Marine Safety, Legal, Marine Environment Protection, Technical Co-operation, Facilitation) and a Secretariat. It is headed by a Secretary-General.

A challenge facing the IMO and its member states is how to have its member states implement and enforce the provisions contained in its many treaties. The states with the will and the resources are not the problem; it is those nations that either have insufficient resources or refuse to regulate their shipping. A state has an obligation under international law to regulate the ships under its flag and ensure their compliance with applicable international rules and standards.\(^7\) The world’s answer to the lack of regulation by many flag states is to impose control over the ships entering their ports; known as Port State Control, which is touched on in Chapter 11.

Before leaving the IMO generally, it should be emphasised that whilst many of the IMO conventions are designed to improve safety at

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\(^6\) Another UN agency; its website is <www.ilo.org>.

\(^7\) UNCLOS Art 217.
sea and minimise marine casualties, safer ships have the added benefit of preventing or reducing spillage of pollutants into the sea. As can be seen from the statistics set out in Chapter 1, the main source of large oil spills is from collisions, groundings and accidents in ships so this is an important aspect of protection of the marine environment. There are many IMO conventions directed to improving safety at sea, of which the main ones are STCW, SOLAS, the Load Line Convention and the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS).

The more important of the IMO conventions that directly relate to prevention and reduction of marine pollution from ships and the protection and preservation of the marine environment, except for those that have a liability and compensation aim, will now be addressed.

### 3.3 Intervention Convention 1969

As a result of the 1967 Torrey Canyon incident the IMO arranged a conference which agreed to the 1969 Intervention Convention. The convention gave powers to coastal states to deal with maritime casualties off their shores on the high seas where the ship was not under their flag, if the coastal state’s waters, coastline or related interests are being polluted or are likely to be polluted from the casualty. The powers are extensive and allow the relevant governments to require the owner of the vessel to deal

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8 *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers* 1978 and especially the 1995 amendments. The STCW covers training courses, certification of the various skills of those onboard ships, and, more recently, bridge team training for general safety of the vessel, its operation and its navigation.

9 *International Convention for the Safety of Life at Sea* 1974 and especially the 1978 and 1988 Protocols. SOLAS mainly covers safe ship construction, lifesaving devices on board, radiotelegraphy, safety of navigation (to some extent) and carriage of dangerous goods (to some extent).

10 *International Convention on Load Lines*, 1966, which deals with how and when ships may be loaded to the maximum safe line (the Plimsoll Line).

11 On 18 March 1967 the *Torrey Canyon*, an 118,000 ton oil tanker registered in Liberia, ran aground on Seven Stones Reef, some miles from Lands End, England. The marine casualty spilled enormous amounts of oil, over 100,000 tonnes, which slowly drifted on to the British and French shores. Being Liberian flagged and outside the territorial sea (three miles as it then was) the British Government had no right in international law to attempt to control the situation. In the event, after some days, the British Government had its naval and airforces bomb the ship to set alight the oil, which lessened the extent of the disaster.

12 *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* 1969. Protocols have extended the provisions, especially as to the list of toxic substances which come under the convention.

13 Of course if the maritime casualty is flagged with the coastal state or within its territorial sea or other waters it already has jurisdiction for its laws to apply to it. Under Art 221 of UNCLOS the coastal state has power to deal with maritime casualties beyond its territorial sea which, of course, includes out to the limit of the EEZ.
with the situation. In default of the owner doing so, the convention gives power to the government to do so. The relevant pollutant was, originally, only oil but starting with a 1973 Protocol the list of pollutants that trigger the convention is now very extensive.

The key aspects to activate the convention is that there be ‘grave and imminent danger to their coastline or related interests from pollution or threat of pollution … which may reasonably be expected to result in harmful consequences’. Other key provisions are that warships or other government ships not used for commercial purposes are excepted, the coastal state must consult with other relevant states, including the flag state, and the coastal state whose measures cause damage to others is liable to pay compensation unless they are ‘reasonably necessary’ to achieve the aims. If the state parties differ, unless they otherwise agree, they are to follow either the conciliation or the arbitration models set out in the annex to the convention.

### 3.4 London Convention 1972 and 1996 Protocol

Pursuant to Recommendation 86 of the UN Conference on the Human Environment, the Government of the United Kingdom convened a conference which led to the London Dumping Convention which, as it was later amended to also deal with incineration, is now known as the London Convention 1972. Under the convention ‘dumping’ is defined as the deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man made structures, other than in normal operations. The usual exceptions are made for emergencies and the safety of the vessels or platforms and the persons connected with them.

Under the London Convention 1972, states are to prohibit the dumping of wastes set out in Annex I (the ‘black’ list). Materials which were not so harmful are listed in Annex II (the ‘grey’ list) and there were restrictions required of the contracting states about these. In 1995 the convention also addressed prohibition of dumping of low level nuclear wastes, which had become a problem. The convention also prohibits or regulates incineration of these substances at sea.

The 1996 Protocol to the London Convention makes major changes in that it consolidates all amendments into the one instrument and, as it came into force on 24 March 2006, special note should be taken of its provisions. As mentioned earlier, the status of conventions at any time is available on the IMO website.

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14 Article 1.


16 IMO website Home Page is <www.imo.org/HOME.html>.
The provisions of the 1996 Protocol replaced the earlier convention and it expressly refers to the need for the ‘precautionary approach’ and the ‘polluter pays’ principle.\textsuperscript{17} State parties are to make laws to prohibit or regulate incineration of the relevant substances at sea and are also to make laws to regulate export of prohibited wastes to other countries for dumping.\textsuperscript{18} The exceptional circumstances are provided for, such as securing the ‘safety of human life or vessels, aircraft, platforms and other man-made structures at sea in cases of force majeure’. A regulatory structure is erected with permits and reporting systems, in default of which state parties are to enforce and prosecute. State parties are to cooperate with each other in its application and dispute resolution between states is to be by negotiation, mediation, arbitration or other peaceful means, or under the dispute settlement provisions of UNCLOS.\textsuperscript{19}

The 1996 Protocol adopts a much stricter attitude to dumping. Whilst under the 1972 convention the annexes list substances in order of toxicity, under the 1996 Protocol dumping is prohibited unless mentioned in Annex I.\textsuperscript{20} The substances listed in Annex I, where dumping is to be regulated but not prohibited, include dredged material, sewage sludge, fish waste, inorganic geological material and bulk materials of harmless materials, such as iron, steel and concrete, where the main concern is the physical impact. The 1996 Protocol has also extended its purview to the storage of waste in the seabed as well as abandonment of offshore installations. Incineration of wastes at sea was prohibited under amendments to the 1972 convention and this prohibition is continued under the 1996 Protocol.\textsuperscript{21}

Overall the \textit{London Convention} has been a great success in helping change the concept from the oceans as a convenient dumping ground for waste to one where the oceans are regarded as a delicate environment which must be protected and which can only absorb limited dumping and that dumping is allowable only after careful consideration of its impact.

3.5 MARPOL 73/78

The problem of oil pollution from tankers was addressed by the British Government through a Royal Commission in the early 1950s which was followed by an international conference, which in turn resulted in the first convention to regulate disposal of waste from ships into the sea,
OILPOL 54. It established ‘prohibited zones’ into which oil from tankers was not to be discharged unless containing minimal oil (less than 100 parts of oil per million of water). It addressed the need for shore facilities to be provided by governments for discharge ashore of oil and oily water. It was amended from time to time and was a first step in the right direction.

The Torrey Canyon oil disaster in 1967 and other tanker accidents made the international community realise that more needed to be done. In 1973 the IMO called a conference which resulted in agreement on the terms of MARPOL 73. Under the terms of this convention much more regulatory control was imposed on tanker operations than under the earlier OILPOL 54 convention and the larger marine pollution problem was addressed going well beyond oil spills. As a result it was directed at regulating disposal or discharge from all types of ships, not just tankers. It also extended beyond regulation of oil.

But MARPOL 73 did not attract sufficient ratifications to come into force, so the IMO organised a further conference which was held in London in 1978. Because so few states had ratified MARPOL 73 the shortcomings needed to be addressed, so the conference approved of a major Protocol that absorbed the 1973 convention and the combined documents became known as MARPOL 73/78. Only Annexes I and II were compulsory for participating states, with the other annexes being optional.

MARPOL 73/78 was drafted to go well beyond oil pollution and it had five annexes initially, each one of which dealt with separate aspects of marine pollution from ships. It is an enormous convention when all of the annexes and appendices are included and the IMO consolidated edition book of the convention runs to about 500 pages. A more detailed description of the present state of the convention will be addressed shortly.

Impetus was given to international acceptance of the IMO conventions by earlier disastrous tanker accidents, but it was the tanker accident involving the Amoco Cadiz in March 1978 that suddenly had governments focusing on oil tanker spills. This huge oil spill impressed on governments that all coastal nations were at risk and not only nations with

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22 International Convention for the Prevention of Pollution of the Sea by Oil 1954.
23 The IMO took over from the British Government as the depositary and organising body for OILPOL 54 so it was the natural successor agency to organise the MARPOL 73 conference.
24 International Convention for the Prevention of Pollution from Ships, which was done at London on 2 November 1973.
26 Ratification automatically required adoption of Annexes I and II, but the other annexes were optional.
shipping fleets and oil companies. As a result there were sufficient ratifications of MARPOL 73/78 for Annexes I and II of the convention to come into force internationally in 1983 and an indication of the international weight of MARPOL is that Annexes I and II now cover some 97% of the world shipping tonnage. As mentioned, states had the option of only agreeing to Annexes I and II or all of the annexes.

At an IMO diplomatic conference held in London in 1997 a Protocol was passed which created Annex VI, which addresses air pollution from ships. It is possible that there will be further annexes to MARPOL 73/78 as amendments to the convention are made regularly.

Particular provision was made in MARPOL 73/78 for the protection of the Australian Great Barrier Reef (GBR). It commenced with an attempt to incorporate a suitable provision in OILPOL 54 but the issue was dealt with by MARPOL 73/78 defining ‘nearest land’ as outside the reef. In the technical annexes, discharges of many types of ships waste are only to take place if the ship is a specified distance to seaward from nearest land. For the Australian GBR ‘nearest land’ was given a special definition that drew a line, by reference to points marked by their latitude and longitude, which ran outside the outer reef of the GBR.

This gave protection to the GBR area by severely restricting the discharge activities of ships under MARPOL 73/78 as the ships had to be offshore from the outer reef before discharges of most types were allowable.

MARPOL is the most extensive of the marine pollution conventions relating to discharge of pollutants from ships. It is one which has significant punitive aspects when given the force of law (for Australian legislation see below). The master, owner and other persons who cause environmental damage may be charged and the fines may be extensive.

28 IMO website (<www.imo.org/HOME.htm>), ‘Summary of Status of Conventions’. The Summary is reproduced as Appendix I to this book.
30 See the IMO website, above, and Annex I of this book for details of ratifications.
31 For the definition of ‘nearest land’ see MARPOL 73/78 Annex I reg 1.10, Annex II reg 1.9, Annex IV reg 1(5) and Annex V reg 1(2).
32 A prominent case was Filipowski v Fratelli D’Amato Srl (The Laura d’Amato) (2000) 108 LGRA 88; [2000] NSWLEC 50. The tanker pumped a large quantity of oil cargo over the side into Sydney harbour instead of ashore into the oil storage tanks. It should be noted that it was the owner and the first officer who were fined (A$510,000 and A$110,000 respectively) under the Marine Pollution Act 1987 (NSW), which Act gave effect to MARPOL. The charge that had been brought against the master was strictly proven but was dismissed under a discretion available to the court under s 556A of the Crimes Act 1900 (NSW). The judge’s reasoning for this dismissal was that ‘to punish the Master or Captain of the ship personally for an occurrence over which he had no personal control, except in a detached overall sense where the owner has already been punished on the basis of its vicarious responsibility and the person directly responsible will also be punished, would, in my opinion, be an excessive and unreasonable punishment’ (at [137]).
Even if a ship complies with the MARPOL requirements the master and owner are still at risk with being charged under general environmental legislation of a state.33

Annex I34 addresses the discharge of oil from ships and imposes a regime under which the normal operations of ships concerning the discharge of oil overboard is strictly controlled. It absorbed the provisions of OILPOL 54 and extended them enormously. It is comprised of 37 Regulations and several appendices. Regulation 1 and its Appendix 1 define the oils caught by it,35 which is practically the whole range (but excludes those petrochemicals which come under Annex II). Regulation 1.10 defines ‘nearest land’ as points to seaward of the GBR, as already mentioned. From the legal point of view, it is worth highlighting several Regulations. Regulation 11 gives the power to enforce port state control and if the vessel does not comply with Annex I to detain it until it does. Regulations 15 and 34 relate to the legal requirements about control of oil, and its key provisions are that ‘any discharge into the sea of oil or oily mixtures from ships … shall be prohibited’ unless the regulatory provisions are satisfied. These provisions relate to no discharge in ‘special areas’ and for other discharges the tanker must be more than 50 miles from the nearest land, proceeding en route and the discharge should not exceed 30 litres per nautical mile etc (the provisions are fairly numerous). Regulation 1.11 defines special areas, which are areas that are particularly at risk36 and in which no discharges are allowable in the main.

33 In EPA v Asmund Bjoerkmo; EPA v Stolt Parcel Tankers; EPA v Stolt Acquamarine; being Victorian Magistrates Court Proceedings Nos M01604930; M01605344; M01605526, the Victorian EPA brought charges for polluting the beaches. The ship, MT Stolt, maintained that it had complied with the requirements of MARPOL when it washed out its tanks (20 miles offshore). It is a problem if State legislation is passed which contravenes the international conventions which Australia ratifies. Such legislation should have a provision that if the marine environmental legislation applies, as in MARPOL, then the general State legislation does not. (An example is the Queensland Environmental Protection Act 1994 s 20(2), which provides that if the Queensland Transport Operations (Marine Pollution) Act 1995 applies then the EPA does not have application). See Chapter 7, below, for Australian State and Territory legislation and Chapter 10 for that for NZ.

34 Revised versions of Annexes I and II entered into force internationally on 1 January 2007 and this text refers to the revised version. Readers should take care to use the relevant version when dealing with Annexes I and II and, for that matter, with all aspects of the international conventions as they are frequently amended.

35 Under reg 1.1 ‘oil means petroleum in any form including crude oil, fuel oil, sludge, oil refuse and refined products (other than petrochemicals which are subject to the provisions of Annex II’.

36 Mediterranean Sea, Baltic Sea, Black Sea, Red Sea, Gulf areas between Ras al Hadd and Ras al Fateh Gulfs, Gulf of Aden, Antarctic area (south of 60 degrees south), North-West European waters (and southern South Africa waters from 2010).
Regulation 4 contains the exceptions to the application of regs 15 and 34, which are the defences in fact. These defences apply if the discharge was to secure the safety of the ship or to save life at sea or it resulted from damage to a ship or its equipment provided all reasonable precautions were taken afterwards to prevent or minimise it. This exception does not apply, however, ‘if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result; or …’ it was approved by the administration to combat another discharge. Annex I applies to fixed and floating drilling rigs and reg 39 equates their responsibilities to non-tankers of 400 tons gross tonnage and above.

The rest of Annex I is concerned with details of ships’ construction, equipment, record books, forms, calculations to meet these requirements and administrative details. In all it is a long and fairly complex document. It applies to tankers and non-tankers and to oil cargo and to bunker oil. Overall Annex I has been very successful in reducing discharge of oil into the sea, as shown in the tables in Chapter 1.

Annex II addresses the discharge or escape of noxious liquid substances from ships transporting them in bulk, which, in lay terms, could be described as bulk chemicals. This is an annex of growing importance as the tonnages of chemicals transported at sea is rising steadily and chemical tankers are now fairly common. Regulation 1.10 defines ‘noxious liquid substance’ in terms of a number of categories of the substances (X, Y and Z) and as listed in the International Bulk Chemical Code. ‘Nearest land’ is defined in similar terms to that in Annex I, as are ‘Special Areas’.

It is reg 13 that has the enforcement provisions. They are complex and are divided into laws relating to the category of chemicals being carried, as in Appendix 1. There are parallels with the oil regime in regs 15 and 34 of Annex I, and, basically, the more toxic categories are prohibited from discharge into the sea unless below the toxic levels laid down. Regulation 3 has the exceptions (defences) which are the usual ones of securing safety of life or property, the discharge resulting from damage to a ship or its equipment or it is approved for combating pollution occurrences. (The same exceptions as are in reg 4 in Annex I). The rest of the lengthy Annex II is devoted to the administration of construction, discharges to facilities ashore, standards for procedures and arrangements and such like.

Annex III, the first of the optional annexes, addresses the carriage by sea of harmful substances in packaged form. The terms ‘harmful substances’

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37 Regulation 2(1). As noted above, revised versions of Annexes I and II entered into force internationally on 1 January 2007 and this text refers to the revised version.

38 For Annex II, however, the special areas are only the Baltic and Black Seas and the Antarctic area.
and ‘packaged form’ are both defined in the International Maritime Dangerous Goods Code (IMDG Code).\textsuperscript{39} State parties are obliged to issue Regulations to prohibit the carriage of such substances other than in accordance with Annex III. The annex sets out a framework for adequate packing, marking, labelling, documentation and stowage of such packages. Basically, Annex III is concerned with bulk shipment of a wide range of substances that may be harmful if discharged into the sea. The Annex III regime also gives some notice to ships’ crews and other cargo handlers of the nature of the cargo. Regulations 1-6 are the parts that deal with requirements for packing, marking, labelling, documentation, stowage and quantities of the cargo.

The enforcement provision is in reg 1(2) which provides that carriage of harmful substances is prohibited except in accordance with Annex II. The exceptions are in reg 7, which are that jettisoning is prohibited except to secure safety of the ship or life at sea and that washing leaking chemicals overboard should be regulated except where it would impair the safety of the ship. Regulation 8 gives the power for port state control inspections and detention of the ship until it complies with the Regulations.

Annex III has not made a huge of on shipping, for instance nothing like Annex I has done, but it is some assistance. It is more of a support for safety for ships and their crews. A container with unknown and unmarked chemicals, that starts to get hot and then to leak highly toxic waste, is a major problem for a ship at sea. Any step to avoid or limit such incidents is welcomed by seafarers and all others involved in the transport of goods by sea.

Annex IV addresses the discharge of sewage from ships on international voyages and it was contentious because there was opposition to the provisions applying to fairly small vessels. As a result, Annex IV was delayed in achieving sufficient ratifications and it only came into force on 27 September 2003 and then only because some amendments were introduced.\textsuperscript{40} The problem that was sought to be addressed was regulation of what ships were to do with sewage when in restricted waters. For smaller ships it is problem enough, but for the modern large passenger cruise ships carrying thousands of passengers and crew when in ports and bays it is a major problem.

The amendment increased the size of the ships to which Annex IV applied to 400 tons and above, or to ships below that tonnage certified to carry 15 or more passengers. Only ships engaged in international voyages are caught by it. Annex IV, in reg 11, prohibits discharge of sewage into the sea, except:

\textsuperscript{39} The IMDG Code was adopted by IMO Resolution A.716(17), is a multi-volume document that lists some thousands of substances. It is regularly amended.

\textsuperscript{40} A revised Annex IV entered into force on 1 August 2005.
(a) at a distance of more than three nautical miles from nearest land for comminuted and disinfected sewage or 12 nautical miles for other sewage, provided the ship is under way at more than four knots and the rate of discharge is approved under the IMO standards; or

(b) the ship has an approved sewage treatment plant meeting the operational requirements laid down by the IMO and no effluent is visible in the water; or

(c) the ship is in coastal state waters whose requirements are less stringent than those of Annex IV; or

(d) the discharge is to secure ‘the safety of a ship and those onboard or saving life at sea’ (reg 3(1)); or

(e) the discharge results from damage to the ship or its equipment and reasonable precautions were taken before and after the discharge (reg 3(2)).

From the Australian waters point of view it is noted that, like Annexes I and V, the definition of ‘nearest land’ normally is the baseline of the coastal State, but for the north-east of Australia it is defined by a series of latitudes and longitudes.\(^{41}\) The purpose and effect is that the outer edge of the Great Barrier Reef is the baseline of the land from which is measured the minimum stated distance for discharge of sewage to be permitted.

Under Annex IV state parties undertake to ensure provision of facilities at ports and terminals to receive sewage ashore without causing undue delay to the ship (reg 12). The appendix relates to the relevant international sewage pollution certificate that ships have to carry for entry into port state control regimes.\(^ {42}\)

**Annex V** strictly regulates the discharge of garbage over the side into the sea. It applies to all ships and to fixed or floating platforms.\(^ {43}\) ‘Garbage’ is defined as ‘all kinds of victual, domestic and operational waste excluding fresh fish and parts thereof, generated during the normal operation of a ship …’ except those substances covered by other annexes. ‘Nearest land’ is defined in the same terms as Annex I, to prohibit discharge of garbage into the GBR, and ‘special areas’ are also the same as those in Annex I. The discharge of ‘all plastics’ is totally banned, because they are persistent and not biodegradable, and that of other garbage regulated so that it is not discharged close to shore. Discharge of dunnage\(^ {44}\) and packing that

\(^ {41}\) Annex IV reg 1(5).

\(^ {42}\) Annex IV was amended on 8 November 2005 to define ‘nearest land’ so that the Australian GBR was a special area; in a similar manner to Annexes I and V.

\(^ {43}\) Regulations 2, 4.

\(^ {44}\) ‘Dunnage’ is the shoring and other packing used to secure a stowed cargo from moving once at sea.
floated is prohibited closer than 25 nautical miles offshore and of food wastes to three nautical miles if comminuted and otherwise it is 12 miles.\(^{45}\)

The usual exceptions are provided, namely securing the safety of the ship and those onboard, saving life at sea, or damage to the ship provided reasonable precautions were taken before and after the discharge. An exception not found in the other annexes is that accidental loss of synthetic fishing nets is a defence but, once again, all reasonable precautions had to have been taken.\(^{46}\) The remainder of Annex V deals with such matters as shore reception facilities, port state control powers, record keeping and the ‘Garbage Record Book’.

Annex VI, which was not one of the initial five annexes to MARPOL, regulates air pollution from ships, primarily the composition of bunkers (fuel) and its combustion to ensure that fuel is used which results in restricted amounts of air pollution from the combustion gases. It only came into force on 19 May 2005. It is more detailed than Annexes III – V and, being more recently drafted, has incorporated some aspects not to be found in the earlier annexes.

Any deliberate emissions of ozone-depleting substances are prohibited (reg 12) unless they come within the provisions of the Regulations, which define and set out the parameters of the fuel that is allowable. Exceptions to this regime are when the emission is necessary for the safety of the ship, saving life at sea, from a damaged ship when all reasonable precautions have been taken before and after with the exception where the owner or master acted either with intent or recklessly and with knowledge that damage would probably result (reg 3).

The rest of the Regulations are concerned with surveys, certification, jurisdiction for port state control regimes and violations and enforcement. Sulphur and nitrogen oxides come in for special mention. Incineration onboard of fuels is regulated (reg 16), governments are to ensure reception facilities are available ashore and offshore platforms are also within the regime (reg 19). The whole point of Annex VI is that if the quality of the fuel burned in ships is regulated to restrict sulphur and other noxious chemicals in it so the atmosphere will be the cleaner. The MEPC has developed policy, practice and guideline documents to address the regulation of all six of the greenhouse gases covered by the Kyoto Protocol.\(^{47}\)

### 3.6 OPRC 1990 and the OPRC Protocol 2000

On 19 October 1989 the IMO General Assembly, galvanised into action by several marine oil spills, including that from the *Exxon Valdez*,

\(^{45}\) Regulation 3.

\(^{46}\) Regulation 6.

\(^{47}\) See IMO website (<www.imo.org>) under “marine environment”.

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adopted Resolution A.674(16) on International Co-operation on Oil Pollution Preparedness and Response. The resolution was referred to committees and led to the conference in London in November 1990 which adopted the *International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC)*.\(^46\) The OPRC recognises the principle that the ‘polluter pays’ and supports UNCLOS and its Pt XII in particular.

The main aim of the convention is set out in the ‘General Provision’ which is that state parties are to ‘take all appropriate measures … to prepare for and respond to an oil pollution incident’ (Art 1). The first part of the OPRC encompasses states requiring compliance from ships flying the state’s flag, in its ports or at its offshore facilities. They must have an oil pollution emergency plan and report any oil pollution discharge incidents. The second part is that state parties are to take steps to cooperate with each other to have a regional plan for major oil spills, so that equipment and personnel can be supplied to combat a spill in another country; that they are to conduct research and share the fruits of it and they should promote education and training in their regions and internationally. This second part of the OPRC also encourages developed nations, such as Australian and New Zealand, to assist other less developed nations in the region.

An OPRC Protocol 2000, also referred to as the OPRC-HNS Protocol 2000,\(^49\) was adopted at the IMO Headquarters on 15 March 2000.\(^50\) It is a protocol by the state parties to the OPRC Convention 1990 to extend the preparedness, response and cooperation provisions of the OPRC Convention from oil to the hazardous and noxious cargos set out in the HNS Convention 1996.\(^51\) It provides that it will enter into force 12 months after the ratification by 15 party states to the OPRC Convention which will be on 14 June 2007. The reason for the cross-reference to the HNS Convention is that the provisions in the Protocol apply many of the obligations under the OPRC to the cargos set out in the HNS Convention. These obligations include:

- A global framework for international cooperation in dealing with major marine pollution incidents, or threats of such, in that parties will need to provide for a national plan and cooperate regionally for such plans;
- A requirement to establish provisions for ships under or in its jurisdiction to carry onboard pollution emergency plans for spills or threats of spills of hazardous and noxious substances carried as cargo;

\(^{48}\) The OPRC entered into force internationally on 13 May 1995.

\(^{49}\) The *HNS Convention* 1996 is mentioned below in Chapter 4.

\(^{50}\) Details are on the IMO website, above. Also see above for details of the *OPRC Convention*.

\(^{51}\) See recitals 1 and 2 to the OPRC Protocol 2000.
Ships carrying hazardous or noxious substances as cargo are covered, or will be covered, by regimes similar to those for oil incidents.

The Protocol extends to non-tankers the existing liabilities for tankers to carry a ship-board plan for pollution spills. Most countries already have national plans and regional cooperative arrangements, so the OPRC Protocol 2000 extends a regime that already has substantial support in relation to oil spills to other hazardous and noxious cargos.

No special legislation was enacted in Australia to give effect to the provisions of OPRC, although, through administrative action, AMSA and other government agencies and departments do implement its provisions.

3.7 Anti-fouling Systems Convention 2001

The Anti-fouling Systems Convention 2001 (AFS Convention 2001) is directed at the use of organotin compounds as anti-fouling on the bottom of ships (see the second recital to the convention). The problem at which it is directed is that the current anti-fouling used on ships’ bottoms is steadily accumulating toxicity in the world’s main ports and harbours. The convention comes with a cost as there is no present anti-fouling which is quite as effective and, as fouling of ships’ bottoms increases, the ships burn more fuel to keep the same speed and this increases the release of exhaust gases and also adds to the expense of carriage of the goods by sea. Where numerous ships and small craft gather, such as busy ports and marinas, so the amount of toxicity increases in the water. If by then it comes in to force, the AFS Convention 2001 requires that ships are to remove or coat over such existing compounds on their bottoms by 1 January 2008.

State parties to the convention are required to prohibit and/or restrict the use of the banned compounds on ships flying their flag, operating under their authority or entering their ports, shipyards or offshore terminals, but warships and other government ships not engaged in commercial operations are exempt. Wastes from such compounds are to

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52 International Convention on the Control of Harmful Anti-fouling Systems on Ships done at the IMO Headquarters in London on 5 October 2001. The Final Act of the Conference that adopted the convention was on 18 October 2001. The convention, not presently in force, is to enter into force 12 months after 25 states have ratified it comprising not less than 25% of the gross tonnage of the world’s merchant fleet – Art 18. TBT is a main offender but it is TBT’s very high toxicity that makes it such a success as an anti-fouling compound.

53 The recitals also refer to Agenda 21, Chapter 17, which calls upon states to take measures to reduce pollution caused by organotin compounds used in anti-fouling systems and to the precautionary approach in Principle 15 of the Rio Declaration. See Chapter 2.

54 Article 4 and Annex I.

55 Article 3.
be disposed of in an environmentally sound manner. Inspections of all aspects of compliance are permitted and sanctions are to be established for violations. Ships unduly detained or delayed are entitled to compensation from the state party for any loss or damage, dispute settlement is to be by ‘peaceful means’ of the choice of the parties and the convention is not to prejudice the rights and obligations of any state under customary international law, as reflected in UNCLOS.

The balance of the convention is taken up with the obligations on state parties to meet technical scientific requirements, to communicate and cooperate with each other, for surveys and certification that ships comply with requirements, detection and enforcement and, finally, for enforcement if there are violations. As mentioned above, entry into force is after not less than 25 nations, the combined merchant fleets of which constitute not less than 25% of world’s merchant shipping gross tonnage, have agreed to be bound. There are four annexes, which deal with technical aspects about implementation of the principles set out in the body of the convention.

### 3.8 Ballast Water Convention 2004

The issue about ballast water is that the ships arriving at a port in ballast often discharge water whilst loading which water contains foreign marine organisms that have a damaging effect on the local marine environment. This syndrome is more prevalent in cold water ports than tropical ones as, in the tropical regions, there tends to be more recirculation of ocean water common to them all. With many bulk cargo ships, often there is a huge volume of ballast water. Overall it is a major problem for marine environmental management. The proposed solutions have been to try and sterilise the ballast water or for the ship to make mid-ocean exchanges of water so that benign mid-ocean water is discharged in the new port rather than the water from the departure port. Ship stability requires that the ship have a certain depth for its draft, or it may roll over at sea in rough weather. To achieve this draft they need to load water in the discharge port, the condition being known as being ‘in ballast’, and then to discharge that water as they load cargo in the loading port. In earlier times ballast was solid material, such as scrap iron or rocks, which the crew had to cart onboard into the hold and then cart out again as they loaded. For modern ships it is economical and convenient to use sea water.

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56 Articles 11, 12.
57 Articles 13, 14 and 15. The interesting aspect as to the wording of Art 15 is that it is not for the convention to decide if UNCLOS is ‘customary international law’, but for the international tribunals such as ITLOS, the ICJ, etc and it seems a little loose to include this in the drafting in this form. The use of a better phrase than ‘as reflected in’ would have been preferable.
58 Article 18.
The IMO has been moving towards an international approach to the problem for some years and Australia was one of the leading states to assist in this early work. The IMO issued guidelines and the MEPC working party drafted Regulations. The IMO also organised the international conference which approved the Ballast Water Convention 2004. Entry into force internationally is 12 months after ratification by 30 states, representing 35% of world merchant shipping tonnage. The IMO has also, as part of its Ballast Water Management Programme, established an informative publication program and an extensive website.

The structure of the Ballast Water Convention 2004 is contained in 22 articles and an annex, with the annex being the Regulations for the Control and Management of Ships’ Ballast Water and Sediments. The convention and the annex are to be read together. The recitals set out the background to the convention, which is clearly and expertly drafted.

The General Obligation, from which the other obligations flow, is for state parties to take steps to ‘prevent, minimize and ultimately eliminate the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ship’s Ballast Water and Sediments’. The convention requires cooperation amongst state parties, especially in the same region, continued research, development of programs, not to cause

59 The Australian Quarantine and Inspection Service (AQIS) was the government department charged with the responsibility of formulating policy and then regulating it and there are Australian Guidelines that ships need to follow if they enter Australian ports. Australia has a National System for the Management of Marine Pest Incursions in which the main agency is the Department of Agriculture, Fisheries and Forestry; website <www.affa.gov.au>. In NZ there are standards relating to Ships’ Ballast Water from all countries, which come under the Biosecurity Act 1993, and the lead agency is the Ministry of Fisheries, especially the Quarantine Service; website <www.fish.govt.nz> and, of course, Maritime New Zealand also plays its part.

60 The IMO ‘Guidelines for the Control and Management of Ships’ Ballast Water to Minimize the Transfer of Harmful Aquatic Organisms and Pathogens’, see IMO Resolution A.868(20).

61 The MEPC was chaired by the Australian Mr Michael Julian, then from AMSA, for much of its work on the Ballast Water Convention 2004.

62 International Convention for the Control and Management of Ships’ Ballast Water and Sediments done at London on 13 February 2004. (Friday 13th for those inclined to superstition.)

63 Article 18. To date there have been very few ratifications.

64 There are numerous publications as part of the ‘Global Ballast Water Management Programme’ and the website is to be found at <www.globallast.imo.org>.

65 The recitals set out the various international instruments calling for action against introduction of alien or new species which cause significant harmful changes to the marine environment, including mention of UNCLOS Art 196(1), the Convention on Biological Diversity and UNCED 1992, 2002 World Summit on Sustainable Development para 34(b) of its Plan of Implementation and several IMO resolutions.

66 Article 2(1).
further or greater harm and to take steps and pass laws to avoid the actual uptake of potentially harmful organisms. The convention applies to ships under the state’s flag or authorisation, but it does not apply to war or other government ships not used for commercial purposes, to those ships not designed or constructed for ballast water and ships only operating within one state’s own waters. Parties are to ensure that ships flagged with non-party states do not receive more favourable treatment.67

Adequate jurisdiction is given in the Ballast Water Convention 2004 to inspect ships and generally to exercise port state control but if a ship is ‘unduly’ detained or delayed it is entitled to compensation for any loss of damage thereby suffered.68 Presumably, if the domestic legislation of the offending state party did not make adequate provision for an action against that state then the ship owner would need to persuade the government of its flag state to give it a fiat to sue the offending government in ITLOS or the ICJ. The dispute settlement provisions are slightly odd, and somewhat vague. Under Art 15 the parties are enjoined to settle any dispute by negotiation, inquiry, mediation, conciliation, etc or other peaceful means of their choice, but it makes no provision for compulsory jurisdiction if one party is recalcitrant. In its present terms it adds nothing to the general requirements for peaceful settlement of disputes under the present international law. On the other hand, Art 16 provides that nothing in the Ballast Water Convention 2004 shall ‘prejudice the rights and obligations’ under customary international law as reflected in UNCLOS. From this one may presume that the applicable UNCLOS provisions include its compulsory dispute resolution provisions. An express provision making this clear is preferable. It also contains the usual IMO ‘Fast Track’ amendment provision, of the MEPC passing an amendment by two-thirds vote and then it being deemed in force six months later except for parties that have expressly objected. Amendment of the convention is also by the IMO holding a full conference to that end that passes the amendments.69

As mentioned, the annex to the Regulations contains detail about how, when and where the ballast water management programs are to be conducted. ‘Nearest land’ is defined to be beyond the outer Great Barrier Reef, as in several annexes of MARPOL, and the exceptions (defences) to the application of the regime are the usual IMO ones of saving life at sea, damage to the ship or its equipment, etc but they also include uptake of water and discharge of that same water on the high seas or in the same

67 Article 3.
68 Articles 8-12. The compensation would, no doubt, be calculable by the charter-party daily rate for that ship, or a ship of similar type, plus any further loss or damage suffered in the particular circumstances, eg for a valid claim against the ship for cargo late delivered to the next port.
69 Article 19.
region or ports etc. Ballast Record Books, Certificates etc are all to be kept and carried onboard and may be inspected and, if they are not in accordance with the convention or annex, can lead to detention of the ship or reporting of the deficiency to the next port authority for it to follow up on it.

Australia is one of the countries particularly at risk from ballast water discharge organisms due to the large number of bulk cargo ships that enter Australian ports in ballast and need to discharge the water overboard as they load. As mentioned above, the Australian Quarantine and Inspection Service (AQIS) is the lead Australian agency for the management of ballast water issues. It has been active and, to a large extent, successful in implementing a regime to deal with the problem. AQIS first issued Guidelines in 1990 and has amended them substantially since then. They include provision for mandatory reporting of details about ballast water imported into Australian waters, require access be given to Australian officials for onboard sampling and regulate the cleaning out of relevant ballast tanks or holds.

The Australian and the New Zealand Guidelines are complementary to the IMO Guidelines. Because it can be hazardous for ship safety when changing ballast water in mid-ocean, the IMO Guidelines on safety aspects of ballast water exchange at sea are also promoted by AQIS to ships' masters. The Australian government has a continuing program to deal with minimisation of introduced pests from ballast water and has funding committed under the ‘Coasts and Clean Seas Introduced Marine Pests Programme’. AQIS also has a strategic ballast water research and development program under which research into the effect of the introduced pests and the best method of dealing with them is studied.

### 3.9 Wreck Removal Convention

The international provisions for wreck removal have always been somewhat controversial. A wreck that sinks in an international strait, or in the channel to a busy port, is a matter of international concern. Who should pay for its removal, what, if any, limit of liability should be available to the ship owner, what laws should apply and in what circumstances are all issues on which there is some considerable divergence.

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70 Regulations A-3, A-4.
71 The Australian Ballast Water Guidelines.
72 The IMO ‘Guidelines for the Control and Management of Ships’ Ballast Water to Minimize the Transfer of Harmful Aquatic Organisms and Pathogens’, see IMO Resolution A.868(20).
An instance is that the *Limitation of Liability for Maritime Claims Convention* 1976 makes provision for limitation of the costs of wreck removal, but had to make this aspect optional. Australia is one of the countries that has chosen not to implement these provisions.\(^{75}\)

As there was no consistent international norm about dealing with wrecks, the IMO resolved that a separate convention dealing with the various aspects of wreck removal would be preferable. A draft convention is under consideration, which is considered by the IMO Legal Committee at its various meetings as it makes its way towards what is hoped will be the adoption of a new convention at an IMO Diplomatic Conference to be held in 2007.\(^{76}\) It is desirable to have this *Wreck Removal Convention* in place to address, on an international basis, the rights and obligations of states and shipowners with respect to wrecks and drifting or sunken cargo.

The draft of the convention covers reporting and locating of ships and wrecks, warning to mariners and coastal states, action by the coastal states, rights and obligations for removal of wrecks by a ship owner or coastal or flag state, time bars, jurisdictions, provision of financial security and dispute resolution.\(^{77}\) It can be seen, therefore, that the draft convention attempts to clarify and standardise a wide number of aspects concerning ship wrecks.\(^{78}\)

### 3.10 Conclusion

The discussion above has sought to outline the main international conventions and programs relating to protection and preservation of the marine environment from ship pollution under the IMO. It may be seen that the IMO has a whole raft of international conventions dealing with these issues. Their strength is that they present an international standard within which the international shipping industry may carry on its business and yet they still provide a framework for the preservation and protection of the marine environment. As can be seen from the schedule of ratifications of the IMO conventions, Appendices I and II to this book, they command much support.

The weaknesses are that the conventions represent, to some extent, the minimum standard in that these are the standards that a majority of the state parties to a diplomatic conference will support. There are major

\(^{75}\) *Limitation of Liability for Maritime Claims Act* 1989 (Cth).

\(^{76}\) See the material on this aspect on the IMO website at <www.imo.org/Conventions>.

\(^{77}\) IMO website, supra.

\(^{78}\) Historic wrecks are usually subject to a different regime. The UNESCO *Convention on the Protection of Underwater Cultural Heritage* 2001, if it comes into force, will make an impact on the topic in relation to historic wrecks, mentioned above in Chapter 2.
issues in having them accepted by all of the major states as some refuse to support some of them, the USA and, more recently, the EU being particularly prominent in this regard. Further, many of the developing nations on the one hand, and the flag of convenience states on the other, are content to ratify the conventions but do not enforce them. Finally, it seems that something like 80% of all marine casualties are caused by human error so these conventions are only as effective as the personnel in the maritime industry are educated and skilled in their implementation.

It is convenient to turn now to deal with other, more general, IMO conventions which are the ones that regulate liability and compensation regimes covering pollution of the marine environment from shipping.
Chapter 4

IMO Conventions – Liability and Compensation

4.1 Introduction

The IMO has played a major part in establishing the present ‘insurance’ schemes for liability and compensation for the costs of clean up and for loss and damage caused by oil spills from tankers, both cargo oil and bunkers. It is presently a three tiered scheme, with the first tier supplied by the CLC 1992, as to which see shortly, the second supplied by the Fund Convention 1992 up to its upper limit of financial liability and the third tier, also under the Fund Convention 1992 is optional as to whether state parties are part of it or not.

The scheme for liability and compensation for oil spills from tankers, arising mainly from the Torrey Canyon maritime casualty and oil spill in 1967, is one of the most successful insurance schemes in the world. Its success led to the scheme gradually being extended from spills of persistent oil from tankers to spills from non-tankers’ bunkers (Bunkers Convention 2001) and also to a long list of cargoes (HNS Convention 1996). The purpose of this chapter is to describe the various conventions that underpin the present schemes for liability and compensation for pollution of the marine environment from ships. By-and-large the conventions are dealt with chronologically based on the year in which they were agreed by the relevant international conference.

4.2 Civil Liability Convention (CLC) 1969 and 1992

There are two IMO conventions that establish a scheme to pay compensation and to reimburse the clean-up costs and damages if a spill occurs from an oil tanker, which are the CLC 1992 and the Fund Convention 1992. It is to be noted that they apply to oil spills from oil tankers only and oil spills from non-tankers come under the Bunkers Convention 2001, see below. The CLC and the Fund Convention work together, as will be seen. First it is appropriate to describe the provisions of the CLC.

The first version of the CLC scheme was the 1969 Civil Liability Convention (the CLC 1969)\(^1\) which came into force internationally on 19 June

\(^1\) *International Convention on Civil Liability for Oil Pollution Damage* done at Brussels on 29 November 1969.
1975. The CLC 1969 had as its main provision a requirement that the oil tanker owners or operators should take compulsory insurance with a suitable insurer. As the only insurers, which are really mutual risk clubs specialising in this type of risk, are the Protection and Indemnity Clubs (P&I Clubs)\(^2\) the effect was that the tanker owners paid premiums to P&I Clubs to cover claims for oil spill damages and costs of clean up. There was set out an upper limit of the amount of the liability, which was related to the tonnage of the ship. The trade-off was that liability was strict, for the most part, so the claimants of the coastal state that had suffered the clean-up costs and damage had no need to prove more in relation to liability than that the tanker held insurance under the CLC and that the oil from that tanker had caused the loss and damage. The two key characteristics of the CLC are that it is the tanker owners or operators who pay the premiums and it is an insurance system under which the relevant P&I Club, the one that has the tanker entered into its books, that meets the payments. Claimants have no need, therefore, to prove negligence but they may not claim beyond the amount allowed under the CLC.

The CLC 1969 served well for many years but it was overdue for updating so it was much amended by its 1992 Protocol (CLC 1992), which came into force internationally on 30 May 1996. Under the CLC 1992 the system of liability was altered, the territory in which the spill may occur was extended to the EEZ, the upper limits of liability were increased and other changes were made. As the 1969 scheme has now ended, this section will only be concerned with the CLC 1992. The CLC links in with the Fund Convention, as to which see below, and is the first monetary tier of the funds available for compensation for oil spills from relevant tankers.

There are some limiting aspects in the provisions of the CLC 1992, which should first be mentioned:

(a) a ‘ship’ for its purposes has to be one ‘constructed or adapted for the carriage of oil in bulk as cargo, provided ... it is actually carrying oil in bulk as cargo and during any voyage following such carriage’, unless it proves there are no oil cargo residues on board. The effect is that tankers are covered unless they have no residue of any oil cargo at all.\(^3\) Warships and other government ships not used for commercial purposes are not covered by the convention;\(^4\)

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2 The P&I Clubs are mutual insurance companies that gradually grew out of the mutual insurance hull, and then other risks, societies of the 18th century. Their main base was, and is, in Great Britain although there are several whose headquarters are in Europe, Japan and the USA. They all have informative websites and there are numerous publications about them.

3 Article I.

4 Article XI.
(b) the type of ‘oil’ that is covered must be a ‘persistent hydrocarbon mineral oil’ such as crude oil fuel oil, heavy diesel oil and lubricating oil, and this can be cargo or bunkers.\(^5\) The effect of this is that spills of the very light fractions of oil, such as kerosene, gasoline, avgas, etc are not covered by the CLC.

A claim may be made by the state on behalf of itself, agencies or citizens. In practice the claimants usually make a direct claim themselves, which is made on the ‘owner’ but, in fact, on the relevant P&I Club. A claim is valid only if the damage that occurs is ‘caused in the territory, including the territorial sea, of a Contracting State and … in the [EEZ]’.\(^6\) So the criterion is the place where the damage from the oil actually occurs rather than where the spill happens. The damage must be to the ‘territory’, meaning states’ shores or its seas out to the outer limit of the EEZ.

A key provision is the type of ‘pollution damage’ that is covered. The definition is that it means ‘loss or damage caused outside the ship by contamination resulting from the escape or discharge from the ship …’ but the compensation for damage to the environment other than loss of profit is limited to ‘costs of reasonable measures taken for reinstatement actually undertaken or to be undertaken’.\(^7\) These costs of reinstatement from oil damage were inserted to clarify that mere loss of amenities, such as mangrove trees killed but not replanted, did not give rise to a claim. The other part of ‘pollution damage’ that is recoverable is the clean up costs which come within the ordinary meaning of loss or damage.

It was an issue whether the costs associated with preventive measures was recoverable, as opposed to actual costs of cleaning up the oil spill. These costs are recoverable because ‘pollution damage’ is now defined to include the ‘costs of preventive measures and further loss or damage caused by preventive measures’. If an oil tanker goes aground, therefore, and costs are incurred in laying out oil spill booms, getting skimmers in place to retrieve the oil and otherwise limit the damage from the spill, the claimants can recover those costs incurred in the preventive measures even if no oil is actually spilled. Such measures must, however, be ‘reasonable’.\(^8\)

There are some exceptions and some limitations to liability of the owner to recompense under the CLC 1992, which are set out in Art III. These are:

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\(^5\) The earlier provisions of the 1969 CLC only covered oil cargo, but this was extended to include the bunkers. This left the problem about bunkers from non-tankers, which is now covered by the Bunkers Convention 2001, as to which see below.
\(^6\) Article II.
\(^7\) Article I(6).
\(^8\) Article I(7).
(a) if the damage resulted from an act of war, hostilities, civil war, insurrection or natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) it was wholly caused by an act or omission done with intent to cause damage by a third party; or

(c) it was wholly caused by a government or other authority responsible for the lights or other navigational aids in the exercise of that function; and

(d) the owner may be partially or wholly exonerated if the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person;

(e) no claim may be made in the contracting state against the owner otherwise than in accordance with the CLC 1992;

(f) the owner is at liberty to seek to claim recompense from third parties;

(g) no claim may be made against the servants or agents of the owner or members of the crew, the pilot or other person performing services for the ship, charterer, manager, operator, salvor acting with the owner’s consent, or person taking preventive measures, or any of their servants or agents, unless the damage resulted from ‘their personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result’.

It may be noted from these limitations that liability may be apportioned between owner and claimant if the person who suffered the damage was the person who caused the damage with that intent, or it resulted from that person’s negligence. Where two or more ships are involved in causing the pollution damage then liability is joint and several, unless one of the exceptions or limitations mentioned above applies. Subject to these exceptions and limitations, if the oil spill from a tanker occurs in the waters of a state party to the CLC 1992 then it is strict liability on the part of the owner, provided the owner is in a P&I Club.

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9 This is the same key phrase which applies to breaking the limit of liability of the ship owner etc in the Limitation of Liability Convention 1976, under which the ‘owner’ may lose the right to limit liability; see White M, ‘Limitation of Liability’, Chapter 10 in White M (ed), Australian Maritime Law (Federation Press, 2nd ed, 2000); Davies M and Dickey A, Shipping Law (Law Book Co, 3rd ed, 2004) Chapter 16.

10 Article IV. If both ships are entered with different P&I Clubs then the clubs share the payments for the claims; the proportion of shares depending on the circumstances.

11 If the tanker owner has not entered the ship in a P&I Club, then the Fund Convention 1992 probably will apply, as to which see below.
Naturally an important aspect is the amount of the liability of the owner in the event of an oil spill. This is calculated by taking the tonnage of the ship, as measured by the *Tonnage Convention*, and multiplying it by the ‘units of account’ to arrive at the amount, but this is subject to a minimum and a maximum limit. The ‘unit of account’ is the Special Drawing Right (SDR), established by the International Monetary Fund, which is often used in such conventions. The minimum amount of liability, which is for ships up to and not exceeding 5000 gross tonnage, is 4.51 million SDRs and the maximum amount rises at the rate of 631 SDR per ton until an absolute maximum at 140,000 tons and a monetary liability of 89.77 million SDRs. The monetary amounts that these come to depend on the value of the SDRs at the time of the incident which, like any exchange rate, fluctuates. For Australia and New Zealand, it is often around 50 cents, so the minimum would then be about $2.25 million (from 4.51 million SDRs) and the maximum about $45 million (from 89.77 million SDRs). The exchange rate of the SDR for the relevant date(s) can be established from the daily financial papers or from the central banks.

This upper monetary limit for a ship can be broken by the claimants proving that the pollution damage resulted from the owner’s ‘personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result’. The time limit for claiming is three years from the date of the damage or no more than six years from the date of the incident, whichever is the sooner.

After an incident the owner may establish a fund in the court of the relevant state and it is then for the court to administer the fund and pay it out to claimants who prove their claims. If there is a surplus it goes back to the owner but if the amount is less than the total of the proven claims then payment is made pro rata, that is in proportion to the amount claimed. If a fund is established then an arrested ship that has given adequate security must be released. The CLC provides that member states are to pass legislation to give effect to these provisions. In fact, the P&I Club often prefers to meet with and pay the claimants direct, rather than pay the amount into a court for it to administer.

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13 Article V(9(a)).
14 For instance, limits of liability for air carriage are set by the units of account under the *Warsaw Convention* 1929.
15 The limits of liability were increased on 1 November 2003. Care needs to be taken to ensure that a current version of the CLC 1992 is used for the date on which the oil spill occurred. The IOPC website is very informative on this subject; see <www.iopcfund.org>.
16 The exchange rate between Australian and NZ fluctuates but it is usually close to parity.
17 Article V(2).
18 Article VIII.
An important, but slightly different, aspect of the CLC 1992 is that the owner must have a certificate of ‘insurance or other financial security’, as evidence that it is covered by a P&I Club in the event of an oil spill.\textsuperscript{19} This requirement is, however, limited to tankers carrying more than 2000 tons of oil in bulk as cargo. States can, and do, demand these certificates be produced under their port state control regimes\textsuperscript{20} and if no satisfactory certificate is produced then the vessel may be turned away or, if already in port, detained until one is obtained. This system works very well and ensures that almost all tankers carrying oil as cargo are covered by the CLC. If there is a dispute between claimants and the owner (P&I Club) then litigation in the courts may proceed in the usual way and if any judgment is obtained it is enforceable in the courts of other member states,\textsuperscript{21} or under the usual other provisions for mutual enforcement of judgments.

The limits of liability for payment relate to each ‘incident’ so, in the event of a complex disaster such as where one tanker drags its anchor and hits another ship which then also drags onto a third ship (another tanker), the question arises whether it is the one or is two incidents. The definition under the CLC is that an ‘incident’ is ‘any occurrence, or series of occurrences having the same origin …’\textsuperscript{22} It may be seen that this definition is fairly vague and, to some extent, begs the question as it depends on the meaning of ‘having the same origin’. In the end this becomes a question of fact and law and if the parties are unable to agree if there has been one incident, or more, then it will need to be litigated or arbitrated.

As mentioned above, the system has strict liability, so negligence does not have to be proven, and the upper limit for the P&I Club liability for damages and costs is clearly set out. It is a very successful insurance system. If the total amount of the claims exceeds, or is likely to exceed, the upper limit for that ship then the provisions of the Fund Convention are usually applicable. In this case the P&I Club cooperates with the agents of the fund and they both work together, with the adjustment between them being payment by the P&I Club to its upper limit of liability.

The upper limit of liabilities of the CLC and the fund have been reviewed periodically, especially after large oil spills. One example is that the breaking up of the tanker \textit{Erika}, that spilled a huge quantity of oil that fouled the French and Spanish Atlantic coasts in 1999, evoked an enormous response in Europe. The European Union was considering

\textsuperscript{19} Article VII.
\textsuperscript{20} See Chapter 11 for a description of how port state control regimes are implemented. The Australian \textit{Protection of the Sea (Civil Liability) Act 1981}, Part IIIA and the Regulations also require tankers over 400 tons to have a certificate for ‘general insurance’; see Section 7.5 below.
\textsuperscript{21} Articles IX, X.
\textsuperscript{22} Article I(8).
establishing a unilateral regime for spills from tankers, like the USA did after the Exxon Valdez spill. This was then compounded when the Prestige disaster occurred in 2002 and further large amounts of oil were spilled on the Spanish and French Atlantic coasts. In the result the IMO dealt with it by the Legal Committee adopting the ‘Tacit Acceptance’ amendments\textsuperscript{23} to the CLC and the Fund Convention that raised the upper limits of liability under these two conventions, including the optional third tier. The provisions of the Fund Convention will be addressed shortly but, to keep with the chronological progression of conventions, the next convention to mention is the Nuclear Material Convention 1971.

### 4.3 Carriage of Nuclear Material Convention 1971

The Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material 1971 (the Nuclear Convention 1971)\textsuperscript{24} arose from two other, more limited, conventions on this topic, the Paris Convention 1960 and the Vienna Convention 1963.\textsuperscript{25}

The sole purpose of the Nuclear Convention 1971 is to exonerate from liability any ‘operator of a nuclear installation’ whose liability, or lack of it, already comes under either of the Paris or the Vienna Conventions or whose national law is as favourable to persons who may suffer damage.\textsuperscript{26} The exoneration extends to the damage to the nuclear installation, any property on its site and to the means of transport or the relevant nuclear material at the time, but it does not extend to any person who has ‘caused the damage by an act or omission done with intent to cause damage’.\textsuperscript{27} Nor does the exoneration extend to affect the liability of the operator of a nuclear ship in respect of damage caused by a nuclear incident involving the nuclear fuel of or radioactive products or waste produced in the ship.\textsuperscript{28} It is not a convention of any consequence as matters currently stand.

Having now mentioned the Nuclear Convention 1971, attention will be turned to the very important Fund Convention 1971/1992.

\textsuperscript{23} Article 15 allows for the Legal Committee to raise the limits, subject to meeting certain requirements, and 18 months later the amendments are ‘deemed’ to take effect unless not less than one-quarter of member states have advised the IMO of rejection, in which case the proposed amendments lapse. For the EU situation, see Wong Hui, ‘Recent Developments in the EU Oil Pollution Regime’ in Faure M and Hu J (eds), Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the US (Kluwer Law, 2006) Chapter 1.

\textsuperscript{24} Done at Brussels on 17 December 1971. It entered into force internationally on 15 July 1975 but has few contracting parties and neither Australia nor NZ have ever ratified it; see IMO website ‘Status of Conventions’.


\textsuperscript{26} Article 1.

\textsuperscript{27} Article 2.

\textsuperscript{28} Article 3.
4.4 Fund Convention 1971 and 1992

The second convention that dealt with compensation for clean-up costs and damage from tanker oil spills was the Fund Convention 1971 and now, more relevantly, its successor, the Fund Convention 1992. As with the CLC 1992, the terms of the 1971 Fund Convention were completely replaced by the 1992 protocol. As the 1971 Fund is, for all practical purposes, wound up, attention will only be paid to the 1992 Fund provisions. The rationale for the creation of the Fund Convention 1971 was that the tanker owners claimed that it was the nature of the cargo they carried, owned by the oil companies, that created the risk and that the oil companies should pay their share of the costs incurred from oil spills. The oil companies agreed and the new convention was arrived at on the basis that the two regimes would share the costs of oil spills from tankers. Under the Fund Convention the oil companies are required to be parties to a fund, which is administered from its headquarters in London. The distinctions of the Fund Convention from the CLC are, first, that the costs fall on the oil companies and not on the tanker owners, and, secondly, the compensation comes from a mutual fund, into which the oil companies pay the levies made on them, rather than from an insurer P&I Club. Under this convention the levies are calculated on the amount of oil which is landed in or shipped out of participating countries, with the levy being imposed at a rate per ton above a minimum threshold. As the Fund Convention is a counterpart to the CLC, its function is to compensate when the valid claims exceed the maximum amount available under the CLC or there is some impediment to a valid recovery under the CLC by the claimants, so it is colloquially known as a ‘top-up’ fund.

To a large extent, the CLC and the Fund Convention are read together. The definitions of many of the terms are the same, so that ‘ship’, ‘oil’, ‘pollution damage’ and ‘ship’s tonnage’ have the same meaning as in the CLC. The key provision is that the fund will pay compensation to any person ‘suffering pollution damage if such person has been unable to obtain full and adequate compensation’ under the CLC. The defences of war etc are similar to, but not identical with, those under the CLC and the time limits within which to bring a suit are the same.

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30 As the risks and limits were different there are different bank accounts and funds for the 1992 fund from the 1971 fund, as was the case with the 1969 CLC and the 1992 CLC.

31 In order to become a member of the Fund Convention 1992 a state must be a member of the CLC 1992.

32 Article 1.

33 Article 4.

34 Article 4(2).

35 Article 6.
The contributions to the fund are, of course, important and have given rise to some tensions. Japan has been the biggest contributor for many years due to the large amount of its imports.\textsuperscript{36} Annual contributions are made by each contracting state which has received ‘contributing oil’ through carriage by sea into its ports or offshore installations of a total quantity exceeding 150,000 tons for any one calendar year.\textsuperscript{37} Not all oil qualifies, as it must be ‘crude’ or ‘fuel’ oil, as defined in the convention.\textsuperscript{38}

The amount of the payout to claimants is not governed by the tonnage of the ship, as with the CLC, but starts at the lower limit of when the CLC upper limit is reached, or from the bottom if the CLC is not applicable. The upper limit is set under the convention in terms of SDRs, as for the CLC, and has been revised upwards a number of times. Because of the issues, including the very large claims that arose out of the \textit{Erika} and the \textit{Prestige} oil spills, a new optional Supplementary Compensation Fund, with a new upper limit was introduced. This came about as some countries wished to have the much higher upper limits, but others considered that their situations would not warrant having to pay the increased levies for such high limits for other countries. The very sensible compromise was to make a provision for a Supplementary Fund that was optional to member states.

Where the total valid claims exceed the maximum amount payable by the fund for that incident the claimants are paid pro rata. It is difficult for the fund director, in many cases, to know the amount of likely claims so claimants are often only paid a proportion of their claim until the final total amount of claims is known. The maximum amount the fund will pay on any one incident, after taking into account any amounts paid under the CLC, is 203 million SDRs for the ordinary fund\textsuperscript{39} and 750 million SDRs for the Supplementary Fund.

The present situation, therefore, is that members of the \textit{Fund Convention} are bound to have laws that require the oil companies that fall under the regime to contribute to the fund. The fund then pays out the claims each year and usually makes two levies each year on the oil companies, which are calculated to meet the expected claims and based on a certain amount per ton of contributing oil. If there is an internal dispute then parties may litigate and an unusual provision is that the fund itself is given the status of a corporate identity and may sue and be sued.

\begin{footnotesize}
\textsuperscript{36} See the Fund Annual Reports, which are available on \texttt{<www.iopcfund.org>}. The 2005 Annual Report showed Japan contributed 17.8\%, which was nearly twice that of the next contributor (Italy). Australia contributed 2.1\% and NZ 0.38\%.
\textsuperscript{37} Article 10. However, to opt into the Supplementary Fund the contributing oil must be 1 million tons a year.
\textsuperscript{38} Article 1 defines ‘crude oil’ and ‘fuel oil’ in some detail, but basically the definitions are similar to the ordinary and natural meanings of both terms.
\textsuperscript{39} There was an interim period when the upper limit of the ordinary fund was 203 million SDRs, but the conditions were met some years ago and need not be addressed in this work.
\end{footnotesize}
The structure of the organisation for the fund is that there is an assembly (all member states), an executive committee (15 member states duly elected), a director and a secretariat. The director has the management of claims and is generally responsible for the performance of the secretariat. Details of claims arising from all of the tanker casualties may be found in the Fund Annual Reports and parties wishing to make a claim would do well to follow the procedures set out in the IOPC Fund ‘Claims Manual’.

Before leaving the two compensatory conventions for oil spills from tankers, the CLC and the Fund Convention, mention should be made of the two voluntary compensation schemes which were in place for some 20 years and the two voluntary schemes that came into force in 2006. The tanker owners and the oil companies each had voluntary schemes under which they provided compensation for the damage caused and the cost of clean up of oil spills from tankers. Under the TOVALOP scheme the tanker owners maintained a system which was similar to the CLC. Nearly all of the tanker owners in the world fleets were members and the scheme was designed to cover the situation where the CLC did not. Under the other scheme, CRISTAL, the oil companies voluntarily agreed to pay into a fund, which ran as a parallel to the Fund Convention. Both of these schemes were seen as having served their purposes when the 1992 Protocols to the CLC and the Fund Convention came into force. As a result both of TOVALOP and CRISTAL were ended 20 February 1997. Due credit should be given to the tanker owners and the oil companies in that they voluntarily agreed to participate in these two schemes.

As has been mentioned, the basic scheme behind the compensation for oil spills was that the shipping and the oil industries should share the burden of meeting the compensation and that this be done about equally. With the introduction of the third tier into the Fund Convention it was felt that this was no longer so, and a study by the IOPC Fund confirmed this. As a result these two sectors entered into a further two voluntary schemes, which in this case were the Small Tanker Oil Pollution Indemnification Agreement (STOPIA 2006) and the Tanker Oil Pollution Indemnification Agreement 2006 (TOPIA 2006). They came into force on 20 February 2006 and the P&I Clubs and other industry entities support

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40 The former director Mr Mans Jacobsson, ran an efficient and effective fund team for many years until he retired at the end of 2006.
41 TOVALOP is the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution. It was a contract, in effect, between the tanker owners and the administering body. CRISTAL is the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution.
42 Further detail about TOVALOP and CRISTAL may be found in White M, Marine Pollution Laws of the Australasian Region (Federation Press, 1994) Sections 4.2.2 and 4.2.3 and in the other books on this topic.
both agreements and have incorporated their provisions into their formats.\textsuperscript{43}

Under STOPIA 2006 relevant tankers of 29,458 GT or less agree to indemnify the 1992 Fund for the difference between the vessel’s limit of liability under the CLC and SDR 20 million. This has the effect of increasing the compensation payable by owners of smaller tankers from SDR 4.5 million to SDR 20 million. A mechanism is in place to extend STOPIA 2006 to all State parties to the Fund 1992 and also to all State parties to the CLC 1992.

TOPIA 2006 is similar to STOPIA 2006 with two notable differences. First, the TOPIA 2006 tanker owners undertake to indemnify the Supplementary Fund for 50\% of any payment falling on that fund. This is shared ‘bottom up’ in that the first amount incurred by the Fund up to the STOPIA limit is reimbursed 100\%. Both of the agreements contain a review mechanism for their revision every 10 years to see that the outcome that their introduction sought to achieve was, in fact, being achieved.

Because of the success of the liability and compensation schemes the IMO then moved to have a similar scheme for other cargos, which will now be addressed.

\subsection*{4.5 HNS Convention 1996}

The \textit{HNS Convention} 1996 seeks to extend the benefits from the CLC and the \textit{Fund Convention} to several thousand categories of hazardous and noxious substances carried by sea as cargo.\textsuperscript{44} The \textit{HNS Convention} is structured in two tiers, of which the first is a provision requiring the ship owners to take insurance, like the CLC, and the second tier is a mutual indemnity provision whereby the cargo owners are required to contribute to payouts, like the \textit{Fund Convention}. The \textit{HNS Convention} applies to damage caused or clean-up costs incurred in the territory of a state party, in the territorial sea and out to the limits of the EEZ, provided it is damage suffered by a state party or for the costs of clean-up or preventive measures by a state party wherever incurred.\textsuperscript{45} It does not apply to oil damage under the CLC or \textit{Fund Conventions}, to damage by certain radioactive materials, or to war ships.\textsuperscript{46}

\textsuperscript{43} For a clear descriptive summary of the agreements see May/July 2006 \textit{Gard News}, No 182, ‘STOPIA and TOPIA 2006 – What, Why and When’.

\textsuperscript{44} The \textit{International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances} done at London on 3 May 1996. A Protocol was agreed for this convention in March 2000; the OPRC-HNS Protocol 2000, which has been mentioned in the section on the \textit{OPRC Convention} in Chapter 3 above.

\textsuperscript{45} Article 3.

\textsuperscript{46} Article 4.
The real difficulty about implementing the HNS Convention is the large number of types of materials that it purports to cover when carried as cargo by sea. Under tier one the owner is liable for damage caused by ‘hazardous and noxious substances’. These are widely defined and include ‘oils’ as defined in Annex I of MARPOL 73/78; noxious liquid substances as defined in Annex II of MARPOL 73/78; dangerous liquid substances; dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code (IMDG Code), liquified gases, liquid substances carried in bulk with a flashpoint not exceeding 60 degrees Celsius and solid bulk materials possessing hazardous chemicals. The list of materials that are covered is very long and probably exceeds 4000 items. Note that the HNS definition is drafted to exclude oil cargoes already covered by the CLC and certain radioactive material.

The terms of tier one (Chapter II) of the convention are similar to the terms of the CLC but there are differences. One is that the definition of ‘damage’ which may give rise to a claim includes personal injury and death onboard or outside the ship provided it is ‘caused’ by one or more of the HNS substances. Claims for damage, contamination of the environment and preventive measures are similar to those under the CLC. The same exceptions, of war, etc also apply. The upper limit of liability under the tier one provisions is 10 million SDRs for ships not exceeding 2000 tons, plus 1500 SDRs per ton thereafter to 50,000 tons, plus 360 SDRs per ton above that up to a total maximum of 100 million SDRs. Claims for death or personal injury have priority over other claims up to two-thirds of the total amount established. Ships are required to carry their certificate showing they have the compulsory insurance (or other certificate of financial security) and state parties are to require their flagged ships to have this insurance. Port state control provisions allow other state parties to demand the certificate if the ship wishes to enter its ports or offshore installations.

The second tier, set out in Chapter III, follows similar provisions to the Fund Convention 1992. An HNS Fund is established from which the claims are paid and administered by an assembly, a committee on claims for compensation, director and secretariat. The member states that meet the minimum of ‘contributing cargo’ are to require companies operating

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47 The full details are set out in Art 1(5).
48 Article 4(3).
49 Article 6.
50 Article 11.
51 The Director and secretariat of the fund appointed under the Fund Convention have also been appointed to administer the HNS Fund, if the HNS Convention comes into force. The many cargos mentioned in the HNS Convention 1996 have been applied to the OPRC Convention 1990 in an OPRC Protocol 2000, as to which see Chapter 3 above.
in their jurisdiction that own relevant cargo to meet the levies made on them by the HNS Fund secretariat. The claims to be met out of the fund are where the tier one cover does not apply, because the owner of the cargo is financially incapable or the damage exceeds the liability under Chapter II.52 The usual exceptions apply and the upper limit, including any payments by the insurer under Chapter II, for any one incident is 250 million SDRs.

One feature of the HNS Fund, not found in the other similar conventions, is that there is power for the assembly to establish three accounts, separate from the general account. These three are the oil account, the LNG account and the LPG account.53 Minimum contributing thresholds apply before any of the three separate accounts are activated and, for the general account, the minimum amount is 20,000 tonnes of contributing cargo per year before a state is liable for the levies. The convention provides for a fund to be established from which the court may make payments and in which court actions are to be brought, that the HNS Fund has corporate identity to sue and be sued, that the time limits are three years from the damage and a maximum of 10 years from the incident and for direct suit against the fund rather than the owner. Entry into force is 18 months after 12 states have ratified, including four states each with not less than 2 million units of gross tonnage, and the ratifying states have a total of contributing cargo of at least 40 million tonnes of cargo.54 There are the usual provisions for amendment by the assembly and the ‘tacit acceptance’ special procedure amendment of the limits of liability (only) through an IMO Legal Committee resolution.55

The provisions of the OPRC-HNS Protocol 2000, which extends the preparedness, response and cooperation provisions of the OPRC Convention to the HNS Convention, are mentioned in Section 3.6 in Chapter 3.

The administrative structure associated with the HNS Convention is concerning to many nations and so far the HNS Convention has attracted little international support.56 Its objects, however, are laudable and the IMO is pressing for states to ratify it. One has in mind, however, that attempting to draft clear laws and regulations for a two tiered system for thousands of cargos is daunting enough, but the task of then educating the shipping industry for such a complex system of liability and compensation, and then enforcing compliance, is even more so. If the number of

52 Article 14.
54 Article 46.
55 Article 48.
56 The IMO Legal Committee meeting of May 2005 noted that, of the eight states that had ratified the HNS Convention, not one had made the mandatory report about the quantity of contributing cargo received during the previous period; see Report Legal Committee 90th session, LEG90/15, 9 May 2005, Item I.
cargos to which it applied was reduced to a small number it would be more manageable.

4.6 Bunkers Convention 2001

In 2002 the IMO diplomatic conference agreed on a new convention about liability and compensation for damage and clean up costs for oil spills from non-tankers in the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunkers Convention 2001). Bunker spills from tankers came under the CLC and Fund Convention 1992, so this Bunkers Convention 2001 met the need for a compulsory ‘insurance’ liability and compensation system to cover oil spills from cargo and passenger ships, some of which carry large amounts of bunker fuel oil. The terms of the convention are similar in many ways to those of the CLC.

‘Bunker oil’ is defined as ‘any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil’. ‘Pollution damage’ is defined as damage caused outside the ship by contamination from the escape or discharge of bunker oil and covers compensation for impairment of the environment for the reasonable costs of reinstatement, and it also covers costs of preventive measures.

The owner is liable for pollution damage caused in the relevant state’s territory, territorial sea or EEZ or to preventive measures wherever taken. It is not possible to state all of the terms of the convention, but the usual defences apply (war etc) and the Bunkers Convention 2001 does not apply if the CLC does. Ships of a registered tonnage greater than 1000 tonnes are required to maintain insurance or other financial security and carry a certificate onboard testifying to such. The ‘ship owner’, which is widely defined to include registered owner, the charterer, operator, etc, is still entitled to limit liability under any applicable national or international scheme, including the Limitation of Liability Convention 1976.

This convention is slightly unusual because its upper limits are set by another convention in Art 7(1) of the convention, the key provision, which provides:

57 Done in London on 23 March 2001.
58 Article 1(5).
59 Article 1(9). In effect the recoverable claims are those for loss or damage caused by the spill and for clean up costs. It should be noted that the operative word is ‘caused’ and questions of remoteness, in similar terms to recoverability to those applied in damage for negligence, do apply.
60 Article 4(1).
The registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party shall be required to ... cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation scheme, but in all cases, not exceeding an amount calculated in accordance with the Convention on Limitation for Maritime Claims, 1976, as amended.

It may be seen from these provisions about the limit of liability for bunker oil spills, that they only apply if the ship is 1000 tonnes or over. The upper limits are those set by the Convention for Limitation for Maritime Claims 1976, as amended (the LLMC), which at the time of writing is by the 1996 Protocol. This is the relevant convention for Australia and New Zealand. Australia is a party to the convention and the 1996 Protocol and at time of writing New Zealand is a party to the convention but not (yet) to the 1996 Protocol. The effects of the national legislation are set out in the relevant chapters, below.

The LLMC provides for a virtually unbreakable test for the claimants to try to break the upper limit of liability. It declares that a person will only lose the right to limit liability if ‘it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result’.

Under the 1996 Protocol to the LLMC the amount of compensation payable in the event of an incident is substantially increased. Its limit of liability for claims for loss of life or personal injury for ships not exceeding 2000 gross tonnage is 2 million SDR and for larger ships the following additional amounts:

- For each ton from 2001 to 30,000 tons, 800 SDRs
- For each ton from 30,001 to 70,000 tons, 600 SDRs
- For each ton in excess of 70,000, 400 SDRs.

For claims other than loss of life or personal injury, up to 2000 gross tonnage it is the same upper limit, but thereafter it only increases at one-half the rate per ton that is set out from the life and injury claims.

The measure for the upper limit of passenger ships is the certified number of passengers rather than by its tonnage. Under the 1996 LLMC

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63 See Chapter 7 for Australia and Chapter 10 for NZ.
65 The upper limits of liability for the LLMC unamended by the 1996 Protocol is less, and may be found in the 1976 convention itself.
66 Article 3(6).
Protocol the upper limit is 175,000 SDRs multiplied by the number of passengers which the ship is authorised to carry, according to the ship’s certificate.\(^{67}\)

The 1996 LLMC Protocol also makes provision for states which are not members of the IMF and whose law does not allow application of SDRs, to include a reservation in their ratification that the provisions of Art 5 shall apply. These relate the upper limits to monetary units, rather than SDRs. The Protocol also allows for states to pass laws whereby the upper limit for passengers of a ship is higher than that allowed under the LLMC.\(^{68}\) Finally, the 1996 Protocol also makes provision for the ‘tacit acceptance’ provision for alternation of the upper limit of liability, whereby the IMO Legal Committee can so resolve and it comes into force unless certain objections by a certain number of states are taken to it.\(^{69}\)

The Bunkers Convention 2001 will enter into force one year after 18 states have ratified or accepted the convention, five of which whose combined gross tonnage is to be not less than 1,000,000 tonnes.\(^{70}\) It may be seen that the Bunkers Convention 2001 fills a valuable gap in the liability and compensation conventions. It seeks to set out a scheme to deal with claims for loss and damage and clean up costs for bunkers oil spills along the same lines as the CLC.

### 4.7 International Tanker Owners Federation

Before leaving oil spills, mention should be made of the International Tanker Owners Pollution Federation Ltd (ITOPF). It is not directly related to the IMO but its work is almost solely related to advising on and assisting to clean up oil spills. It is based in London so mixes regularly with the IMO personnel, so it should be mentioned in this context. It was established in 1968 to service the tanker owners’ requirements arising under CRISTAL\(^ {71}\) to provide technical advice and similar services when oil spills occurred. When CRISTAL ended in 2002, the ITOPF had proved such a successful service that it was kept going. It now derives its income from subscriptions from the P&I Clubs and consultancy fees. Acting on behalf of some 5000 tanker owners and bareboat charterers,\(^ {72}\) it provides technical advice, expertise and information on effective responses to ship-sourced pollution. It is normally one of the organisations from which assistance is sought in any major oil spill and its staff has attended some 560 ship-sourced spills in 93 countries. It also maintains a very

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\(^{67}\) Article 7(1).

\(^{68}\) Article 6 of the 1996 Protocol inserts a new Article 3bis into Art 15 of the convention.

\(^{69}\) Protocol Art 8.

\(^{70}\) Article 14.

\(^{71}\) See Section 4.4 above for mention of CRISTAL and TOVALOP.

useful information service on oil spill statistics, as set out in Chapter 1 above, and has useful publications on the effect of oil spills and the various techniques for dealing with them.\textsuperscript{73}

4.8 Conclusion

The liability and compensation schemes under the IMO are some of the most successful ‘insurance’ schemes in the world. They have worked well for years. If a state party suffers damage in its waters out to the limits of the EEZ then these schemes apply. Provided the state is a party to the conventions and provided all of the conventions receive sufficient support to come into force, there are safeguards to recompense government agencies and private citizens for loss and damage from the effects of spills of most cargos. The IMO has done all that may reasonably be expected of it in this regard and it is up to the national governments to give effect to these conventions.

This, then, ends the description of the IMO conventions which establish a liability and compensation system for spills from ships. It is appropriate now to turn to the interaction between salvage and marine pollution which will be done in the next chapter.

\textsuperscript{73} Ibid.
Chapter 5

Salvage and Marine Pollution

5.1 Introduction

The law of salvage is complex and the topic will only be addressed sufficiently to touch on those aspects that relate to the marine environment and marine pollution from ships. That it should be addressed at all in this book is because the protection of the marine environment, mainly from oil spills, is now intimately mixed with salvage operations. The earlier salvage rule of ‘no cure – no pay’ had to be modified as salvors, often the best equipped and skilled people to deal with a marine casualty, found that they had no financial incentive to attempt to save the casualty. If the casualty was not a good salvage risk, which was especially the case if it was spilling oil, the risks involved were too high for a salvage to be attempted. As a result, the best equipped and qualified people often did not address the problem.

Several major casualties in European waters drove the sentiment that a solution to the problem was to give salvors a direct financial interest in protecting the marine environment when a shipping casualty was polluting, or threatening to pollute, it.

This aspect was addressed gradually by giving the salvors this financial interest and it was first introduced in the Salvage Convention 1989, so it is convenient to look at its terms.

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2 A salvor also had in mind that if the salvage operation went wrong it may be subject to claims seeking to recover damages for negligence, as happened to the salvor in Owners of MV Tojo Maru v NV Bureau Wijsmuller (The Tojo Maru) [1972] AC 242 (HL).

3 These included the Torrey Canyon, the Amoco Cadiz, the Nagasaki Spirit, the Erika and the Prestige, which are fully documented and put in context elsewhere, including by Brice on Maritime Law and Kennedy and Rose: The Law of Salvage, above. These casualties are also mentioned in Chapter 1, above.
5.2 The Salvage Convention 1989 and the ‘Special Compensation’ Provisions

The Salvage Convention 1989 is the first convention on the topic that recognised the need for protection and preservation of the marine environment as an aspect of salvage, which it did in Art 14. As mentioned, the origins of Art 14 lie in the shortcomings of the salvage rule of ‘no cure – no pay’, so that the salvor had no incentive to risk equipment, time and money in salving a marine casualty if there was no, or little, prospect of salving the ship or other property. Salvors were inclined, and were entitled, in these circumstances not to attempt to salve the casualty and this was especially so when the casualty was spilling copious quantities of oil into the sea. The important advances in this convention were that remuneration for the salvor was to recognise these efforts and some remuneration was no longer entirely dependent on some success in salving the ship or cargo.

The structure of salvage remuneration is more or less codified and simplified in the Salvage Convention 1989. The key article to the amount of compensation for a successful salving of relevant property was Art 13. The changes were that Art 13 was amended to add that an aspect in calculating the reward was success in preventing or minimising damage to the environment. This change alone was important, but to this was added Art 14, which is the one that was to give a financial incentive to salvors if they try to protect the marine environment, even if they do not succeed in the salvage. It is widely recognised that Art 14 is not well

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5 Article 13 is as follows: ‘Article 13. Criteria for fixing the reward. (1) The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below: (a) the salved value of the vessel and other property; (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment; (c) the measure of success obtained by the salvor; (d) the nature and degree of the danger; (e) the skill and efforts of the salvors in salving the vessel, other property and life; (f) the time used and expenses and losses incurred by the salvors; (g) the risk of liability and other risks run by the salvors or their equipment; (h) the promptness of the services rendered; (i) the availability and use of vessels or other equipment intended for salvage operations; (j) the state of readiness and efficiency of the salvor’s equipment and the value thereof’. Article 13 goes on to provide that payment for the award shall be by the vessel and other property interests in proportion to their salved values and that the award shall not exceed their salved value.

6 ‘Article 14. Special Compensation. 1. If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under Article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined. 2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under
drafted, but it was the only draft which was able to attract sufficient support at the diplomatic conference, so the maritime world has had to work with it; as to which see below in relation to the ‘Common Understanding’ and the Special Compensation Protection and Indemnity Clause (the SCOPIC Clause).

In the Salvage Convention 1989, Art 14(1) has the requirements that, in order for the salvor to earn the special compensation, the salvage operations be carried out where the stricken vessel or its cargo threatened damage to the environment and the salvor has failed to earn a reward under Art 13 of an equivalent amount. Article 14(1) raises the problems of the relationship between it and Art 13, and the problem of how to calculate the amount of the special compensation.

Article 14(2) addresses when the amount payable as special compensation may be increased from that provided in Art 14(1). It provides for an increase up to a ‘maximum of 30%’ of the expenses, but it then goes on to provide that this may be further increased up to 100% if the tribunal considers it ‘fair and just’. This drafting is, of course, fairly close to nonsense and it provided no other criteria for this further increase, which was most unsatisfactory. 7

Article 14(3) addresses the problem of what are the salvor’s ‘expenses’ and provides that it means the out-of-pocket expenses reasonably incurred by the salvor and a fair rate for equipment and personnel actually and reasonably used, taking into consideration the criteria in Art 13(1)(h), (i) and (j).

Article 14(4) provides that the total under Art 14 is that amount that is greater than any reward recoverable under Art 13, so the ordinary salvage reward is the first entitlement and then the special compensation.

7 Article 14 goes on in paras (3), (4) and (5) to make provisions for the reward not to exceed compensation under Art 13, not to exclude deprivation of the special compensation if the salvor be negligent and not to exclude the rights of the owner of the vessel for recourse against the salvor. These paragraphs are difficult in their application and understanding and will not be further addressed, so readers are referred to other works, especially Brice on Maritime Law and Kennedy and Rose: The Law of Salvage, above. The author has also addressed them briefly in White, Australian Maritime Law 2000, above.
tops it up, if applicable. Article 14(5) provides that the reward may be reduced, or the salvor even deprived of all reward, if the salvor has been negligent and thereby failed to prevent or minimise damage to the environment. Article 14(6) makes it clear that the rights of the owner are preserved to take recourse against any other party if it so wishes.

The matter of what ‘expenses’ under Art 14(2) could be claimed by the salvor was a major issue. It was addressed by the House of Lords in the Nagasaki Spirit, where the court held that the meaning to be attributed to ‘expenses’ was one which ‘denotes amounts either disbursed or bourne, not earned as profits’. The second major point before the House of Lords was whether the expenses were those incurred throughout the salvage operation or only those incurred whilst the threat to the marine environment was in existence, and the court held that it was the former.

All of this uncertainty was, however, so unsatisfactory that it was subject to further elucidation by further decisions and agreements, as to which see below.

5.3 The Common Understanding

The unclear provisions of Art 14 in the Salvage Convention 1989 terms was recognised at the conference itself, so the conference resolved to add a further clause, which is an attachment to the convention, which provides:

**Common Understanding Concerning Articles 13 and 14 of the International Convention on Salvage, 1989**

It is the common understanding of the Conference that, in fixing a reward under article 13 and assessing special compensation under article 14 of the International Convention on Salvage, 1989, the tribunal is under no duty to fix a reward under article 13 up to the maximum salved value of the vessel and other property before assessing the special compensation to be paid under article 14.

It may be seen from the ‘Common Understanding’ that the tribunal (arbitration or court) is not bound, where the value of ship and property salved is limited, to fix all of the amount of that salved value as the reward under Art 13. In effect, the tribunal may end up apportioning between the salvage reward under Art 13 and the special compensation under Art 14. The importance lies in the fact that different entities, in this case different insurers, will often be meeting the payments to the salvor under the two different parts of the reward.

This means that if the salvage of a maritime casualty is financially successful then the amount paid to the salvor is calculated in the

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9 The Hull and Cargo Underwriters usually pay the Art 13 reward and the P&I Club usually pays the Art 14 reward.
ordinary way under the items listed in Art 13. However, if that amount is
too low then the salvor claims under the ‘special compensation’ provi-
sion in Art 14. Provided the provisos are met then the amount which may
be awarded lies somewhere between the amount of the expenses that the
salvor incurred in the salvage operations plus a further sum of between
30% and 100% of those expenses. The lower percentage is incurred as of
right and the tribunal then has a discretion to increase it up to 100%
provided it considers that it is ‘fair and just’ to do so.

The Salvage Convention 1989 is not always the form of law that regu-
lates salvage. In many situations, and usually where the parties involved
are professional salvors, they agree to the Lloyds Open Form agreement,
to which attention will now be paid.

5.4 Lloyd’s Open Form (LOF)

Lloyd’s Open Form (LOF) is a common form of salvage agreement which
has become universally respected as being fair to all of the interests
involved in a salvage. It was devised by the Committee of Lloyds,
London, as its ‘Standard Form of Salvage Agreement’ towards the end of
the 19th century and, although its terms have changed over the years, it
is still widely used. The objects were to provide a fair form of contract
which was readily understandable, to enable parties to agree on the
terms of the salvage without delay so that the salvage could immediately
commence and to establish a structure for resolution of any disputes
arising from the salvage. In other words, the LOF sets out the obligations
on the parties to the salvage, provides for security against which the
salvor can be paid, for arbitration in the event of dispute and the enforce-
ment of and appeal from any arbitration decision. Its strength is that in
the crisis of the moment the parties can agree to a fair means of resolving
any future disputes and concentrate on saving life and property from the
marine casualty at hand.

Since the first inception of the LOF there have been many revisions
but the old salvage principle of ‘no cure – no pay’ had completely
dominated each version of it. Provision for protection of the marine
environment was first incorporated in the LOF 1980. This was regarded
as a success but more was needed and the Comite Maritime International
(CMI) and the International Salvage Union (ISU) and others pushed

10 Details may be obtained from the Lloyd’s website; see <www.lloydsoflondon.co.uk>.
11 Generally see Brice on Maritime Law and Kennedy and Rose: The Law of Salvage,
above.
12 The CMI is the head body of the world wide national associations in maritime
law. The CMI website is <www.comitemaritime.org>. For Australia and NZ the
association which is a member of the CMI is the Maritime Law Association of
Australia and New Zealand (MLAANZ); website is <www.mlaanz.org>.
for a convention, which became the Salvage Convention 1989. Most of the Salvage Convention 1989 terms were incorporated into LOF 1990 and there have been changes since then. However, the principle is now established that if there is ‘no cure’ other than the salvor protecting the marine environment the salvor will still be paid something.

The current edition is LOF 2000, which is a simple document of two primary pages, with all of the conditions printed into a separate but related document. Lloyds has a panel of arbitrators in London where the salvage arbitrations are heard. Most of the arbitrators are members of the Admiralty Bar in London. The LOF 2000 provides for a hearing and an award by a salvage arbitrator, then for an appeal to an appeal arbitrator. Further appeal beyond that lies to the court in London.

LOF 2000 gives effect to the sentiments addressed by Articles 13 and 14 of the Salvage Convention 1989 and it addresses the problems about the meaning of Art 14 by having an alternative system for assessment of the remuneration to a salvor relating to the protection of the marine environment. This is in Box 7 of the first page, in which the parties agree whether the SCOPIC clause is to be in or is to be out of the agreement, which will now be addressed.

5.5 The SCOPIC Clause

These special compensation provisions in the Salvage Convention 1989 were not to the liking of either the salvors, represented by the ISU, or the insurers, the P&I Clubs, so negotiations were commenced for their improvement. The result was agreement on a SCOPIC clause. SCOPIC leaves the fundamental principles of Special Compensation unchanged but puts in place a more workable framework for calculating remuneration, which is a system based on pre-agreed rates for vessels, personnel and equipment. This has the benefit of providing greater financial certainty. SCOPIC also dispenses with the problematical Special Compensation ‘triggers’ required under Art 14. Instead, the salvor may invoke SCOPIC at any stage during a salvage operation – but only in

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15 The particular aspects of the LOF that are not necessarily in the Australian and NZ interests are that its terms require that all arbitrations be held in London, that English law applies and that a party must appoint a representative in London or the party will not be heard. One solution is for the parties to agree that the arbitration be held in a convenient city in Australia or NZ and that local law apply.
16 All aspects of the LOF and salvage are available on the Lloyd’s website; see <www.lloydsagency.com> and follow the prompts relating to salvage.
17 Even if the SCOPIC clause is not incorporated at the outset the salvor may later do so, as to which see below.
18 Details of SCOPIC itself and ancillary documents are available on a number of websites, including the Lloyd’s Agency one, above.
appropriate circumstances, including high risk/low value cases. This reinforces the salvor’s ability to deliver a swift response.\(^\text{19}\)

SCOPIC is designed to be incorporated into an LOF salvage contract so that its terms replace those of Art 14. It is an option open to the salvor, who may carry on the salvage under the LOF incorporating Art 14, or may seek to invoke SCOPIC, thereby ousting Art 14 but otherwise operating under the terms of the LOF. As the P&I Clubs are not usually parties to the salvage agreement they cannot demand that the SCOPIC clause be used but, under a Code of Practice, the International Group of P&I Clubs and the ISU agreed to encourage their respective members to use its provisions and the clubs agreed generally to provide any financial security that may be required for SCOPIC remuneration. This provision of security is important as there may be no ship or property which seems likely to be saved and the salvor wants some security to cover its financial exposure if it is to proceed with the salvage.\(^\text{20}\)

SCOPIC 2005 is a lengthy document, comprised of 15 sub-clauses and three appendices. The tariff at which payment is made for tugs, equipment and personnel is set out in Appendix A and, in addition, a further 25% is paid as a ‘standard bonus’,\(^\text{21}\) which compensates for overhead expenses. There are some special provisions. The payment under SCOPIC is still only made if the special compensation amount exceeds any Art 13 amount,\(^\text{22}\) but there is a detriment for the salvor in that if the Art 13 award exceeds the SCOPIC figure then the award is reduced by 25%.\(^\text{23}\) Another feature of SCOPIC is that the owner may appoint a Special Casualty Representative (SCR) under the terms set out in Appendices B and C to the agreement, whose function is to observe and report on the salvor’s work and the reasonableness of the expenses incurred.

In summary, SCOPIC has advantages for each interested party in that P&I clubs have greater control over the salvage operations and can now prevent expenses escalating unreasonably and salvors receive rather more generous remuneration in most cases (reversing one aspect of the

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19 Walenkamp H, ‘SCOPIC: a new solution now available for use’, *International Salvage Union Bulletin*, November 1999, p 1. Mr Walenkamp was then the President of the ISU and was engaged in some of the negotiations.

20 Security is addressed in the SCOPIC agreement under cl 3.

21 Clause 5(iv).

22 Clause 6.

23 Clause 7 provides: ‘7. Discount. If the SCOPIC clause is invoked under sub-cl 2 hereof and the Article 13 Award or settlement (before currency adjustment and before interest and costs) under the Main Agreement is greater that the assessed SCOPIC remuneration then, notwithstanding the actual date on which the SCOPIC remuneration provisions were invoked, the said Article 13 Award or settlement shall be discounted by 25% of the difference between the said Article 13 Award or settlement and the amount of SCOPIC remuneration that would have been assessed had the SCOPIC remuneration provisions been invoked on the first day of services’.
Nagasaki Spirit decision) and they have better provisions regarding security, termination and quick payment.

For Australian and New Zealand conditions, therefore, the option for a salvor operating under an LOF 1995 or 2000 to elect for SCOPIC to operate does mean that a salvor has an incentive to undertake the salvage where the casualty is a risk to the environment and the likelihood of recovery under the principle of ‘no cure – no pay’ is slim or non-existent. With so many sensitive marine areas, like the Great Barrier Reef, this is a positive step. However, while the LOF insists on arbitration in London and English law there are still advantages for a salvage in the Australian or New Zealand region to take place without invoking the LOF at all, or invoking it on amended terms that holds the arbitration locally and that Australian or New Zealand law applies. However, the Australian and the New Zealand law respectively are quite adequate to deal fairly with all parties to a salvage without them entering into an LOF and, in this case, compulsory arbitration in London and English law are avoided.

5.6 Salvors and the ‘Criminalisation’ of Mariners in Maritime Casualties

In this chapter it is appropriate to mention one aspect about salvors and the protection of the marine environment, which is the detrimental effect of the increasing tendency for coastal states’ governments and others to ‘criminalise’ the conduct of the mariners involved in marine casualties. There are many cases of ships’ captains and others being imprisoned following oil and other spills.24 The effect of this is that competent officers are increasingly reluctant to accept jobs at sea, with the result that the standard of competence is likely to fall. Further, if coastal states and others continue to do this it will fracture the IMO conventions and accepted norms for international law relating to mariners, again with detrimental results. This ‘criminalisation’ risk extends to the salvors when they take over the control of the casualty from the master and owners.

An example of the concern raised by the ‘criminalisation’ is the address by the President of the ISU in 2005, when he said that:

The decision of the European Parliament favouring the criminalisation of marine accident events caused dismay throughout the global maritime community and deepened an already rapidly developing schism between the EU and the IMO.25

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24 Concerns are being expressed by the IMO, the Nautical Institute, the CMI (Professor Edgar Gold CM, AM, QC is the chair of the sub-committee dealing with this issue), the ISU and many other responsible and knowledgeable bodies.

25 Mr Hans van Rooij, President ISU, address to the ISU on Members Day 2005; see ISU Bulletin 24, September 2005, p 1.
This sentiment was compounded when the ISU Special Advisor warned that salvors would be forced to ‘back away from assisting casualties in EU waters if oil is spilt or an active threat of spill exists’. The net effect is that there could be a lessening of the use of the skills and equipment of the salvors unless a less hostile approach is taken to their work when salving marine casualties that are causing, or likely to cause, a serious pollution spill.

5.7 Limitation of Liability Upper Limits

It frequently occurs in maritime casualties that the two maritime regimes that set an upper limit to the liability of various entities engaged in the salvage are brought into play. The question then arises, which is the relevant limit or do they both apply and do the respective parties seek their remedies under the different conflicting regimes? This aspect has been addressed comprehensively elsewhere and only the aspects relating to the marine environment will be addressed here.

A typical example to illustrate the point is where an oil tanker has become a casualty and has been salvaged. When a tanker oil spill occurs then the CLC and the Fund Conventions may well apply, but so may the limits under the Limitation of Liability Convention (the LLMC). When a container vessel is a casualty and spills bunker oil it may be that the Hague Convention limits apply to the cargo, or versions of it, and it and the LLMC otherwise applies. The combinations of situations vary with the circumstances so only this one example will be addressed. Most of the relevant conventions provide clearly what limits apply in the various circumstances, so they need to be read carefully.

Taking the example of an oil spill from a tanker and whether the LLMC applies, one notes that Australia is party to the 1996 Protocol but New Zealand is not, so New Zealand applies the LLMC 1976. As the legislation of both countries accurately reflects the conventions, it suffices to set out what the LLMC itself prescribes. The key provision, which applies to the 1976 LLMC and the 1996 Protocol, is that Art 3 sets out which claims are not the subject of limitation under the LLMC. (The 1996 Protocol does not amend Art 3 of the 1976 LLMC, so the key provision is the same for Australia and New Zealand). These provisions in Art 3 setting out what do not come under the LLMC jurisdiction are:

26 Mr Michael Lacy, ISU Special Advisor, ISU Bulletin, above.
28 For Australia it is the Limitation of Liability for Maritime Claims Act 1989 (Cth) and for NZ it is the Maritime Transport Act 1994 Pt 7. The NZ MTA is addressed in Chapter 10. Note that the Australian Act does not give effect to Art 1(d) and (e) of the LLMC, so there is no limit of liability for raising, removal etc of wrecks and their cargoes.
(a) claims for salvage or contribution in general average;
(b) claims for oil pollution under the CLC;
(c) claims relating to nuclear damage where the local law so provides and, further, claims against the shipowner of a nuclear ship for nuclear damage; and
(d) claims by the servants (employees) of the shipowner or salvor and their heirs and dependants (subject to some limitations set out in Art 3(e)).

In applying this to the present example, one notes that claims under the CLC are excepted, so this drafting makes it clear that when a spill of cargo oil occurs from a tanker then it is the CLC (and, it follows, the Fund Convention) limits that apply and not the limits set under the LLMC. Turning now to a bunker oil spill from a tanker, as opposed to a cargo spill, one notes that the Bunkers Convention provides that if the CLC definition of damage applies then the Bunkers Convention does not. So, once again, it is clear that the limitation of liability under the CLC applies and not that under the Bunkers Convention.

As mentioned, there are many circumstances where more than one convention could possibly apply to set the upper limit of liability for a marine casualty in a salvage, but most of the conventions are skilfully drafted to clarify which of the conventions do, in fact, apply.

5.8 Conclusion

It may be seen from this chapter that the traditional salvage law of ‘no cure – no pay’ was altered because of the importance placed on the salvor being encouraged to bring personnel and equipment to prevent, or limit, damage to the marine environment when marine casualties occur. It was the LOF 1980 that first did this, and this theme was taken up and written into the Salvage Convention 1989. After that the LOF forms took more and more account of this issue and, because of the unsatisfactory drafting of Art 14 of the Salvage Convention, the ISU and P&I Clubs introduced the optional SCOPIC clauses. This is the present situation and it seems to suit most parties. Of course when next the Salvage Convention 1989 comes up for review one hopes and expects that Art 14 will be amended and the new provisions will be much clearer.

30 Article 4(1).
31 At time of writing the Bunkers Convention is not yet in force, but it should attract sufficient ratifications in the near future to do so. To check the status of conventions at any time see the IMO website <www.im.org/Conventions> and follow prompts.
Chapter 6

Australian Offshore Jurisdictions — Petroleum and Constitutional Settlements

6.1 Introduction

Australia is a federation of States with the addition since federation in 1901 of two self-governing territories, so a total of nine parliaments are available to pass legislation, including legislating over their respective jurisdictions in the offshore coastal waters. The exercise of sovereignty and jurisdiction over the coastal waters is an important aspect of regulation of the marine environment and pollution from ships and offshore installations. This chapter will address that issue. The question of the Australian offshore jurisdiction is important and growing. Australia’s laws, both State and Commonwealth, apply offshore consistently with the international maritime law and law of the sea. A background knowledge of that international structure is, therefore, important in understanding how and when Australian laws apply to the offshore marine environment.

For New Zealand its offshore jurisdiction is simpler than that of Australia as New Zealand is a unitary state and not subject to the same complications as a federal structure. The offshore jurisdiction in New Zealand is given effect in the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 and the offshore zones therein set out are in accordance with UNCLOS and customary international law. Both New Zealand and Australia base their offshore zones on UNCLOS. The Australian situation is set out in this chapter and that of New Zealand in Chapter 10.

Australian regulation of offshore petroleum was addressed in the 1960s but the question of whether the Australian Commonwealth or the States had offshore jurisdiction did not fully arise for some 70 years after

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1 The nine parliaments are those of the Commonwealth of Australia, six States (Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia), and two Territories (Australian Capital Territory and the Northern Territory). The ACT has part of Jervis Bay as part of its legislative responsibility, but little marine environmental legislation is passed by that parliament and no further attention will be paid to it. Most of the Commonwealth legislation expressly provides that it applies to offshore Australian territories.

the 1901 federation; until the Commonwealth took legislative action in the 1970s. Its catalyst was the Commonwealth Parliament giving legislative effect to the 1958 international conventions. This was in the *Seas and Submerged Lands Act 1973* (Cth), which claimed Commonwealth sovereignty from the low water mark or State historic boundaries. The States objected to this Commonwealth claim on the basis that as Colonies they had offshore sovereignty over the territorial seas and federation had not altered it. This issue was litigated in the High Court and the Commonwealth won, by majority, who held that it was the Commonwealth that had jurisdiction from the low water mark or historic boundaries.

However, it did not suit the Commonwealth to have to administer the small craft and other detail relating to activities close inshore, so the States and the Commonwealth agreed on the ‘Offshore Constitutional Settlement, 1979’. Under this Agreement the States were also given legislative jurisdiction and title out to the three nautical mile limit, which was then the limit of the territorial sea, if they chose to exercise it. Legislation was passed by the Commonwealth, the States and the Northern Territory to give effect to this Settlement. In the Commonwealth legislation there was and is a ‘roll back’ provision, by which if the State passes legislation similar to that of the Commonwealth then the latter legislation rolls back its jurisdiction out to the three mile limit. The details on this are addressed later in this chapter.

However, in terms of chronological development of the law in this area it was the question of how to regulate exploration and exploitation of offshore oil and gas that came first; in the 1960s. As will be seen, this was dealt with by agreement, the terms of which are in stark contrast to the confrontational approach of the governments in the 1970s. It is convenient, therefore, first to set out the details of the Offshore Petroleum Agreement 1967 and the legislation that arose from it. After that the constitutional jurisdiction more generally will be addressed, then the

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3 The particular convention was the *Convention on the Territorial Sea and the Contiguous Zone* 1958, as this convention provided for the territorial sea to extend from the low water mark, or some other basis for the baselines, as appropriate. The other 1958 conventions were the *Convention on the High Seas* 1958, the *Convention on the Continental Shelf* 1958 and the *Convention on Fishing and Conservation of the Living Resources of the High Seas* 1958. All of these conventions may be accessed on the Australian Treaty Series website <www.austlii.edu.au/au/other/dfat/>.

4 *New South Wales v Commonwealth (The Seas and Submerged Lands Act Case)* (1975) 135 CLR 337.

5 For greater detail on these points, see White M, *Marine Pollution Laws in the Australasian Region* (Federation Press, 1994) section 7.1.

6 Australia extended the outer limit of its Territorial Sea to 12 miles from the baseline in 1990, but under the Agreement the powers of the States remained at the three mile limit, where it still remains.

7 Except where stated otherwise, in order to save repetition, the word ‘State’ will include the Northern Territory in discussing the offshore jurisdiction. The word ‘State’, with upper case ‘s’, refers to the Australian States and the word ‘state’, with lower case, to international sovereign countries.
present offshore maritime zones and, finally, some conclusions will be drawn about the unsatisfactory state of the law and the need to revisit the Offshore Constitutional Settlement 1979.

6.2 Australia’s Offshore Petroleum Agreement 1967

Oil and gas exploration grew slowly from a single oil bore in South Australia in 1892. From then to the 1960s it grew into permits to explore some 158,000 square kilometres in offshore areas from the South Australian, Tasmanian and Victorian State governments. By 1967 Hematite Petroleum Pty Ltd and its partner in the exploration, Esso Exploration Australia Inc, had made major finds in the Gippsland Basin off the Victorian coast. Other finds followed. At this stage, although there was general Commonwealth legislation encouraging exploration and exploitation of minerals, including oil and gas, there was none exercising specific jurisdiction over the offshore areas and it was seen as desirable that there be some national Australian regulatory structure.

On the international scene, there was increasing interest in offshore oil and gas regulation relating to protection of the marine environment. The High Seas Convention 1958 required states to control marine pollution of the high seas in general terms, and the Continental Shelf Convention 1958 obliged states to take appropriate means to protect living resources of the sea from harmful agents around continental shelf installations. UNCLOS later had similar provisions requiring states to adopt laws and regulations to prevent pollution from seabed activities and artificial islands in their offshore jurisdiction.

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11 Convention on the Continental Shelf done at Geneva on 29 April 1958. It came into force generally and for Australia on 10 June 1964. Article 5(1) provided: ‘The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication’.
12 United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982. Article 208(1) was the relevant provision which stated: ‘Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80’.
In 1962 the Commonwealth Minister for National Development and the State Ministers for Mines decided to refer the matter of a cooperative approach on the subject of offshore mining to the Standing Committee of Commonwealth and State Attorneys-General. No government was confident as to the outcome of any litigation on the vexed question of jurisdiction over the territorial sea and the continental shelf and advisory opinions from the High Court are not available. In the result the Offshore Petroleum Agreement 1967 was arrived at which provided that the Commonwealth and the States would each introduce legislation which would establish a regime within which offshore mineral exploration and exploitation could be jointly undertaken and the royalties from the oil production would be shared.

The Agreement basically provided for a total cooperative approach amongst the Commonwealth and the States with the one set of laws covering the activities and with regulation by joint committees on which all interested government are represented.

The primary part of the agreed legislation was the Petroleum (Submerged Lands) Act 1967 (PSLA). The reasons behind its enactment and its purposes were admirably stated in the preamble, which repeats the preamble to the Agreement, as follows:

WHEREAS in accordance with international law Australia as a coastal state has sovereign rights over the continental shelf beyond the limits of Australian territorial waters for the purpose of exploring it and exploiting its natural resources:

AND WHEREAS Australia is a party to the Convention on the Continental Shelf signed at Geneva on 29th April, 1958, in which those rights were defined;

AND WHEREAS the exploration for and the exploitation of the petroleum resources of submerged lands adjacent to the Australian coast would be encouraged by the adoption of legislative measures applying uniformly to the continental shelf and to the sea-bed and subsoil beneath territorial waters:

AND WHEREAS the Governments of the Commonwealth and of the States have decided, in the national interest, that, without raising

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14 Its full title is ‘Agreement relating to the Exploration for, and the Exploitation of, the Petroleum Resources, and certain other Resources, of the Continental Shelf of Australia and of certain Territories of the Commonwealth and of certain other Submerged Land (sic)’ made 16 October 1967, amongst the Commonwealth and the States (NSW, Queensland, SA, Tasmania, Victoria and WA).
15 For a fuller description of these events, see Cullen, above, Chapter 3.
16 For details of the sharing of royalties, see Cullen, above, p 66. The Victorian government levied fees for the use of a pipeline to convey the oil and gas from Bass Strait under the Pipelines Act 1967 and the Pipelines (Fees) Act 1967, but when they raised the amount of the levy substantially by amendment in 1981 it was challenged and the High Court held that it amounted to an excise (for which the State had no power) and was invalid – Hematite Petroleum Pty Ltd v Victoria (1983) 151 CLR 599.
questions concerning, and without derogating from, their respective constitutional powers, they should co-operate for the purpose of ensuring the legal effectiveness of authorities to explore for or to exploit the petroleum resources of those submerged lands:

AND WHEREAS the Governments of the Commonwealth and of the States have accordingly agreed to submit to their respective Parliaments legislation relating both to the continental shelf and to the sea-bed and subsoil beneath territorial waters and have also agreed to co-operate in the administration of that legislation:

BE IT THEREFORE enacted ...

The Act used the drafting device of the ‘adjacent area’ (set out in Sch 2) as the area adjacent to the respective States and Territories by creating a line off the Australian coast within which the adjacent area exists. In other words the jurisdiction of the PSLA extended over the ‘adjacent area’ which was subject to special provisions for outlying territories and maritime boundaries with neighbouring States, out to the limits of the outer continental shelf but it did not include out to the three nautical mile limit, the Coral Sea area and any relevant Joint Petroleum Development Areas. The laws (written and unwritten), of the Commonwealth and the States were made applicable, and the Supreme Courts of the States were invested with, and of the Territories had conferred on them, federal jurisdiction. The term ‘natural resources’ had the same meaning as that set out in UNCLOS.

In relation to mining for petroleum the PSLA provided for the Governor-General to make arrangements with the Governors of the States for a Designated Authority to have relevant administrative power, for permits to be applied for, after blocks had been advertised, and for terms and conditions to be imposed on successful applicants. Where petroleum was discovered the Designated Authority was to be notified and the permit holder was required to comply with its directions. Provision was also made for Production Licences for petroleum and, where there was more than one company producing from the one petroleum pool, the Designated Authority had power to require that they enter into an agreement for ‘unit development’. The Act was amended by the Maritime Legislation Amendment Act 1994 to replace the references to

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17 Section 5A
18 Sections 9-13.
19 UNCLOS Art 77(4) defines ‘natural resources’ as ‘the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belong to sedentary species’. This definition is expressly set out to cover the outer continental shelf as ‘natural resources’ in the EEZ are defined to include fisheries. The PSLA is directed only to oil and gas mineral resources, in effect, which are the resources to which a coastal state is entitled to exercise jurisdiction in the outer continental shelf.
20 The reference to the Governor-General and the State Governors is merely a constitutional drafting device for reference to the respective Commonwealth and State governments to make these arrangements.
the Convention on the Territorial Sea and Contiguous Zone 1958 and the Convention on the Continental Shelf 1958 with references to comparable provisions in UNCLOS. The PSLA had a number of supporting Acts, mainly relating to revenue aspects.\textsuperscript{21}

The PSLA was repealed and the legislative area completely revised by the Offshore Petroleum Act 2006 (OPA); which is the main Act in a package of six Acts that rewrite and replace the PSLA and associated legislation.\textsuperscript{22} The OPA and associated Acts provide for the grant of exploration permits, retention leases, production licences, infrastructure licences, pipeline licences, special prospecting authorities and access authorities and occupational health and safety provisions, including the operation of the National Offshore Petroleum Safety Authority for their administration.\textsuperscript{23} The OPA does not alter the basic exercise of jurisdiction over natural resources out to the limits of the claimable outer continental shelf\textsuperscript{24} but from its relevant sections a most complex jurisdiction emerges.

This complexity does not so much relate to the outer limits of the jurisdiction established by the OPA as the constitutional issues thereby raised. Section 4 refers to the Offshore Constitutional Settlement 1979, as to which see the next section, and then s 5 sets out some simplified maps. Because the States and the Northern Territory have jurisdiction over petroleum for the first three miles from the baselines, see ss 4 and 5, then the accuracy of the baselines is called into question as is the accuracy of the measurement of that distance. When it comes to the detail, one sees that special provision has been made for South Australia,\textsuperscript{25} for Queensland, Western Australia and the Northern Territory (excluding the Timor


\textsuperscript{23} At time of writing the Acts have not been proclaimed so readers will need to check the dates for implementation; see generally the Commonwealth Parliamentary website on legislation; <www.comlaw.gov.au>.

\textsuperscript{24} Section 3 sets out the simplified outline of the Act as follows: ‘This Act sets up a system for regulating the following activities in offshore areas’ and it goes on to set out the activities of petroleum exploration, recovery, construction and operation of facilities and of pipelines. It also sets out that an ‘offshore area’ starts three nautical miles from the baseline and extends seaward to the outer limits of the continental shelf.

\textsuperscript{25} See ss 4, 5.
Sea Joint Petroleum Development Area) and for the external island territories. The OPA purports to apply to ‘all’ individuals and corporations, without restriction.

The offshore area to which OPA applies is from three nautical miles from the baseline seawards to the outer limits of the continental shelf. From that three nautical mile limit towards the land the relevant State or Northern Territory laws apply. It may be seen from this how desirable it is that the laws be absolutely consistent and whilst this is broadly achieved the result is far from perfect. The map (see over) shows the geographical areas to which the OPA applies.

Apart from the problems involved in territorial jurisdiction, when it comes to what laws should apply, the matrix becomes fascinating. Part 1.4 of the OPA applies all State laws relevant to petroleum exploration, exploitation and conveyance in the offshore area ‘as laws of the Commonwealth’ and it defines ‘laws’ as all written and unwritten ones including instruments. It then sets out lengthy provisions as to what laws do not apply and, as well, provides that certain provisions relating to pipelines are ‘subject to Australia’s obligations under international law’.

There is insufficient space to deal with the complexities of the offshore jurisdictional issues raised by the OPA but suffice for present purposes to state that they are complex and will provide for much litigation over the coming years and give rise to many legislative amendments. The problem does not lie with the drafters, who spent several years working on it and seeking comment on their drafts, but with the underlying weakness of the Offshore Constitutional Settlement 1979, which will be addressed shortly.

It may be helpful to emphasise that the outgoing PSLA and the incoming OPA dealt only with regulation of petroleum exploration and exploitation. Other offshore mining was and is covered by the *Offshore Minerals Act* 1994 (Cth), the jurisdictional aspects which are similar. In the same manner as the PSLA and the OPA, it gives effect in its offshore

26 Sections 7, 17.
27 Section 18.
28 Sections 3, 4. Australia submitted its claim to the continental shelf beyond the EEZ in November 2004, under UNCLOS Art 76, to the Commission on the Limits of the Continental Shelf established under UNCLOS Annex II. It is consistent with UNCLOS Pt VI and international law that the continental shelf areas claimable under UNCLOS beyond the EEZ should be subject to the coastal state’s mining and petroleum jurisdiction. Under UNCLOS Art 77 the coastal state has the right to explore and exploit the natural resources on its claimable continental shelf.
29 Section 19.
application to the Offshore Constitutional Settlement 1979 and Australia’s offshore claims under UNCLOS. This area is from the limits of the State or Northern Territory, which is usually the low water mark or port limit, out to the three nautical mile limit from the baseline is described as ‘coastal waters’. In this area the State and Northern Territory mining laws apply. From the three nautical mile limit to the outer limit of the continental shelf the Commonwealth Offshore Minerals Act 1994 applies.31 The Act will need amendment to give effect to the OPA in place of the PSLA and this is in hand. The diagram (opposite) depicts the offshore geographical application of the Act.

31 Sections 3, 5, 10(3), 13, 14, 16. This area excludes where the outer limit meets the limits of Australia’s sea boundaries with foreign countries; such as Indonesia, Papua New Guinea, Solomon Island etc.
When it comes to offshore installations other than petroleum ones, however, these are addressed by the *Sea Installations Act 1987* (Cth). The object of this Act is to ensure sea installations are installed and operated safely, to apply appropriate laws and ‘to ensure that such sea installations are operated in a manner that is consistent with the protection of the environment’.\(^{32}\) Unless exempted, the owner or occupier of a sea installation is guilty of an offence if a sea installation is installed in an adjacent area otherwise than in accordance with a permit.\(^{33}\) A ‘sea installation’ means any man-made structure, whether floating or in physical contact with the seabed, that can be used for ‘an environment related activity’ (but excludes a fixed structure such as a pipeline and a vessel exploring or exploiting natural mineral resources by drilling the seabed or its subsoil or obtaining substantial quantities of material therefrom).\(^{34}\) An ‘environment related activity’ is defined as meaning any activity relating to tourism or recreation, carrying on business, exploiting the living resources of the sea or the seabed, marine archaeology or a prescribed

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\(^{32}\) Section 3.

\(^{33}\) Section 14.

\(^{34}\) Section 4.
Thus it can be seen that the Act sets out to regulate most activities other than those relating to oil, gas or minerals.

As presently comprised, the *Sea Installations Act 1987* operates over the ‘adjacent area’ which includes the space above and below this area, which has been mentioned above in relation to the PSLA. It applies in the Coral Sea (off the Great Barrier Reef area); but not in any area over which, by international agreement, Australia does not exercise sovereign rights. Under the OPA the adjacent area becomes known as the ‘offshore area’.

The *Sea Installations Act 1987* sets up a system of permits for installations in the sea and prohibits persons carrying out any activity not allowed by the appropriate permit. Where the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) has application to sea installations there are some requirements on the minister to make required decisions in good time. Where the minister considers that a sea installation is or may constitute a threat to the safety of persons or that it is having or is likely to have an ‘adverse effect on the environment’ the minister may direct the owner of the permit to take requisite action and in default the minister may carry out the requisite action him or herself and claim the expenses therefore from the permit holder. The minister or an ‘interested person’ is empowered to seek an injunction from the court against any actual or proposed contravention. Wide powers are given in relation to enforcement and there is provision for the enforcement and collection of a levy, the amount of which is based on the market value of the installation. Provision is made for review of decisions under the Act by the Administrative Appeals Tribunal. Fortunately, offshore installations are not of major concern in threatening the marine environment but there are some aspects that need regulatory attention from time to time, especially the many installations for tourist purposes in the Great Barrier Reef.

Power for a levy is to be found in the *Sea Installations Levy Act 1987* (Cth) which provides that where a sea installation is installed in accordance with a permit and ‘is being, or has been, used for an environment related activity’ a levy is imposed on the permit holder. The rate of the levy is fixed by the regulations.

To summarise this section about offshore petroleum, mining and installations, one notes that the oil and gas rigs come under the outgoing PSLA and the incoming OPA, minerals come under the *Offshore Minerals Act 1994* and other installations under the *Sea Installations Act 1987*. It

35 Section 4.
36 Section 5.
37 Section 20(5A).
38 Section 54.
39 Section 59.
40 Part VIII.
may be seen from this section that the offshore jurisdiction relating to regulation of exploration for and exploitation of offshore oil and gas was dealt with in the 1960s in a cooperative manner between the States and the Commonwealth in the Offshore Petroleum Agreement 1967. This agreement was then subsumed into the Offshore Constitutional Settlement 1979, which is now applied in these Acts so it is, therefore, to this issue that we now turn.

6.3 Australia’s Offshore Constitutional Settlement 1979 and Subsequent Developments

Because of the Australian federal structure, those laws regulating the marine environment and pollution from ships have become complex. This section discusses the constitutional background and developments providing a background to the Australian laws which currently regulate marine pollution offshore. International law attributes sovereignty over territorial seas to the coastal state, so, after British settlement brought English law with it to the Australian colonies, the colonies assumed sovereignty over their territorial seas (then from the low water mark out to the three nautical mile limit).41 Federation of the Australian Colonies in 1901 did not change this, so control over shipping, fisheries, offshore minerals and other offshore activities was exercised by the States without question. Protection of the marine environment was not then an issue for the States so there was little, if any, legislation on the subject.

As mentioned above, apart from offshore jurisdiction over oil and gas, it was not until the 1970s that the question of whether the Commonwealth or the States had offshore jurisdiction over the territorial sea firmly arose. There was a preliminary skirmish in the High Court in Bonser v La Macchia42 in 1969 when a fisherman some six miles offshore from Sydney was charged with using illegal nets, an offence under the Fisheries Act 1952 (Cth). The defence was that the Commonwealth Act did not extend beyond the territorial sea of three miles, so six miles offshore was not ‘Australian waters’ under the Constitution and so the Act did not apply.43 The court was against this argument and the Commonwealth fisheries law was held to apply to the fisherman. In the judgments there

41 See the argument set out and the cases collected by Lumb RD, The Law of the Sea and Australian Off-Shore Areas (University of Queensland Press, 2nd ed, 1978) pp 57-60; and see also the judgment of Gibbs J, as he then was, in his decision (dissenting) in New South Wales v Commonwealth (Seas and Submerged Lands Act case) (1975) 135 CLR 337 at 391 and following.

42 (1970) 122 CLR 177. The earlier case of R v Keyn (1876) 2 Ex D 63 had raised some of the basic issues about when the British laws extended offshore but it had not definitively settled it for relevant purposes.

43 The Constitution gives power to the Commonwealth in s 51(x) with respect to ‘fisheries in Australian waters beyond territorial limits’.
was some mention of the inner limits of the territorial sea but as these were not part of the ratio of the case they were not directly relevant.\textsuperscript{44}

A Senate Select Committee had been established, following on from the Offshore Petroleum Agreement 1967, and it had recommended that the Parliament should deal with the wider offshore jurisdiction issue quite apart from petroleum.\textsuperscript{45} This was not effective in bringing the matter to a head and it required the ratification of the four 1958 conventions to do this. A Bill was first introduced by the Gorton Government in 1970 and, after some stops and starts, legislation was passed finally in the \textit{Seas and Submerged Lands Act} 1973 under the Whitlam Government. This Act asserted Commonwealth sovereignty from the low water mark or recognised closing lines. The Commonwealth claim is set out in the preamble to the 1973 Act:

\begin{quote}
WHEREAS a belt of sea adjacent to the coast of Australia, known as the territorial sea, and the airspace over the territorial sea and the bed and subsoil of the territorial sea, are within the sovereignty of Australia:

AND WHEREAS Australia is a party to the \textit{Convention on the Territorial Sea and the Contiguous Zone} a copy of which in the English language is set out in Schedule I:

AND WHEREAS Australia as a coastal state has sovereign rights in respect of the continental shelf (that is to say, the sea-bed and the subsoil of certain submarine areas adjacent to its coast but outside the area of the territorial sea) for the purpose of exploring it and exploiting its natural resources:

AND WHEREAS Australia is a party to the \textit{Convention on the Continental Shelf} a copy of which in the English language is set out in Schedule 2:

BE IT THEREFORE ENACTED ...
\end{quote}

This assertion of offshore jurisdiction gave rise to much litigation and this will now be discussed.

### 6.3.1 The High Court Litigation

The States immediately took the matter to the High Court, with the result that the claims by the Commonwealth were upheld in \textit{New South Wales v Commonwealth (Seas and Submerged Lands Act Case)}.\textsuperscript{46} This gave the Com-

\begin{footnotesize}
\textsuperscript{44} The Solicitor-General for NSW had expressly submitted that it was undesirable for the court to decide what was the inner margin of Australian waters; 122 CLR at 180.


\textsuperscript{46} (1975) 135 CLR 337.
\end{footnotesize}
monwealth full sovereignty over the sea from low water mark or State historic boundaries. The whole court held that the provisions of the Act relating to the continental shelf were within the legislative power of the Commonwealth under s 51(xxix) of the Constitution (the external affairs power). A majority held that the provisions relating to the matters other than the continental shelf were also within s 51(xxix) on the ground that they gave effect to the Convention on the Territorial Sea and the Contiguous Zone 1958 and, by three justices, on the further ground that the external affairs power was not limited to authorising laws with respect to Australia’s relationships with foreign countries but extended to any matter, thing, person or activity external to Australia. A majority also held that the boundaries of the former Australian colonies ended at the low water mark and that, therefore, the States had no sovereign or proprietary rights in respect of the territorial sea or the subadjacent soil or superadjacent airspace. Thus was settled the major point for present purposes, which was that the Commonwealth and not the States had jurisdiction from the low water mark or State historic boundaries.

The offshore jurisdiction issue became mixed with the general powers of the Commonwealth Parliament to deal with international matters. Since the Seas and Submerged Lands Act Case, the jurisdiction of the Commonwealth over the States has been further extended by a whole series of cases, some of which related to jurisdiction offshore and some to wider constitutional issues. This was especially so on the extent of the external affairs power granted to the Commonwealth under s 51(xxix) of the Constitution. They included such cases as Robinson v Western Australian Museum;\(^47\) Bistricic v Rokov;\(^48\) Raptis v South Australia;\(^49\) Koowarta

\(^47\) (1977) 138 CLR 283. The finder of an historic Dutch wreck, Gilt Dragon found 2.87 miles offshore from WA, sought declarations that the WA legislation that sought to regulate the find and vest rights in the WA Museum was not valid. The finder sought the usual rights of derelict/finds or salvage. The court held, by a majority although some of them on differing grounds, that the WA legislation was invalid in its attempted application to this wreck. This was, of course, before the Offshore Constitutional Settlement 1979. The Australian law on this issue is discussed by White M, ‘Salvage, Towage, Wreck and Pilotage’ in White M (ed), Australian Maritime Law (Federation Press, 2nd ed, 2000) Chapter 10. The Commonwealth passed the Historic Shipwrecks Act 1976, which gave the Commonwealth the necessary offshore jurisdiction and, after the Offshore Constitutional Settlement in 1979, the States were given power for this legislation out to three nautical miles from the baselines.

\(^48\) (1976) 135 CLR 552. The court held that the Merchant Shipping (Liability of Shipowners and Others) Act 1958 (UK) did not apply in Australia as it was not expressed so to apply.

\(^49\) (1977) 138 CLR 346. A fisherman held a Commonwealth licence but not one from the South Australian Government while fishing outside the three mile limit off the coast of South Australia. He had his fish seized by the South Australian fisheries inspectors for failing to have a South Australian licence. The court held that the South Australian legislation was invalid as it purported to extend beyond the three mile limit and, further, that it was inconsistent with the Commonwealth legislation (in contravention of s 109 of the Constitution).
v Bjelke-Petersen,50 Commonwealth v Tasmania (Tasmanian Dams case)51 and Richardson v Forestry Commission (Lemonthyme and Southern Forests case).52 The result of these cases was that the external foreign affairs ambit and powers of the Commonwealth were greatly extended.

Then in Polyukovich v Commonwealth53 the extent of the external affairs power was raised once again. The accused, who had emigrated to Australia from Europe, had been charged with a serious war crime in Europe during World War II under the new, and controversial, amendment to the War Crimes Act 1945 (Cth). Declarations were sought on his behalf in the High Court to strike down certain provisions of the Act as being beyond the legislative power of the Commonwealth. The Commonwealth relied on the defence power and the external affairs power under the Constitution. An interesting aspect of the case was that, while Australia was a party to the various Geneva Conventions, Australia had not entered into any convention expressly requiring the parties to it to bring such persons to trial. Thus it was the extended jurisdiction under the external affairs and defence powers which came in for consideration by the court, which powers the court upheld.

In his judgment Mason CJ said:

Discussion of the scope of the external affairs power has naturally concentrated upon its operation in the context of Australia’s relationships with other countries and the implementation of Australia’s treaty obligations. However, it is clear that the scope of the power is not confined to these matters and that it extends to matters external to Australia. I have previously expressed the view that the grant of legislative power with respect to external affairs should be construed with all the generality that the words admit and that, so construed, the power extends to matters and things, as well as relationships, outside Australia.54

50 (1982) 53 CLR 168. A purchase of a large area of land by the Aboriginal Land Fund Commission was refused its transfer by the Queensland (State) Minister, which refusal was claimed to be in contravention of the terms of the Racial Discrimination Act 1975 (Cth). It was submitted that the terms of the Act were beyond the legislative powers of the Commonwealth Parliament. The court held that the relevant terms of the Act were valid as they were passed in support of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 to which Australia was a party. Once again the decision was based on the ambit of the external powers under the Constitution (s 51(xxix)).

51 (1983) 158 CLR 1. In this case the court, once again, upheld the power of the Commonwealth legislation in support of an international convention. The result was that a dam, that the Tasmanian Government wished to build that would flood a large area of heritage forest, was prevented by Commonwealth legislation.

52 (1988) 164 CLR 261. The court here applied the Tasmanian Dams case in holding that it was within the legislative competence of the Commonwealth to pass domestic legislation to enforce the terms of an international convention, in this case the Convention Concerning the Protection for the World Cultural and Natural Heritage 1972.


54 At 528.
To like effect Brennan J, who was one of the dissenting judges in that particular case, said:

The recent cases relating to s 51(xxix) show that the power thereby conferred enables the Commonwealth to legislate for the purpose of discharging the responsibilities and asserting to the full interests of Australia as an independent member of the community of nations … It is a plenary power exercisable as well in protection of Australia’s international interests as in performance of its international obligations.  

The majority held that the legislation was valid and similar views to those of Mason CJ and Brennan J were expressed by other members of the court as to the wide powers under the external affairs power and that jurisdiction for the exercise of such powers did not necessarily have to be based on an international treaty. Further, the Commonwealth is not restricted to the external affairs power in relation to control of the marine environment as it has all of the other powers set out under the Constitution.

The effect is that, for the purposes of enacting domestic legislation to prohibit or control marine pollution, the Commonwealth does not have to rely expressly on an international convention. Such jurisdiction is attracted if there is some discernible connection between Australia’s interests, as perceived by the Commonwealth Parliament, and the proposed legislation.

The outer limits of the external affairs power have yet to be set by the High Court but there is now no doubt that the present powers uphold the jurisdiction of the Commonwealth to incorporate the provisions of international treaties into domestic legislation. As most of the regime concerning marine pollution has been imposed by international convention this gives great flexibility to the Commonwealth in this area. Thus the groundwork is laid for the Commonwealth to legislate widely, even in areas where no actual treaty has been included, to control offshore marine pollution provided there is some sufficient aspect of external affairs to attract jurisdiction.

55 At 551-552.
56 The 'suite of powers' available to the Commonwealth are discussed by James Crawford, 'The Constitution and the Environment' (1991) 13 Sydney Law Review 11-30. The place and extent of customary international law, as opposed to international law as settled by convention, is still a question to be settled in the ambit of the foreign affairs power. For further High Court cases on the external affairs power, see XYZ v Commonwealth [2006] HCA 25 and Vasiljkovic v Commonwealth [2006] HCA 40.
57 The issue as to exactly where the baseline of the low water mark is placed, from which is measured the limits of the territorial sea and other offshore zones, was considered by the High Court in Li Chia Hsing v Rankin (1978) 141 CLR 182. There a fisherman charged with offending Commonwealth fishing laws challenged whether it could be established from a chart exactly how far offshore he was at the time of the alleged offence. The court held that it was a question of fact and so it could be established by a chart or by any other suitable evidence, such as the actual position of the low water mark on the coast itself.
It should be mentioned that, despite the decision in the *Seas and Submerged Lands Act* case, each State retained some legislative jurisdiction beyond the low water mark provided there was demonstrated some nexus with the facts of the case and the State parliaments’ powers to regulate for the peace, order and good government of the State. The High Court cases which decided this were *Pearce v Florence* (Western Australian lobster fisheries legislation valid offshore); by *obiter dicta* in *Raptis v South Australia*; *Union Steamship Company of Australia Ltd v King* (State workers’ compensation provisions extending to an interstate ship); *Wacando v Commonwealth* (Queensland and Commonwealth legislation, including that the *Petroleum (Submerged Lands) Acts 1982* was held applicable to Darnley Island off the Queensland coast); and *Port MacDonnell Professional Fishermen’s Association Inc v South Australia*, as to which see shortly. Some of these decisions also held that the State had jurisdiction out to the three mile limit, rather than the low water mark or historic boundaries, but this was because of the agreement between the Commonwealth and the States to grant back jurisdiction over the then coastal waters area of three miles, which will now be discussed. However, in order to discuss the development of this agreement it is necessary to turn the clock back to 1975 and to go into slightly more detail about what has already been mentioned a number of times, the Offshore Constitutional Settlement 1979.

### 6.3.2 The Offshore Constitutional Settlement 1979

As mentioned above, having established the point in the *Seas and Submerged Lands Act* case that the Commonwealth’s jurisdiction ran from the low water mark or historic boundaries, the Commonwealth Government decided that it was more convenient for the States to have this jurisdiction back. In the result the Commonwealth and the States negotiated an agreement for the control of the offshore waters in 1979, known as the ‘Offshore Constitutional Settlement 1979’.

The Standing Committee of the Attorneys-General had met three years earlier, in Hobart on 5 March 1976, and formed three sub-committees and, after much negotiation over quite some time, ‘Agreed Arrangements’ were published. The agreement covered quite a long list of matters, but the major ones which touch on offshore jurisdiction are:

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58 (1976) 135 CLR 507.
59 (1977) 138 CLR 346.
60 (1968) 166 CLR 1.
(a) The Commonwealth was to give each State the same powers with respect to the adjacent territorial sea (including the seabed) as it would have if the waters were within the limits of the State;

(b) The Commonwealth would pass legislation to vest in each State proprietary rights and title in respect of the seabed of the adjacent territorial sea, with reservations for national purposes such as defence etc;

(c) All of these powers were limited to three miles offshore. (This was then the extent of the territorial sea but the agreement was that it was to remain at three miles when the Commonwealth proclaimed the territorial sea to be 12 miles);

(d) With respect to the offshore petroleum powers it was affirmed that, as in the 1967 Agreement and the PSLA, the States would regulate it within three miles and the Commonwealth outside that area, but with a statutory Joint Authority for each adjacent area;

(e) Offshore mining for non-petroleum minerals was to have a similar arrangement to that for offshore petroleum;

(f) Offshore fisheries would give legislative responsibilities to the States out to three miles and to the Commonwealth beyond that;

(g) In relation to ship sourced marine pollution it was agreed that the arrangements that existed before the High Court decision in the *Seas and Submerged Lands* case should be continued, with the Commonwealth legislation having a savings clause to allow the States to legislate to implement certain aspects of marine pollution conventions if they wished to do so;

(h) Other areas agreed upon were shipping and navigation, crimes at sea, the Great Barrier Reef Marine Park, other marine parks, historic shipwrecks; and

(i) There should be continuing discussions on land-based marine pollution and marine pollution through dumping.

6.3.3 *Subsequent Developments*

Naturally there were developments from this 1979 Offshore Constitutional Settlement. The first was that the agreement was given effect in a number of Acts passed by the Commonwealth and State Parliaments.64

64 These Acts were the *Coastal Waters (Northern Territory Powers)* Act 1980; *Coastal Waters (Northern Territory Title)* Act 1980; *Coastal Waters (State Powers)* Act 1980; *Coastal Waters (State Title)* Act 1980; *Crimes at Sea* Act 1974; *Petroleum (Submerged Lands) Amendment* Act 1980; *Petroleum (Submerged Lands) (Exploration Permit Fees)* Amendment Act 1980; *Petroleum (Submerged Lands) (Pipeline Licence Fees)* Amendment Act 1980; *Petroleum (Submerged Lands) (Royalty)* Amendment Act 1980; *Seas and Submerged Lands Amendment* Act 1980.
Their essence, in the Commonwealth Acts, was that by the Coastal Waters (State Powers) Act 1980 the States were given legislative powers as if the coastal waters were within the limits of the State and beyond the coastal waters for certain limited purposes.65 By the Coastal Waters (State Title) Act 1980 the title in the property to the seabed beneath the coastal waters and the space above it was given to the States, subject to excepted areas such as that in the Great Barrier Reef Marine Park.66 As has been noted in the summary of the Settlement above, in relation to offshore mining the basic structure under the Offshore Petroleum Agreement 1967 was kept, but to deal with some changes the Commonwealth Parliament passed a different group of Acts.67

Under the 1979 Settlement there was power for the Commonwealth and a State to agree as to jurisdiction of fisheries offshore from any State.68 Pursuant to this arrangement, the Commonwealth and the South Australia governments made an agreement for the regulation of the South Australian rock lobster industry by the South Australia legislation applying for some 200 nautical miles offshore from South Australia. This led to an attack on the Fisheries Act 1952 (Cth), the Fisheries Act 1982 (SA), the Petroleum (Submerged Lands) Act 1967 (Cth) and the Coastal Waters (State Powers) Act 1980 (Cth) in the High Court in Port MacDonnell Professional Fishermen’s Association Inc v South Australia.69 The High Court upheld the validity of most of the legislation and the arrangements made and confirmed and applied the nexus power that had been established in Pearce v Florenca,70 mentioned above.

In relation to this nexus, the powers of the States in this area were probably strengthened when the last colonial legislative links with the Imperial Parliament were removed with the Australia Act 1986 (Cth) and the Australia Act 1986 (UK). By s 2 the States were given full power to make laws having extraterritorial effect for their own peace, order and

65 Section 5.
66 Section 4. Similar provision was made for the NT in the Coastal Waters (Northern Territory Powers) Act 1980 and the Coastal Waters (Northern Territory Title) Act 1980.
67 These were the Minerals (Submerged Lands) Act 1981 (later it became the Offshore Minerals Act 1994); Minerals (Submerged Lands) Exploration Fees Act 1981; Minerals (Submerged Lands) (Production Licence Fees) Act 1981; Minerals (Submerged Lands) (Registration Fees) Act 1981; Minerals (Submerged Lands) (Royalty) Act 1981 and the Minerals (Submerged Lands) (Works Authority Fees) Act 1981. The minerals position has been discussed above in this chapter.
68 Fisheries Act 1952 (Cth), into which Act s 12h(4) was inserted in 1980 with similar power being inserted into the Fisheries Act 1982 (SA).
70 (1976) 135 CLR 507; affirmed in the later case of Union Steamship Co of Australian Pty Ltd v King (1988) 166 CLR 1 (NSW legislation relating to Workers’ Compensation was held to apply to a NSW registered ship).
good government. As has been noted, this was a power that the High Court had held that they had always had but which was now expressly provided for in the legislation.

In relation to the width of the Australian offshore jurisdiction claims, the Commonwealth had, in 1967, established a 12 nautical mile fishing zone and in 1979 it extended that claim to 200 nautical miles, although this was only for fisheries laws. Under s 7 of the *Seas and Submerged Lands Act* 1973 (Cth) the Governor General was given power, consistently with para 2 of Pt I of the *Convention on the Territorial Sea and the Contiguous Zone* 1958, to declare the outer limits of the whole or any part of the territorial sea. By a statement made on 13 November 1991 the Federal Government announced that this power had been exercised with effect from 20 November 1990 and the outer limit of the territorial sea was extended to 12 miles, but this did not extend the jurisdiction of the States beyond the three mile limit previously agreed under the Offshore Constitutional Settlement 1979. Also in 1991 the Commonwealth Government announced the move to establish an exclusive economic zone (EEZ) around its coast and to adopt the *Convention on the Continental Shelf* 1958 provisions in this regard.

When UNCLOS came into force generally and for Australia in November 1994 and the various offshore zones came into force the situation suited Australia very well. The *Seas and Submerged Lands Act* 1973 was amended and the UNCLOS provisions given full force and effect. These zones are described further on in this chapter. For completeness, it is worth noting that ‘security’ is fashionable at the moment and legislation directed at it in relation to ships and ports was enacted in the *Maritime Transport and Offshore Facilities Security Act* 2003 (Cth). Its relevance to the marine environment and pollution from ships is only that one of the consequences of the criminal acts against which this Act is directed could cause marine pollution. It is not intended, therefore, to make further reference to it.

As already mentioned, the Offshore Constitutional Settlement 1979 made provision for the States to exercise jurisdiction out to the three mile limit and if the State did indeed exercise it then the Commonwealth legislation would not apply. This will now be addressed.

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71 The Commonwealth Act requesting and consenting to the UK Parliament passing the *Australia Act* 1986 was the *Australia (Request and Consent) Act* 1985. The strengthening is based on s 21 of the *Australia Act* 1986 (Cth) which provides that the ‘legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extraterritorial operation’.


6.4 The ‘Roll Back’ Provision

A discussion of the constitutional issues needs also to mention the ‘roll-back’ provisions concerning the Commonwealth legislation. Although the Offshore Constitutional Settlement 1979 agreed that the States were to be handed back the jurisdiction out to the three mile limit, this was not exclusive as the Commonwealth still retained jurisdiction as well. The net result was that if the States legislated to cover the field in an area in which they had jurisdiction in this three mile area then the Commonwealth jurisdiction was displaced, or ‘rolled back’ as it has been termed.

The Commonwealth has included ‘roll back’ provisions in its relevant legislation so that the effect is that Commonwealth jurisdiction initially applies from the low water mark but rolls back to the three mile limit if the relevant State or the Northern Territory passes similar legislation.

An example of this ‘roll back’ provision is in the Environment Protection (Sea Dumping) Act 1981 (Cth), which provides:

9. (1) Where the Minister is satisfied that the law of a State or of the Northern Territory will, on and after a particular date, make provision for giving effect to the Convention in relation to coastal waters of that State or of the Northern Territory (whether or not the Convention extends to the whole of those coastal waters), the Minister shall, by notice published in the Gazette, declare that, on and after that date, this Act does not apply in relation to the coastal waters of that State or the Northern Territory, as the case may be.\(^\text{75}\)

A different drafting formula is used in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983, which is the Act that gives effect to MARPOL. In applying MARPOL Annex I, which relates to discharges of oil, this Act provides for the offence against the Commonwealth Act provided ‘there is no law of that State or Territory that makes provision giving effect to Regulations 9 and 11 of Annex I to [MARPOL] …’.\(^\text{76}\)

These relevant Commonwealth Acts also have provisions that have the Act interrelate with the relevant State laws. For instance, in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) the relevant provision is:

**10 Relationship with State Law**

This Act is not intended to exclude or limit the concurrent operation of any law of a State or Territory, except so far as the contrary intention appears.

All the relevant Commonwealth Acts provide that they ‘shall be read and construed as being in addition to, and not in derogation of or in

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74 As mentioned above, the word ‘States’ in this context includes the NT.
75 Section 9. The section then goes on to provide that the declaration shall have the effect that the Act shall be read as not including a reference to coastal waters, with certain exceptions that are not immediately relevant.
76 Section 9(1)(c).
substitution for, any other law of the Commonwealth or any law of a State or Territory. They also provide that the Acts apply ‘both within and outside Australia and extend to every external Territory’. All of the States have legislation relating to oil spills in the ports and coastal waters and if the Commonwealth legislation is also given effect there are two legislative schemes covering the same area. This may raise, of course, the operation of s 109 of the Constitution, and it may be argued that some or all of the State legislation is thereby invalid. However, the better view seems to be that the ‘roll back’ provisions are quite valid and no inconsistency arises between the Commonwealth and the State legislation. The area of some uncertainty is where a State Act only partially covers the field. Examples abound, but one clear one is where a State Act only gives effect to some annexes to MARPOL but the Commonwealth Act gives effect to all of them. There has been no litigation on these complexities to date, but it is almost certain to arise in due course.

The Commonwealth laws on marine pollution do not have effect in the bays, harbours and other waterways of the States as these are internal waters. This jurisdictional diversity points to the continuing need for cooperation among the Commonwealth and the States and the Northern Territory in relation to drafting and giving effect to the mass of relevant legislation.

6.5 Australia’s Offshore Zones

As there has been mention of Australia’s offshore zones in this discussion of offshore jurisdiction, it is advisable to summarise the current situation by mentioning each offshore zone. In international law, the sovereignty or

77 For example, the Protection of the Sea (Powers of Intervention) Act 1981 (Cth) in s 5 provides that the Act shall be read and construed as ‘being in addition to, and not in derogation of or in substitution for, any other law of the Commonwealth or any law of a State or Territory’. The Act giving effect to MARPOL, the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth), has a similar provision in s 5(2). The ‘Savings of Other Laws’ section in the relevant Acts is usually in s 5.

78 The ‘Operation of the Act’ section in the relevant Acts is usually in s 6.

79 The ‘inconsistency of laws’ provision in s 109 of the Constitution provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

80 For the various provisions of the State Acts in this regard see the descriptions in Chapter 8 of this book.

81 Section 14(1) of the Seas and Submerged Lands Act 1973 provides that the Act does not affect the sovereignty or sovereign rights of a State that were in being on 1 January 1901 (at federation) and so remain within the limits of the State; see also s 16 (savings of other laws). One should also note that in the Acts Interpretation Act 1901 whilst Commonwealth laws have application in the ‘coastal sea’ as if it were part of Australia, the ‘coastal sea’ is defined as the territorial sea and the sea on its landward side that is ‘not within the limits of a State’ or a Territory; see s 158. Thus the Commonwealth jurisdiction of the ‘coastal sea’ excludes the sea out to the three mile limit from the baselines.
jurisdiction granted to a coastal state decreases with the distance offshore. The powers granted to a coastal state are total sovereignty in the internal waters and territorial sea (subject to innocent passage) and they steadily decrease as the zones move further offshore. A second aspect to note is that the right, and the obligation, to protect and preserve the marine environment, including from pollution from ships, is quite clearly set out in UNCLOS (as well as the conventions described in Chapters 2-5 above) and these extend to the limits of the EEZ and the outer continental shelf in some cases and are unlimited in geographical terms in others.

UNCLOS is the source of international recognition of these offshore zones and has been given Australian legislative effect. This was given in the Seas and Submerged Lands Act 1973, as originally enacted, which gave effect to the Convention on the Territorial Sea and the Contiguous Zone 1958 and the Convention on the Continental Shelf 1958. Under those 1958 conventions the offshore zones were not so extensive as they later became under UNCLOS, so the Act at that time established the zones of internal waters, a territorial sea (three miles from the baseline), a contiguous zone and the continental shelf. After UNCLOS came into force in 1994 this Act was amended by the Maritime Legislation Amendment Act 1994, which repealed the provisions of these conventions and gave full effect to UNCLOS.

Mention should be made of the need to distinguish between the differing concepts when considering international law as opposed to Australian federal constitutional and domestic law. From the international law point of view, that a federation may choose to share jurisdiction amongst the Commonwealth and the State parliaments is almost irrelevant. International sovereign bodies only recognise the sovereign state; in this case Australia. It does not recognise sovereignty in the individual States that make up the sovereign state. When it comes to recognition of offshore zones, therefore, the same principle applies and that the Commonwealth Parliament has agreed to grant jurisdiction to the State and Northern Territory Parliaments out to three miles is not, as a general rule, recognised in international law.

Returning now to the domestic Australian constitutional law, one needs first to address the terms of ‘internal waters’ and ‘coastal waters’, although they are not zones as such. The phrase ‘internal waters’ refers to the landward side of the baseline, see the Seas and Submerged Lands Act

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82 In UNCLOS Pt XII, the general obligation to protect and preserve the marine environment is set out in Art 192, and then the rest of Pt XII spells out the rights, obligations and limitations in this regard.

83 For example, the ‘General Obligation’ in UNCLOS Art 192 to ‘protect and preserve the marine environment’ is not expressed to be subject to any limit, geographical or otherwise.

1973.\textsuperscript{85} This is consistent with UNCLOS in that the basis for internal waters is contained in Art 8, which provides that the waters on the landward side of the baseline form part of the internal waters and that a coastal state has sovereignty over them. There are some Commonwealth internal waters,\textsuperscript{86} but most of the waters to the landward side of the low water mark or the baseline lie within the jurisdiction of the States and the Northern Territory. The Commonwealth does not claim jurisdiction over waters of any bay, gulf, etc that were at federation and remain within the limits of a State.\textsuperscript{87}

The phrases ‘coastal waters’ and ‘coastal waters of a State’ derive from the Offshore Constitutional Settlement 1979 and its legislative effect in the \textit{Coastal Waters (State Powers) Act} 1980 (Cth) (and State equivalents). It defines the term as the territorial sea out to three miles that is within the adjacent area\textsuperscript{88} of the respective States and the sea on the landward side of it not within the limits of a State. In other words, this is from the baseline out to three miles of the sea which is adjacent to any particular State. This is the sea area that is subject to the ‘roll back’ provision, mentioned above. Of course, as is also mentioned above, if specifically agreed or if the State has a nexus between the legislation for the peace, order and good government of the State and the relevant activity or person, and the legislation is not struck down as being in contravention of s 109 of the Constitution,\textsuperscript{89} the State still has jurisdiction.

Further in relation to the relevant terminology, the Commonwealth proclaims ‘sovereignty’ over the territorial sea (12 miles from the baseline), rights of ‘control’ over the contiguous zone (12-24 miles from the baseline), and its ‘sovereign rights’ over the EEZ (24-200 miles) and the continental shelf beyond the EEZ.\textsuperscript{90}

\textsuperscript{85} Section 10.
\textsuperscript{86} Such as part of Jervis Bay, over the southern part of which the Commonwealth does have jurisdiction because it is part of the ACT.
\textsuperscript{87} Section 14.
\textsuperscript{88} The ‘adjacent area’ is defined in the \textit{Petroleum (Submerged Lands) Act} 1967 under s 5A and Sch 2. Basically it is that area outside the territorial sea and within the continental shelf that is not otherwise excluded that is adjacent to a State or the Northern Territory. The exclusions include any Joint Petroleum Development Area (currently there is only one, which is the JPDA in the Timor Sea with Timor-Leste. The PSSLAs are very poorly drafted in this regard and the Commonwealth \textit{Acts Interpretation Act} 1901 s 15B(4) is much clearer, as is the Commonwealth \textit{Coastal Waters (State Powers) Act} 1980 s 3 and the Queensland \textit{Acts Interpretation Act} 1954 s 36. The PSSLAs is being replaced by the \textit{Offshore Petroleum Act} 2006, and the terms used in the OPA are ‘coastal waters’ for the area from baseline for three miles to State outer limit and ‘offshore area’ from there to the outer limit of the EEZ or claimed outer continental shelf where it is beyond the EEZ; see OPA ss 3, 4, 5, 7 and discussion on the offshore petroleum agreement mentioned above.
\textsuperscript{89} The nexus was established by the High Court decision in \textit{Pearce v Florenca} (1976) 135 CLR 507, mentioned above.
\textsuperscript{90} The phrases quoted are taken from the long title to the \textit{Seas and Submerged Lands Act} 1973, as amended. The Preamble expands on these claims and then the Act itself sets out the detail about them.
Attention will now be paid to the various zones, so it may be helpful to set out a stylised map of these zones, as below.

**Relationship of maritime features, limits and zones**

Source: Geoscience Australia  (© Commonwealth of Australia, Geoscience Australia (2007))

The ‘Territorial Sea’ runs from the baseline out for 12 miles. As mentioned above, under s 7 of the earlier version of the *Seas and Submerged Lands Act 1973* (Cth) the Governor General was given power, under the *Convention on the Territorial Sea and the Contiguous Zone 1958*, to declare the outer limits of the territorial sea. By a statement made on 13 November 1991, the Federal Government announced that this power had been exercised with effect from 20 November 1990 and the outer limit of the territorial sea was extended to 12 miles, but that this did not extend the jurisdiction of the States beyond the three mile limit previously agreed under the Offshore Constitutional Settlement 1979.

The **Contiguous Zone** runs from the baseline out to a limit of 24 miles, which means that it extends 12 miles beyond the territorial sea and is contiguous to it. Under UNCLOS there is power in a coastal state to legislate to control this zone to prevent infringement of its ‘customs, fiscal, immigration and sanitary laws and regulations’ within its territory.

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92 Some of the Torres Strait Island continue to have a three nm territorial sea and these include Deliverance, Talbot Islands, Turnagain, Sabai, Dauan, Kerr and Turu Cay.

93 **UNCLOS** Art 33(2).
or territorial sea. The rationale behind this is to allow power to the coastal State to legislate to prevent persons of ill intent hovering just outside its territorial sea. The power to legislate for the contiguous zone is limited to the four aspects mentioned above. The Commonwealth has given domestic effect to this jurisdiction in the *Seas and Submerged Lands Act* 1973. It will be noticed that the first 12 miles of the contiguous zone also covers the area of the territorial sea. This technique of measuring each zone from the baseline is used throughout UNCLOS, but it is of no consequence as the powers granted to a coastal state in an inner zone are coextensive with those in the outer zone.

The **Exclusive Economic Zone** (EEZ) runs from the baseline out for 200 miles. Under UNCLOS there is jurisdiction given to a coastal state to regulate certain activities out to the 200 nautical mile limit, and this the Commonwealth has done in proclaiming its rights and jurisdiction in the *Seas and Submerged Lands Act* 1973. The main coastal state rights in the EEZ are to the seabed, subsoil and water column, which means for economic purposes rights to exploit the oil and gas in the seabed and subsoil and to the fisheries in the water column.

The **Continental Shelf** was established pursuant to the *Convention on the Continental Shelf* 1958 and it was and is derived from a geographical concept of the sea shelf extending offshore and contiguous with the coastal state land territory. It is the submarine area of land which is the natural prolongation from the low water mark of the coastal state extending seaward. It comprises the seabed and subsoil (but not the water column or the sea surface or air above it). The continental shelf extends to the outer limit of the EEZ, or to the outer limit of the continental margin, whichever is the greater, but in the latter situation it may not extend beyond the distance set out in a formula in UNCLOS and in no case beyond 350 nautical miles from the baseline. This zone, for present purposes, is better described as the **Outer Continental Shelf** or continental shelf beyond the EEZ. In the Outer Continental Shelf the coastal state only has sovereign rights for the purpose of ‘exploring and exploiting its natural resources’ in the seabed and subsoil. No rights are granted in this area to the water column or its living resources, so there are no rights to fisheries. The coastal state has the exclusive rights to regulate drilling and exploitation on the continental shelf (in effect for

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94 UNCLOS Art 33(1).
95 The Commonwealth has ‘declared and enacted that Australia has a contiguous zone’; s 13A.
96 UNCLOS Pt V.
97 Section 10A.
98 UNCLOS Pt VI.
99 The distinction being made here is that some coastal states have a geographical continental shelf that extends beyond that which is claimable under UNCLOS.
100 Article 77(1).
minerals, oil and gas) and there is a formula for payment of some of the benefits of exploitation of these resources to the developing states.\textsuperscript{101} The \textit{Seas and Submerged Lands Act 1973} proclaims Australia’s rights in the continental shelf.\textsuperscript{102}

In relation to coastal state claims to the Outer Continental Shelf, UNCLOS established a Commission on the Limits of the Continental Shelf (CLCS) to receive, comment and make recommendations on coastal states’ claims to the Outer Continental Shelf.\textsuperscript{103} Australia lodged its claim with the CLCS in November 2004.\textsuperscript{104}

The final zone is that of the \textbf{High Seas} which are not expressly defined in UNCLOS but basically are those seas beyond the EEZ.\textsuperscript{105} Whilst there are general obligations to protect and preserve the marine environment on the high seas the rights of coastal states are very limited and, with some exceptions, the obligations lie on the flag states to regulate their flagged shipping. Australia’s \textit{Seas and Submerged Lands Act 1973} does not, therefore, make any claim to any rights in the high seas.

It is convenient to finish this section by mentioning the \textbf{Australian Fisheries Zone} (AFZ). The relevance is that there is a close inter-relationship between protecting the marine environment and regulating the fisheries so that the fish stocks are sustainable. It is sufficient for present purposes to mention that the AFZ is defined as the waters in the Australian EEZ; see the \textit{Fisheries Management Act 1991}.\textsuperscript{106} Thus the AFZ is coterminous with the EEZ.

\section*{Conclusion}

In this chapter an attempt has been made to set out a general outline of Australia’s offshore jurisdiction as established in international law and given domestic effect by Commonwealth, and, to a more limited extent, by State and Northern Territory laws. It may be seen from this outline that the jurisdiction offshore is mixed amongst the various parliaments, nearly all of which have chosen to proclaim their rights. It should be noted that this chapter has addressed the offshore jurisdiction where it has any connection with protection and preservation of the marine environment. It has not touched on the other complex offshore jurisdiction areas, such as the powers of the defence forces, customs or fisheries...
enforcement. These powers are also confused and confusing but addressing them will need to await another book.

One can confidently assert that the offshore jurisdiction in Australia is, as a result of the lack of sufficient cooperation amongst the Commonwealth and the States, in a most unsatisfactory situation. It is complex, unwieldy and unclear. It is suggested that the Offshore Constitutional Settlement 1979 should be revisited and that the Commonwealth and the States agree on one unified structure, not unlike that initially agreed in the Offshore Petroleum Agreement 1969, but simplified and clarified.

The preferred structure would be for one council of ministers from all of the Commonwealth, States and the two self-governing Territories. Under that should be various structures, which would establish the administrative and regulatory entities. At the ministerial council level all parties would have a right to debate and to vote and all would be bound by the outcome of its decisions. There would be the one set of laws, enacted by the Commonwealth but supported by the States, which would apply offshore from the baselines. In many cases, the same set of laws would also cover the internal waters; such as port state control and navigation. The whole process would best be commenced with a high-powered committee taking evidence, gathering material and then making a report. From that would flow the recommendations for the necessary political conference at ministerial level.

Simplification and clarification of Australian offshore jurisdiction would bring considerable benefits to the nation and to others who have to deal with it or pass through its waters and this difficult task should be addressed sooner rather than later.
Chapter 7

Australian Laws – Commonwealth

7.1 Introduction

In some countries, especially those with a civil law (European) system, international conventions may automatically be given the force of law when they are entered into by the relevant country. This is not the case for the common law countries, such as Australia and New Zealand, where the international conventions, to have the force of law, must be given effect through one or more Acts of the Parliament. There is a third situation, which is where the relevant state does not bind itself to the convention but does still give effect to its provisions in its domestic law and some Asian countries have followed this model.

This chapter will address the legislation enacted by the Australian Commonwealth Parliament to give effect to the international conventions that have been described in Chapters 2-4. The legislators have been effective in Australia in enacting the necessary domestic legislation.\(^1\) In Australia the responsibility for the legislation falls mainly on the Commonwealth Department of Transport and Regional Services and the implementation and enforcement of most of it is the responsibility of AMSA. The New Zealand legislation is addressed in Chapter 10.

7.2 Early Legislation

During the course of the 20th century there was a steady increase of legislation to address the need to protect and preserve the marine environment. Since the conclusion of World War II in 1945 this move gained increasing momentum. The Commonwealth Parliament gave effect to OILPOL 54\(^2\) in the Pollution of Waters by Oil Act 1960. This Act

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1. Unfortunately, there is a disturbing trend in recent years for the Commonwealth parliamentary legislators to pass domestic legislation that differs from the terms of the international conventions that Australia has ratified. One importance of international conventions is to give uniformity so that international activity, like shipping and protection of the environment, can be advanced uniformly. Departure from this uniformity should not normally be countenanced by a national state like Australia, whose national interest lies in international regularity and probity.

was repealed to give legislative effect to MARPOL.³ These earlier Acts
are not addressed here,⁴ but the reader may wish to be aware that the
legislation in many cases was not the first on the topic and earlier
versions were much less detailed. The balance of this chapter will set out
a description of the main provisions of the current Commonwealth legis-
lation.

### 7.3 Protection of the Sea (Prevention of Pollution from
Ships) Act 1983

The main Commonwealth legislation giving effect to MARPOL is the
Protection of the Sea (Prevention of Pollution from Ships) Act 1983.⁵ This is the
legislation that controls the various operational aspects of MARPOL. The
structure of the 1983 Act is that it is in parts, some of which correlate with
the provisions of MARPOL. The Act’s relevant Parts are: Part II (Preven-
tion of pollution from oil); Part III (Prevention of pollution by noxious
substances); Part IIIA (Prevention of pollution by packaged harmful
substances); Part IIIB (Prevention of pollution by sewage) and Part IIC
(Prevention of pollution by garbage). As may be seen, these five Parts
correlate to the first five annexes to MARPOL. An amendment to the Act to
give effect to Annex VI (Air Pollution) will be introduced in due course.⁶

In relation to pollution by oil, the key sections of the Act are ss 9-11.
Section 9 has complex provisions, which stray somewhat from the provi-
sions of MARPOL to which they give effect. In summary, s 9 provides:

(a) if oil⁷ or an oily mixture⁸ is discharged from a ship into the sea, in
effect, out to the limits of the EEZ the master and owner each
commit an offence which is of strict liability;⁹

(b) if the ship is an ‘Australian ship’¹⁰ then the offence occurs even if
outside the limits of the EEZ;¹¹

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³ MARPOL has been addressed above in Chapter 3.
⁴ For some description see White, Marine Pollution Laws 1994, above, and Gold E,
Gard Handbook on Marine Pollution (Gard, 2nd ed, 1997).
⁵ Usually referred to in this book as the Pollution from Ships Act 1983. There had
been an interregnum Act, which was the Protection of the Sea (Discharge of Oil from
Ships) Act 1981 and before that another Act had given effect to OILPOL 54.
⁶ At time of writing Annex VI had been recommended for acceptance by Australia,
but the legislation had not been drafted.
⁷ Oil is defined in MARPOL Annex I reg 1(1) as ‘petroleum in any form’.
⁸ Oily mixture is defined in MARPOL Annex I reg 1(2) as a mixture with any oil
content.
⁹ Section 9(1B).
¹⁰ Defined as a ship registered in Australia or an unregistered ship having Austra-
lian nationality; s 3. The Shipping Registration Act 1981 (Cth) regulates registration.
¹¹ Section 9(18). Maximum penalty is 500 penalty points. It should be noted that the
maximum penalty for a corporation is five times that for a natural person; Crimes
Act 1914 (Cth) s 48(3).

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(c) if a person engages in conduct that causes a discharge of oil or an oily mixture into the sea out to the limits of the EEZ and in doing so the person is reckless or negligent the person commits an offence;

(d) if the said discharge is from an ‘Australian ship’ then the offence occurs even outside the EEZ.\(^{12}\) (author’s italics)

There are a number of exceptions and defences to the offences.\(^{13}\) In relation to an action against the owner or master, they apply:

(a) where there is a law of a State or Territory that gives effect to the discharge provisions of MARPOL Annex I (this is the ‘roll back’ provision);

(b) if the discharge is to secure the safety of a ship or saving life at sea;

(c) if the oil or oily mixture escaped by ‘non-intentional’\(^{14}\) damage\(^{15}\) to the ship or its equipment, and all reasonable precautions were taken after the occurrence of the damage or the discovery of the discharge to prevent or minimise it;

(d) if the discharge was made to combat specific pollution and was approved by a prescribed officer, or where the damage occurred in another country’s jurisdiction and it was approved by its government; or

(e) if the tanker meets certain detailed requirements, the main ones being that it was under way, not in a special area,\(^{16}\) not less than

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12 Section 9(1). Maximum penalty is 2000 penalty points.

13 The Act has a note that the defendant bears the evidential burden of proof of these exceptions or defences; note entered under s 9(2). Chapter 2 (except Pt 2.5 - Corporate Criminal Responsibility) of the Commonwealth Criminal Code Act 1915 applies to all offences under the Prevention of Pollution from Ships Act 1983; see s 7. The Criminal Code also has such defences as lack of capacity, mistake or ignorance of fact, duress, claim of right, sudden or extraordinary emergency, etc; see Pt 2.3.

14 In somewhat clumsy drafting, ‘not non-intentional’ occurs if the master or owner acted with intent to cause the damage or acted recklessly and with knowledge that the damage would probably result, or arose from their negligence; s 9(3).

15 ‘Damage’ is defined as not including deterioration resulting from failure to maintain or defects that develop during the normal operation of the ship or equipment; s 9(3A). The meaning of ‘damage’ was considered by the Australian High Court in *Morrison v Peacock (The Sitka II)* (2002) 210 CLR 274, when the court held that ‘damage’ occurred only when there was a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some event, whether the event was external or internal to the ship or its equipment. The question before the court was whether routine use of wear and tear of an hydraulic hose which ruptured and spilled oil some of which went over the side into the sea was within this defence (in reg 11 of Annex I of MARPOL). It held that ordinary wear and tear was not within this meaning. It seems that the IMO is content with this meaning and there is no move to alter the definition of ‘damage’ in MARPOL Annex I.

16 ‘Special area’ is defined in MARPOL Annex I reg 1(10).
the specified distance from nearest land, operated an oil discharge monitoring and control system and did not discharge beyond the specified rate of oil or mixture.\textsuperscript{17}

For Australia it is important to note that ‘nearest land’ is defined to include points of latitude and longitude that run along the outer parts of the Great Barrier Reef\textsuperscript{18} with the effect that all discharges are prohibited in the Great Barrier Reef area.

As noted above, s 9 is directed at offences relating to discharge of oil. On the other hand, s 10 is directed at discharges of oil residue and its provisions are much the same as those of s 9. A person (other than master or owner) commits an offence if that person engages in conduct that causes a discharge from an Australian ship of an oil residue into the sea and the conduct is reckless or negligent and the discharge is an offence under s 9(1) or (1B) or is an offence against the law of a State or Territory.\textsuperscript{19} As already noted, if the master or owner engages in the same conduct it is an offence of strict liability and they are each guilty.\textsuperscript{20}

The rest of Pt II of the Act relates to other regulatory provisions. Ships are to report incidents involving oil spills;\textsuperscript{21} Australian ships are to have shipboard oil emergency plans;\textsuperscript{22} Oil Record Books are to be kept accurately\textsuperscript{23} and prescribed officers may require that certain offensive oils be discharged to a shore reception facility.\textsuperscript{24}

Part III of the 1983 Act gives effect to MARPOL Annex II in dealing with any discharge of noxious liquid substances.\textsuperscript{25} The sections of the Act establishing the prerequisites for offences have provisions similar to, but not identical with, those in Pt II of the Act relating to oil. It is an offence for a person to cause a discharge into the sea of a ‘liquid substance, being a substance or mixture carried as cargo or part cargo in bulk’ if the person is reckless or negligent. For foreign ships the master and the owner each commit an offence if the ship discharges a liquid substance, or mixture, into the sea inside the outer limit of the EEZ and into any sea if

\textsuperscript{17} Section 9(4). The requirements are too detailed to be set out in full.
\textsuperscript{18} Section 8 adopts the meanings in MARPOL, and ‘nearest land’ is so defined in MARPOL Annex I reg 1(9).
\textsuperscript{19} Section 10(1). The maximum penalty is 2000 penalty points.
\textsuperscript{20} Section 10(3), (4). The maximum penalty is 500 penalty points but, as noted above, for corporations this becomes multiplied by five; see Crimes Act 1914 (Cth) s 48(3).
\textsuperscript{21} Section 11.
\textsuperscript{22} Section 11A.
\textsuperscript{23} Sections 12-14.
\textsuperscript{24} Section 14A.
\textsuperscript{25} Noxious liquid substances are defined and categorised in MARPOL Annex II, especially in its Appendix II and have the same meaning in Pt III of the Act as in MARPOL Annex II; see s 15(1). These substances do not include oil; s 15(1). However, certain oil-like substances, as identified by the IMO, may be carried in tankers and treated like oil; see s 21A.
it is an Australian ship.\textsuperscript{26} The exceptions and defences are similar to those in Pt II.\textsuperscript{27} There are detailed provisions about discharging chemical tank washings from the cargo tanks, or discharging whilst under way unless the ship is sufficiently far from nearest land and so on.\textsuperscript{28}

The \textit{Maritime Legislation Amendment Act} 2006 amends the Act to require chemical cargo ships over 150 gross tons\textsuperscript{29} to have onboard a shipboard marine pollution emergency plan to deal with a discharge incident.\textsuperscript{30}

The balance of Pt III of the Act has similar provisions to Pt II in relation to the obligation to report incidents, to keep an accurate Cargo Record Book and it gives power to the prescribed officer to require certain cargo to be discharged into a shore reception facility.\textsuperscript{31}

Part IIIA of the \textit{Pollution from Ships Act} 1983 deals with ‘packaged harmful substances’ and it gives effect to MARPOL Annex III. Its terms have the same meaning as in that annex.\textsuperscript{32} The aim of these provisions is to deal with likely toxic cargo (harmful substance) that is contained in some manner and is likely to be dangerous to the marine environment, and it could well also be dangerous to the ship. The complex part is that what is a ‘harmful substance’ is defined in terms of the list of substances identified in the International Maritime Dangerous Goods Code (IMDG Code), which Code has thousands of items set out in it. The Act defines ‘packaged form’ for such cargo also in terms of the Code which is, basically, anything contained in bulk.\textsuperscript{33}

The key prescribed conduct is set out in similar, but not identical, terms to s 9 of the Act (relating to oil). The master and owner each commit an offence if a harmful substance carried as cargo in packaged form is \textit{jettisoned} from the ship into the sea out to the limits of the EEZ and, if an Australian ship, anywhere into the sea.\textsuperscript{34} Note that the key element of the offence lies in the jettisoning, rather than discharge, which is explicable by the fact that usually the ship is carrying this sort of cargo in some type of container. The usual defences apply; such as jettisoning to secure the safety of the ship or to save life at sea. The Act also operates to make a \textit{person} liable who engages in conduct that causes the harmful substance

\begin{itemize}
  \item \textsuperscript{26} Section 21(1B), (1C).
  \item \textsuperscript{27} Section 21(2).
  \item \textsuperscript{28} Section 21(4)-(13). Discharges are not permitted in the Antarctic area of the sea; s 21(14).
  \item \textsuperscript{29} This refers to those ships that come under MARPOL Annex II in relation to cargos of noxious substances.
  \item \textsuperscript{30} The \textit{Maritime Legislation Amendment Act} 2006 Sch 3 inserts a new s 22A into the \textit{Prevention of Pollution Act} 1983.
  \item \textsuperscript{31} Sections 22-26AA.
  \item \textsuperscript{32} Section 26A(2).
  \item \textsuperscript{33} Section 26A and MARPOL Annex III regs 1-7.
  \item \textsuperscript{34} Section 26AB(3), (4). This is a matter of strict liability for the master and owner, s 26AB(4).
\end{itemize}
to be jettisoned due to the person being reckless or negligent.\footnote{35} There is a difference that should be noted, which is that if the container leaks a harmful substance and the ship discharges the substance into the sea, it is taken to have been ‘jettisoned’ for the purposes of liability unless it was washed overboard under the requirements therein set out.\footnote{36} It is a ‘strict liability’ offence.\footnote{37}

Part III has the usual obligation to report prescribed incidents. Defences and exceptions include the ‘roll back’ provision where a State or Territory has a similar law, or if a foreign ship is beyond the Australian EEZ. This reporting obligation falls on the master unless the master is unable to comply and if the ship is abandoned it falls on the owner, charterer, manager or operator.\footnote{38}

Part IIIB of the 1983 Act deals with discharge of sewage. Division II of Pt IIIB addresses the discharge of sewage from a ship into seas other than the Antarctic. This MARPOL annex about sewage was held up for many years as it did not attract sufficient ratifications to come into force because there was opposition to some of its provisions. There was much debate on what was the smallest size of ship to which it should apply. Finally, the revised annex gained sufficient support and it came into force internationally on 27 September 2003. In relation to the category of ‘ship’ to which Annex IV is applicable; expressions in the Act have the same meaning as Annex IV,\footnote{39} and that annex provides that the regime applies to new ships of 400 gross tonnage and above or to new ships of less than that tonnage that are certified to carry more than 15 persons. Existing ships in either of these two categories have five years in which to comply.\footnote{40}

The master and owner are each liable if sewage is discharged from a ship into the sea off Australia out to the outer limits of the EEZ and an Australian ship is liable in those seas and beyond that. These are ‘strict liability’ offences.\footnote{41} A person is liable if the person engages in conduct that is reckless or negligent and it causes a discharge into the sea to the outer limits of the EEZ.\footnote{42}

The usual exceptions and defences apply of securing the safety of the ship or saving life at sea or the sewage escaped in consequence of

\footnotesize{\begin{itemize}
\item Section 26AB(1).
\item Section 26AB(6). The Act has a note that the evidential burden is on the defendant; under s 26AB(5).
\item Section 26AB(4).
\item Section 26AB.
\item Section 26C(1).
\item Revised MARPOL Annex IV reg 2. The five years runs from when Annex IV came into force internationally, which was on 27 September 2003; see IMO Summary of Status of Conventions.
\item Section 26D(3), (4).
\item Section 26D(1).
\end{itemize}}
'damage' and all reasonable precautions were taken before and after the escape. Further, like discharge of oil, if the ship is under way it may discharge sewage if it is steaming at the prescribed speed, the sewage has been comminuted and disinfected and the discharge is not above the prescribed rate. There is the usual power for a prescribed officer to require the sewage to be discharged into a reception facility ashore. There is the usual ‘roll back’ provision to the effect that if a State or the Northern Territory has a law giving effect to reg 3 of Annex IV then the Commonwealth Act does not apply. Division 1 of Pt IIIB regulates discharge of untreated sewage into the Australian Antarctic sea area (south of 60 degrees south latitude). Note that this provision is enacted under the obligation in Annex IV of the Protocol to the Antarctic Treaty 1959 and not MARPOL. Section 26D has the key elements of the offence which make the master and owner strictly liable if the ship discharges untreated sewage. The usual defences and exceptions apply of securing the safety of the ship or life and, as for oil tankers discharging oil, the ship may do so if the sewage had been stored in a holding tank and is discharge under way at not less than four knots, at the prescribed rate and not less than 12 nautical miles from nearest land. Again as in s 9 relating to oil, a person is liable if the person engages in conduct that is reckless or negligence that causes a discharge of untreated sewage. Part IIIC of the 1983 Act governs the regulation of the discharge and incineration of garbage, giving effect to MARPOL Annex V. This part of the Act adopts the meanings in MARPOL and also Annex IV to the Antarctic Protocol. The usual structure is followed in that the master and owner are strictly liable if there is a ‘disposal of garbage’ into the sea out to the EEZ limits and also beyond that for an Australian ship, and a person is liable if the person causes the discharge by recklessness or negligence. The exceptions and defences are the usual ones of saving the ship or life at sea or the ship is under way and the prescribed distance from

43 Section 26D(5). ‘Damage’ is defined to exclude steady deterioration; s 26D(5A); which is to the same effect as the High Court decision in Morrison v Peacock (Sitka II) (2002) 210 CLR.
44 Section 26D(6)-(8).
45 Sections 26D(1)(c); 26D(3)(b).
46 The Protocol on Environmental Protection to the Antarctic Treaty; and the ‘Antarctic Area’ is the sea south of 60 degrees south latitude; s 3 of the Act.
47 Section 26E(2A), (2B), (3).
48 Section 26E(4). ‘Nearest land’ is defined in Annex IV as including points along lines outside the Great Barrier Reef; Annex IV reg 1(5).
49 Section 26E(1).
50 Section 26E.
51 Section 26F(1)-(4).
nearest land (not in a special area). In this part it also provides that there should not be a discharge within 500 metres of a fixed or floating platform, so no discharge is allowable alongside oil or gas rigs. The regime discriminates amongst the wastes and prohibits discharge of the non-biodegradable wastes such as plastics. Food wastes have a discrete regulatory system so that, if it has been comminuted or is ground, discharge is allowable more than 12 nautical miles from land. In particular the Act provides that a discharge is allowable not within a special area and not less than 25 nautical miles from nearest land, but not in the case of dunnage, lining or packing materials which will float and are not plastics. In the case of other garbage, but not plastics, discharge is allowable ‘as far as practicable from nearest land’. The important point to have in mind is that no plastics may be discharged at any time or place (because they are very slow to biodegrade).

Garbage Record Books are to be kept accurately and are to be retained and produced for inspection; there should be a Shipboard Waste Management Plan and placards about the Plan should be placed around the ship. There is the usual power to require discharge into a shore reception facility.

Having earlier disposed of most of the substantive law issues, the Pollution from Ships Act 1983 has a raft of regulatory provisions in Pt IV (Miscellaneous). In this part the powers of the inspectors are set out to allow them to require information, inspect ships and documents, etc. The ‘authority’ that is given many of these powers is the Australian Maritime Safety Authority (AMSA) and its officers. Part IV of the Act also addresses many of the legal aspects relating to evidence and prosecutions; so that evidence from documents and analysts is prima facie evidence, time limits for prosecution are unlimited for Australian ships but three years for foreign ships, ships may be detained etc.

It should be noted that Pt IV, rightly, reflects the limitations on foreign ships if they are only in the EEZ waters or are on innocent passage passing through the territorial sea. In these cases the Act reflects various provisions in UNCLOS as well as MARPOL. For example, if the flag state commences a prosecution for a violation of the marine environment laws by a ship in the EEZ then the coastal state, Australia in this case, must suspend its own prosecution, as set out in Art 228 of UNCLOS. Another example is that Pt IV reflects the international maritime law in that if a ship is proceeding to or from an Australian port then

52 Section 26F(6)(c), (7)(c), (8)(c).  
53 Section 26F(6).  
54 Section 26F(7). ‘Plastics’ are defined as including synthetic ropes, synthetic fishing nets, plastic garbage bags and incinerator ashes from plastic products that may contain toxic or heavy metal residues; s 26F(13).  
55 Sections 3, 26c, 27 etc. See Chapter 11 for some discussion on AMSA.
the limitations of innocent passage, straits passage or passing through
the EEZ do not apply; with the exception being if the ship is proceeding
to or from a port to secure the safety of a ship or human life. The Act
also makes provision for a wide raft of Regulations and orders, which
have duly been put in place.

It should be noted that the new MARPOL Annex VI (air pollution
from ships), came into force internationally on 19 May 2005 but the 1983
Act has not yet been amended to give effect to it in Australia.

The Pollution from Ships Act 1983 has wide application as it binds the
Crown in right of the Commonwealth, each of the States and Norfolk
Island, has application within and outside Australia and extends to the
outer limits of the EEZ. It applies to Australian flagged ships wherever
they may be and to foreign flagged ships in Australian ports or the
territorial sea. The AMSA inspectors are assiduous in checking whether
ships comply with MARPOL in the port state control regime. Ships that
do not comply are liable to be detained until the defect is remedied.
The Act, in reflecting the provisions of MARPOL 73/78, is a regulatory one
with detention or a prosecution as part of the enforcement regime. It
should be noted that the Act gives effect to the provisions of the Offshore
Constitutional Settlement 1979 in providing for a ‘roll back’ provision to
the effect that the Commonwealth Act only applies if ‘there is no law of
that State or Territory that makes provision giving effect to regs 4 and 15
of Annex I to the Convention in relation to that sea’.

This then is a brief description of MARPOL and how it is given effect
in Australia. Attention is now turned to other Commonwealth legislation
that relates to marine pollution from ships.

7.4 Navigation Act 1912

Many provisions under MARPOL have particular construction require-
ments for ships, especially tankers, and such ships are obliged to carry
special equipment (such as oily water separators). These requirements
are given force in Australian legislation by the Commonwealth Navi-
gation Act 1912. This is a sensible division of the requirements between
this Act and the Pollution from Ships Act 1983 as the Navigation Act
1912 has other provisions about construction and equipment and these

56 Section 32(2).
57 Sections 33, 34.
58 AMSA makes regular reports on its website as to its actions in ‘port state control’; see also mention in Chapter 11.
59 Section 9(1). In this example it refers to oil discharges and similar provisions
apply to the other parts of the Act; s 21(1B)(b) and s 22(1A) (noxious liquid sub-
stances), s 26A8(3)(i) and s 26B(1) (harmful packaged substances), s 26D(3)(b)(i)
(sewage), s 26F(1)(c)(i) (garbage). The ‘roll back’ provisions are mentioned in
more detail in Chapter 6.
requirements are best all contained in the one Act. The *Navigation Act* 1912 is very large, with many sections and many schedules of the conventions to which Australia is a party. This commentary is restricted to its relevance to vessels being required to comply with the ship construction and equipment aspects of MARPOL.

The Commonwealth Parliament’s jurisdiction is, of course, restricted by the Australian Constitution. Section 2 of the *Navigation Act* 1912 reflects this, in part, when it provides for the Act to apply, in the main, only to overseas and interstate voyage vessels. Also, in the main, the Act does not apply to defence and other government owned or operated vessels. The relevant provisions of MARPOL are given effect in Pt IV. In that Part, Div 12 addresses the regulatory structure for ships carrying or using oil, giving effect to MARPOL Annex I, and sets in place requirements for surveys and inspections and for Ship Construction and International Oil Pollution Prevention Certificates to be issued to Australian ships that comply with the regime. For foreign ships, if they enter Australian ports the port state control regime is given effect and they must comply with the international and Australian requirements. Ships are required to produce relevant certificates on demand and if the ship is found not to have complied in all circumstances, then the AMSA officers may detain it or exercise other powers.

A similar structure is put in place by Div 12A, which regulates the construction requirements for ships carrying noxious liquid substances in bulk, to give effect to MARPOL Annex II (chemical tankers). Div 12B sets out the requirements for ships carrying packaged harmful substances (Annex III) and Div 12C applies to sewage.

The *Navigation Act* 1912 already gives power for a ship to be detained if it is not ‘seaworthy’ and this includes that it not pose a ‘threat to the environment’. Whilst dealing with the *Navigation Act* 1912, it should be

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60 The *Navigation Act* 1912 has been the subject of frequent amendment and major review and one needs to check it frequently for any amendments. At time of writing there is another major review underway and further legislative amendment will probably be made.


62 Section 2.

63 Annex I regs 12-14 (inclusive), reg 16, regs 18-31 (inclusive) and regs 33 and 35, but not if the laws of a State or Territory apply the same regulations (the ‘roll back’ provision); see ss 267, 267A and mention in Chapter 6.

64 Sections 266-267k.

65 As mentioned above, the Australian Government is proposing to give effect to Annex VI, including amending legislation to that end, but at the time of writing it had not yet done so.

66 Maritime Legislation Amendment Act 2006, by s 60 of Sch 2, amends the *Navigation Act* 1912 s 207 ‘Definition of Seaworthy’.

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noted that it also gives power to pass Regulations which regulate those vessels that service the offshore industry and offshore industry mobile units (oil and gas platforms whilst in mobile phase, as opposed to when they are in fixed mode).67

7.5 Protection of the Sea (Civil Liability) Act 1981

The provisions of the CLC are given the force in Australian law by the Protection of the Sea (Civil Liability) Act 1981 (Cth), although the Act goes beyond the provisions of the CLC. Part I of the Act sets out the general provisions and provides, amongst other things, for the Gazettal of the countries that have agreed to the provisions of the convention.

Part II gives the force of domestic law to most of the CLC. It has the usual ‘roll back’ provision so that if the laws of a State or Territory give effect to the CLC 1992, the Commonwealth Act does not apply.68 The Commonwealth Act applies, basically, to Australian ships on overseas or interstate voyages and to foreign flagged ships that enter Australian ports.69 The Act is selective in the provisions of the CLC that are given the force of law70 and readers should have in mind that the 1969 CLC, (Sch 1 to the Act) has been replaced by the 1992 Protocol (Sch 2). The Supreme Courts of the States and the Territories are given jurisdiction to determine claims, including whether the owner, or the owner’s insurer or other party providing financial security, is able to limit liability.71 Further as to jurisdiction, under the Admiralty Act 1988 a claim under the Protection of the Sea (Civil Liability) Act 1981, or a law of the State or Territory that makes provision under it, is a ‘general maritime claim’ and jurisdiction is conferred, and the Supreme Courts of a State or Territory are invested, with federal jurisdiction to deal with limitation proceedings in personam or in rem.72 The result is that such claims may be taken in any of the Federal Court or the Supreme Courts of a State or a Territory.

In the usual way, if the owner is able to limit the amount of liability the owner may pay that amount into court and the courts then have jurisdiction over distribution amongst the claimants. Part II makes provision for Regulations to apply to the relevant terms of the CLC, including conversion from SDRs to Australian dollars, the kinds of guarantee that are acceptable to constitute the fund, any rights of subrogation claimed by the insurer and any disputes, including over the tonnage of the ship for limitation calculations.73

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67 Part VB.
68 Section 7(1). For discussion of the ‘roll back’ provisions see Chapter 6.
69 Section 7.
70 Section 8.
71 Sections 9, 10.
73 Section 12.
By Pt III, Australian and foreign flagged ships (other than government ships), carrying more than 2000 tons of oil in bulk as cargo, visiting Australian ports or offshore terminals, are bound to carry the relevant insurance certificate required by the convention, in default of which the master and owner are each strictly liable. By Pt IIIA and the regulations, tankers not covered by Pt III still need a certificate showing they have insurance up to the limit of the LLMC (as to which see Section 5.7 in Chapter 5).

The Administrative Appeals Tribunal (AAT) is given jurisdiction to hear matters relating to refusal to issue, or cancellation of, insurance certificates. It may be observed that the AAT does not have the fast track provisions for matters to be heard in the event of a dispute between the owner and the AMSA officer, such as is available in the Federal or Supreme Courts. This may be a weakness in the AAT system as commercial ships need fast dispute resolution of disputes which delay them in port.

Under Pt IV of the Act, AMSA is given power to recover any expense which has been incurred in relation to the Protection of the Sea (Powers of Intervention) Act 1981 (as to which Act see below). These expenses, which may be recovered as a debt due to the Commonwealth Government, are those to which it may have been put in cleaning up oil spills or in taking precautions in case a spill should occur. The debt is a charge on the ship, which may be detained until the debt is discharged. By Pt IVA similar powers are granted in relation to any expenses incurred by AMSA in relation to the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 or combating pollution of the marine environment under the Australian Maritime Safety Act 1990.

By Pt V and the Regulations under the Act provision is made for prosecution of offences and for general governance of the Act. Schedule 1 to the Act is the CLC 1969, as amended by protocols, Sch 2 is the 1992 Protocol and Sch 3 is the IMO Legal Committee ‘fast track’ amendment of the upper limits of liability under the CLC Art VI. It should be noted that Australia has denounced the CLC 1969, as have most other countries, and it is the CLC 1992 that is the effective regime under Australian law.

Overall, the Act is sensibly drafted and gives effect to the CLC in a sound and effective manner. It may be noted that ordinary limitation proceedings, not connected with the CLC but under the Limitation of Liability for Maritime Claims Act 1989 (Cth), are discussed elsewhere.

74 Sections 13-19c.  
75 Section 19.  
76 The Department of Transport and Regional Services has the conduct of the matter; its website is at <www.dotrs.gov.au>.  
77 See White M, ‘Limitation of Liability’ Chapter 10 in White, Australian Maritime Law 2000, above; Davies and Dickey, above, Chapter 16. See also Section 5.7 in Chapter 5 of this book.
7.6 Protection of the Sea (Oil Pollution Compensation Fund) Act 1993

The Commonwealth Act which gives effect to the Fund Convention\(^78\) is the Protection of the Sea (Oil Pollution Compensation Fund) Act 1993. The government took many years to ratify and to give effect to the Fund Convention 1971 as a number of government stakeholders considered that the risk of an oil spill being of such dimension as to exceed the CLC was slight, compared to the payments the oil companies would have to make to the fund. In fact, even to date, no spill in Australian waters has ever exceeded the upper limits of the CLC and called on the fund for payments. The Oil Pollution Compensation Fund Act 1993 is supported by three Acts which give effect to the levies which are imposed by the fund from year to year on the Australian participating oil companies.\(^79\) The Act in its present form gives effect to the 1992 Fund Convention.\(^80\) (The 1971 Fund has now been wound up).

The Act gives the right to persons who have suffered damage or been put to expense in cleaning up oil spills\(^81\) to claim compensation and, if necessary, the right to sue to enforce their claims. In effect, the Oil Pollution Compensation Fund Act 1993 provides that the fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damages, or costs of cleaning up the oil spill, under the CLC.

Under the Act, the participating oil companies are required to keep records, make reports and to pay the levies imposed by the fund. AMSA is empowered to enforce these provisions, and the ‘Fund’ is deemed to be a legal entity similar to a corporation with a right to sue and be sued in Australian courts.\(^82\) The Federal and the Supreme Courts of the States and Territories are given jurisdiction to deal with disputed claims.\(^83\) The oil companies are required to make the relevant payments to the ‘Consolidated Revenue Fund’ and then an equivalent amount is to be forwarded to the fund in London. The 1971 convention, the 1976 Protocol and the 1992 Protocol are all schedules to the Act.

In practice what happens is that if an oil spill from a tanker gives rise to total claims that exceed the CLC limits then the fund takes control of the claims system acting in cooperation with the relevant P&I Club. In major spills, the fund personnel or agents often establish an office in a suitable city near to the scene of the spill and they deal with claims. In

\(^{78}\) The Fund Convention is discussed in Chapter 4.  
\(^{79}\) The Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – Customs) Act 1993, and the two related Excise and General Acts.  
\(^{80}\) Section 31.  
\(^{81}\) Sections 32, 33.  
\(^{82}\) Section 29.  
\(^{83}\) Sections 32, 34.
simpler situations the claims are dealt with from the London headquarters. If claims are disputed then the claimant is entitled to commence litigation and this is done from time to time (see the Fund Annual Reports). The background to the Fund Convention and details of how to claim are set out in the excellent ‘Claims Manual’ available from the fund and posted on its website.

7.7 Protection of the Sea (Shipping Levy) Act 1981

The Protection of the Sea (Shipping Levy) Act 1981 (Cth) has as it main aim to raise revenue from any ships with 10 tonnes of oil or more using Australian ports. A levy in respect of the ship is payable quarterly.84 The supporting Act is the Protection of the Sea (Shipping Levy Collection) Act 1981 which provides the details for the collection of the levy. These Acts do not derive from any IMO convention, but are revenue raising Acts by the Commonwealth Government. A ship is not liable for the levy for the quarter if it is only in port for some non-commercial reason, such as mere watering, fuelling, provisioning, changing crew or passengers or in an emergency.85 Masters and owners are jointly and severally liable to pay and the ship may be detained for unpaid levies.86

The funds raised from the levy are payable to AMSA and are expended for administration of the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances (‘the National Plan’).87 The rate of the levy is regularly reviewed and over recent years the rate struck under the levy has been steadily reduced.

7.8 Protection of the Sea (Powers of Intervention) Act 1981

The Intervention Convention was given domestic force in Australia by the Protection of the Sea (Powers of Intervention) Act 1981 (the POI 1981), which gave extensive powers to the Commonwealth Government to intervene in the case of an offshore shipping casualty that is polluting, or threatening to pollute, the Australian marine environment.88 The substance that was initially identified to warrant intervention was oil, but in sub-

84 Section 5 provides: ‘Where, at any time during a quarter when a ship to which this Act applies was in an Australian port, there was on board the ship a quantity of oil in bulk weighing not less than 10 tonnes, levy is imposed in respect of the ship for the quarter’.
85 Section 5 of the Collections Act.
86 Collection Act ss 9, 12.
87 For further detail about AMSA and the National Plan see Chapter 8; also see White, Marine Pollution Laws 1994, above, Sections 7.2.5 and 7.2.6.
88 The Intervention Convention and this Act originally derived from the Torrey Canyon maritime casualty; as mentioned in Chapter 1.
sequent protocols to the Convention, followed in the POI 1981 Act, this has been extended to a wide range of listed pollutants, which list is frequently amended. The Convention itself only applies in the high seas, but the POI 1981 has been extended to apply also in the EEZ and other maritime zones offshore from the Australian coastline.

The POI 1981 is in two parts in relation to the areas to which it applies offshore from Australia. The first is the high seas and the second is the EEZ and zones inshore from its outer edge. Before mentioning that, however, it is appropriate to mention the basis in international maritime law for the Australian Act to apply in each of these zones. Commencing from inshore zone, the powers underpinning the POI 1981 for the internal waters and territorial sea derive from the sovereignty that Australia, like all coastal states, has over these waters but they are, of course, subject to certain rights of innocent passage. In the contiguous zone and to the other edge of the EEZ a coastal state may rely on the enforcement powers in Section 6 of Part XII of UNCLOS and especially Art 221. Beyond the EEZ, which is the high seas, there is an argument that UNCLOS Art 221 applies, but it is not necessary to rely on this provision as the Intervention Convention expressly gives the coastal state power in international law in the high seas.

Turning now to the provisions of the POI 1981, one notes that the powers in relation to dealing with a maritime casualty on the high seas are extensive. The trigger for their exercise is that AMSA must be satisfied that the pollution from the casualty may result in a ‘grave and imminent danger’ to the Australian coastline or related Australian interests. AMSA’s powers to deal with the maritime casualty or its cargo include moving it, removing cargo, salvage, taking control, etc, but to sink or destroy the ship requires the approval of the Minister. AMSA may issue directions to the owner, master or salvor to deal with the casualty, or AMSA itself may take steps to move or otherwise deal with

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89 See the Schedules to the Act for the lists of substances. Readers should check this Act, and every Act for that matter, for amendments as they are made frequently.

90 Article 221 provides that nothing in Pt XII shall prejudice the right of states, pursuant to international law, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage from pollution from a maritime casualty.

91 Section 8(1), which relates to oil, provides: ‘(1). Where the Authority is satisfied that, following upon a maritime casualty on the high seas or acts related to such a casualty, there is grave and imminent danger to the coastline of Australia, or to the related interests of Australia, from pollution or threat or pollution of the sea by oil which may reasonably be expected to result in major harmful consequences, the Authority may take such measures, whether on the high seas or elsewhere, as it considers necessary to prevent, mitigate or eliminate the danger.’ The ‘Authority’ is defined to be AMSA; s 3. Section 9(1) has similar provisions but relating to substances other than oil. It is noted that s 8(1) is expressed to apply in the high seas ‘or elsewhere’, whereas Art I(1) of the Intervention Convention is expressed only to apply in the high seas.
the ship or cargo,\textsuperscript{92} which it would normally do through employing contractors such as salvors.

Of particular note is that the powers given to AMSA also include giving directions to owners, masters or controllers of ships other than the casualty, or of any other ‘tangible asset’,\textsuperscript{93} or any supplier of goods or services, or to a person to whom those goods or services were proposed to be supplied.\textsuperscript{94} In short, under this part of the POI 1981 AMSA is empowered to give directions to a very wide range of persons, either in the own right or because they are in control of ships, installations or other things.\textsuperscript{95}

The limitations on the exercise of these powers are:

(a) that a ship other than the casualty can only be given directions if it is in the Australian EEZ or one of the other Australian zones, or it is an Australian ship;
(b) directions may not be given to a warship or any ship owned or operated by a foreign country that is only in use on government non-commercial service;
(c) consultation is to occur with other state parties likely to be affected, which includes the flag state of the casualty, as required by Art III of the Intervention Convention;
(d) the powers must only be exercised proportionately to the threatened damage, should not unnecessarily interfere with the rights and interests of others, should not go beyond what is reasonably necessary and should cease as soon as the risk has ended; all of which is required by Art V of the Convention.\textsuperscript{96}

The second part of the POI 1981 relating to powers is in s 10, under the heading of ‘general powers’. There are subtle differences in the provisions of the Act in relation to these powers and those exercisable on the high seas. These general powers may be exercised in the EEZ, territorial sea (coastal sea)\textsuperscript{97} or internal waters (or an Australian ship on the

\textsuperscript{92} Article 8.
\textsuperscript{93} A ‘tangible asset’s is defined as ‘land or seabed, premises, a facility, a structure, an installation, vessel, aircraft, vehicle, an item of equipment or machinery, a tool or ‘any other article’; s 3.
\textsuperscript{94} Sections 8(2b) and 9(2b). These powers are similar to the wide powers given to a ‘Receiver of Wreck’ in Part VIII of the Navigation Act 1912. For discussion on this, see White M, ‘Salvage, Towage, Wreck & Pilotage’, Section 9.20 in Chapter 9 of White M (ed), Australian Maritime Law (Federation Press, 2nd ed, 2000).
\textsuperscript{95} Sections 8(2c) and 9(2c).
\textsuperscript{96} Sections 8(4) and 9(4).
\textsuperscript{97} ‘Australian coastal sea’ is defined as the territorial sea and the sea on its landward side not within the limits of a State or the Northern Territory. In effect, off most of the Australian coastline the coastal sea is the territorial sea although there are some small areas of the sea between the baselines and the internal waters of the States or the NT.
high seas). The trigger for their exercise relates to ‘oil or noxious substances’, rather than the ‘oil’ or ‘substances other than oil’, and they relate to escaping, have escaped, or are likely to escape from a ship, rather than a ‘marine casualty’. In such cases AMSA may take such measures as it considers necessary to prevent or reduce the pollution, or likely pollution, by the oil or noxious substance.

This different wording would not normally be material, but it could be if there is a dispute about compensation being sought, as to which see below. One may see that the difference between this part of the Act and the earlier part is not only the zones of the sea where the casualty or other ship may be, but also what pollutant is involved. In the first part, where the Act relies on the Intervention Convention, the convention itself sets out the substances that are involved. In this second part, ‘oil’ is defined widely as including just about any oil. However, ‘noxious substance’ is defined in the same terms as the Protocol to the Intervention Convention, so it has the same meaning as for the first part of the Act.

Contravention or failure to comply with a valid direction is an indictable offence for which prosecution may be brought without any time limit. It may well be that AMSA incurs much expense in dealing with a marine casualty and the power to recover its expenses incurred in dealing with the vessel or its cargo is contained in a separate Act, Pts IV and IVA of the Protection of the Sea (Civil Liability) Act 1981.

Many of these extensive powers were created under major amendments to the Act in 2006 and, in order to deal with these powers and to bring expertise to their exercise, AMSA created the position of Maritime Emergency Response Commander (MERCOM). The position arose out of the Australian Transport Council agreement in 2005 to provide a towage capability at strategic locations around the Australian coast, to appoint a single national coordinator to manage emergency interventions in shipping casualties that threaten to create significant pollution and to enhance the powers for intervention in them. A towage tug has been commissioned (Pacific Responder) and it is based in Cairns and there are arrangements in place for tugs to be hired as the occasion demands, which aspects are managed by MERCOM.

It can be seen, therefore, that the Powers of Intervention Act 1981 gives wide powers to the Commonwealth, administered through AMSA, to direct and regulate the management of a maritime casualty that pollutes or is likely to pollute the Australian coast or the waters off it. Of parti-

98 Section 10(1),(2).
99 Section 10(8).
100 Sections 11-20.
101 Comprised of the Transport Ministers of the Commonwealth, States and the NT.
cular note is that a direction under the POI 1981 prevails over a direction under any State or NT law to the extent of any inconsistency.\textsuperscript{103} It also prevails over any direction under any other Commonwealth Act unless that act is enacted after the 2006 amendments to the POI 1981, or an Act expressly provides to the contrary, or unless the actions come under the \textit{Historic Shipwrecks Act} 1976 (Cth).\textsuperscript{104}

There are other provisions of the POI 1981 that are important but space precludes addressing them all except for two of them. The first is that extensive protections are given against liability for civil or criminal proceedings against the Minister, AMSA officers, persons giving or being given directions, etc, because of any act done or omitted to be done in the exercise of any power conferred or compliance with any direction made under the Act.\textsuperscript{105} It should be noted, however, that this leaves open possible liability for any act or omission purportedly done under the Act but, in fact, not so at all. However, and this is another area in which legal options are open, the Act also provides that the protection does not lie to a person to whom a direction is given to the extent that it is inconsistent with an international agreement to which Australia is a party.\textsuperscript{106}

The other point that should be mentioned relates to recovery of expenses or compensation by those, other than the casualty or ship that caused the problem, who may suffer an expense in compliance with a direction. A party to whom a direction is given who incurs reasonable expense may seek to recover it from the owner or owners of the ship and that sum is a debt recoverable in any court of competent jurisdiction.\textsuperscript{107}

As to compensation, if actions under the Act result in acquisition of property from a person otherwise than on just terms the Commonwealth is liable to pay a reasonable amount for it. This reflects the provision in the Australian Constitution that the Commonwealth may not acquire property from a person without paying compensation on just terms.\textsuperscript{108}

The POI 1981 does not, however, provide that the acquisition is by the Commonwealth and leaves open an argument that if a person’s property is acquired by any party then the Commonwealth must pay the compensation. There is a compensation provision in the \textit{Intervention Convention} which, however, is on somewhat different terms\textsuperscript{109} and it would have

\begin{itemize}
\item \textsuperscript{103} Section 5.
\item \textsuperscript{104} Section 5(1C).
\item \textsuperscript{105} Section 17A(1)-(5).
\item \textsuperscript{106} Section 17A(6).
\item \textsuperscript{107} Section 17B.
\item \textsuperscript{108} Section 51(xxxi).
\item \textsuperscript{109} \textit{Intervention Convention} Art VI provides: ‘Any Party which has taken measures in contravention of the provisions of the present Convention causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article I’.
\end{itemize}
been preferable if this had been reflected in the Act. However, there is not space here to explore the liability of the Commonwealth under the Convention or the POI 1981 except to note that the compensation provisions could have been made clearer and that this lack of clarity is liable to be the source of extensive litigation should a major and expensive incident occur.\textsuperscript{110}

These powers given under the POI 1981 are extensive, but they are not far different from the powers given to the SOSREP in the United Kingdom.\textsuperscript{111} They are necessary if there is to be power to deal with a major maritime casualty that is causing, or threatening to cause, major pollution. One only has to be aware of millions of dollars of damage, the killing and maiming of marine life and general loss and distress caused by a major maritime casualty to be sympathetic to these extensive powers being granted, but it is essential, of course, that they be exercised well. Examples of these types of marine casualties are the Exxon Valdez, the Erika and the Prestige where better and more extensive management may well have prevented the extent of the disasters. One also notes that these powers, except sinking of the casualty itself, are exercisable by AMSA, through the office of MERCOM, so the risks of uninformed political intervention are much reduced. This uninformed interference occurred in the Australian maritime casualty, the tanker Kirki in 1991, when certain political interference resulted in certain aspects of the casualty’s management being far from satisfactory. Under the POI 1981 its repetition is now much less likely although, of course, in the end AMSA is subject to directions from the Minister.\textsuperscript{112}

7.9 Environment Protection (Sea Dumping) Act 1981

The Australian Government gave effect to the London Convention in the Environment Protection (Sea Dumping) Act 1981. This Act fairly faithfully reproduces the provisions of the convention. Controls and regulations

\textsuperscript{110} It should be noted that if the casualty is an oil tanker there may be adequate compensation paid to those who suffer loss, damage or expense under the CLC or the Fund Convention and the Commonwealth Acts, discussed above, that give effect to them in Australian law.

\textsuperscript{111} The structure of marine rescue, marine pollution response and general coastguard functions were the subject of a number of inquiries and then revisions in the United Kingdom. The functions are now combined into the Maritime and Coastguard Agency (MCA), which is the competent authority to deal with marine pollution from ships and offshore rigs. Included in the MCA is the Counter Pollution and Response branch. In its Salvage Control Unit is the SOSREP, the Secretary of State’s Representative for Marine Salvage and Intervention, SOSREP, who has wide powers to overview marine casualties and their salvage and to give directions. The UK National Contingency Plan for Marine Pollution from Shipping and Offshore Installations is the UK equivalent of Australia’s National Plan, as to which see Section 11.4 below. Generally see the MCA website on <http://www.mc.gagov.uk> and follow prompts.

\textsuperscript{112} Australian Marine Safety Authority Act 1990 (Cth) s 9A.
are imposed on materials that fall within the definitions of the substances that are banned from dumping at sea or that are required to be strictly controlled as to the amount, place and manner of their dumping at sea. The Act extends to incineration at sea, and it also covers loading controlled wastes for that purpose without a permit. Dumping extends to ships and other material which may be placed offshore to create artificial reefs, which are often used to create an attractive marine environment for marine life and to support scuba diving tourist attractions. This Act has a different structure to the other marine environment Acts that give effect to the IMO conventions, so it needs to be read carefully to understand its various nuances.

Turning to more detailed consideration of the Act, one sees that the early sections deal with definitions and jurisdiction over which the Act operates, including ‘Australian waters’, which are defined as out to the limits of the outer continental shelf. Provision is made to deal with the special offshore areas; including the overlap area between the Australian and Papua New Guinean waters in and near the Torres Strait and the maritime boundary between Australia and Indonesia. In relation to these, the Act makes provision for the minister to consult with the governments of those countries and then gazette whether the Act applies to those relevant waters or not. The Act binds the Crown, including the territories, but does not apply to Australian or foreign government defence ships and aircraft.

There is the usual ‘roll back’ provision of the Commonwealth laws in the Act if the State or Territory gives effect to the 1996 Protocol to the convention. This is done by notice in the gazette if the minister is so satisfied.

The substantive aspects of the Act commence with s 10A which section provides that a person is guilty of an offence if, otherwise than in accordance with a permit, the person ‘dumps controlled material into Australian waters from any vessel, aircraft or platform’, or dumps a vessel, aircraft or platform into those seas. If the dumping occurs from an Australian vessel, aircraft or platform the person commits an offence if it occurs into any part of the sea. The penalty for the offence varies on conviction, in declining seriousness, from when the material is ‘seriously harmful’, down to not being in the list in Annex I to the 1996 Protocol, and further down to ‘in any other case’.

113 Section 4.
114 Sections 4-8.
115 Section 9(1). Exceptions to the ‘roll back’ are if the activities involve ‘seriously harmful material’; s 9(2).
116 Section 10A(1).
117 Section 10A(2). The penalty varies from a maximum of 10 years prison and 2000 penalty units down to one year prison and 250 penalty units, s 10A(2).
Incineration of controlled material is made an offence in a section similar to that regulating dumping\(^\text{118}\) and a person who knowingly or recklessly loads, or exports, such material for illegal dumping or incineration is also guilty of an offence.\(^\text{119}\) In relation to placing an artificial reef in the sea, a person is guilty of an offence if it is not done in accordance with a permit.\(^\text{120}\) Further, a person who is a ‘responsible person’ in relation to such activities concerning an offending craft, material or artificial reef is also guilty of an offence. There are exceptions to the application of the relevant sections, which include for vessels dumping or incinerating beyond Australian waters if done in accordance with a permit granted by another state party to the 1996 Protocol, or loading for such an activity. Other defences are the more usual ones, such as the activity being necessary to secure the safety of human life or of a vessel, aircraft or platform, or averting a threat, or to minimise damage to human or marine life.\(^\text{121}\) The onus is on the defendant if relying on any of these exceptions.\(^\text{122}\)

The Act also provides that a party seeking a permit for a regulated occurrence may be liable to refund the government the costs of it taking steps to repair or remedy any condition arising from it. Applications for a permit may be granted, revoked or varied.\(^\text{123}\) Enforcement is by inspectors who are given very wide powers. They may board any relevant vessel, aircraft or platform, or enter premises ashore by consent or, if there is no consent, by warrant by a magistrate. The inspectors may search, make copies of documents, and even have the power of arrest without warrant if the inspector believes, on reasonable grounds, that a person has committed an offence and proceeding on notice by summons would not be effective.\(^\text{124}\) A Federal or State court may grant an injunction on application by the Attorney-General or an ‘interested person’ and, of course, providing false statements or documents is an offence. There are detailed provisions whereby documents, certificates etc are prima facie evidence of their contents. The 1996 Protocol is Sch 1 to the Act.

### 7.10 Hazardous Waste (Regulation of Exports and Imports) Act 1989

Australia gave effect to the Basel Convention in the Hazardous Waste (Regulation of Exports and Imports) Act 1989. The Act seeks to regulate the

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\(^{118}\) Section 10f.

\(^{119}\) Sections 10c, 10d.

\(^{120}\) Section 10e.

\(^{121}\) Section 15. In the latter case a report must be made to the minister as soon as practicable, s 15(3)(d).

\(^{122}\) Section 15(d).

\(^{123}\) Sections 16-23. To give the whole process transparency, all applications, permits, refusals etc are to be published in the Government Gazette, s 25.

\(^{124}\) Section 32.
export, import and transit\textsuperscript{125} of hazardous waste to ensure that it is done in an environmentally sound manner to protect the environment from the harmful effects of the waste.\textsuperscript{126} It is drafted in a detailed manner and, perhaps, is somewhat convoluted in its provisions and many of its prescriptive provisions would be better in the Regulations.

Part 2 regulates the activity in providing that a person wishing to import, export or transit ‘hazardous waste’ must put a ‘proposal’ to the minister for a permit. ‘Hazardous waste’ is defined in s 4 and in relevant parts of the \textit{Basel Convention} to which are added ‘household waste’ and ‘residues’. Permits are only granted if the minister is satisfied as to the requirements set out in the Act and, if granted, may be revoked, surrendered or varied.\textsuperscript{127}

The Act sets out strict guidelines under which the ‘minister’, which means the departmental advisers in most cases, is to make a decision on applications for permits. The Act also requires that the regulated waste may not be disposed of in Antarctica. The powers given to the minister are wide, but there is some check on them as reviews of the minister’s decision can be taken to the independent Administrative Appeals Tribunal.\textsuperscript{128} Inspectors are given wide powers and some transparency is provided by the minister being required to publish details of applications, permits, etc in the Government Gazette.\textsuperscript{129} The \textit{Basel Convention} is a schedule to the Act.

7.11 Environment Protection and Biodiversity Conservation Act 1999

A major review and revision of the Commonwealth environmental legislation resulted in the passage of the \textit{Environment Protection and Biodiversity Conservation Act 1999} (EPBC Act) which consolidated a number of Acts dealing with regulation of activities that may have an effect on the environment. The Act is massive and its concerns include the process for approvals for all sorts of activities, prosecutions for offences and the conservation of the environment and biodiversity. It has its major application to land activities, but it also applies to the marine environment and offshore generally. It expressly extends to cover the ‘Australian jurisdiction’, which is defined to mean all persons, aircraft and vessels within the limits of the Australian EEZ and outer continental shelf and to

\textsuperscript{125} ‘Transit’ in this Act relates not to transit passage through the territorial sea, but transit in that the waste is imported into Australia and then exported again (within 30 days); s 4B.

\textsuperscript{126} Section 3.

\textsuperscript{127} Part 2 Div 4.

\textsuperscript{128} Section 57.

\textsuperscript{129} Section 33.
Australian persons, corporations, aircraft, vessels and their crews etc anywhere.\textsuperscript{130}

The objects of the EPBC Act include to provide for the protection of the environment, promote ecologically sustainable development, to promote the conservation of biodiversity and the protection and conservation of heritage.\textsuperscript{131} A detailed consideration of the EPBC Act is not appropriate here, but its main relevant aspects will be mentioned.

Part 3 deals with the World and National Heritage listing of suitable things and areas, of which one example offshore is the listing of the Great Barrier Reef on the World Heritage list.\textsuperscript{132} The Act also touches on the requirements and regulation of a Commonwealth marine area.\textsuperscript{133} A person may not take an action, without approval, in a Commonwealth marine area, or even outside it, if it has or is likely to have a ‘significant impact’ on the environment, and this control extends over the fisheries covered by the \textit{Fisheries Management Act} 1991 (Cth).\textsuperscript{134} The approval process is regulated by Chapter 4 of the EPBC Act, so that an assessment must be made of the environmental impact of the proposed action.

The Act also deals with strategic assessments, including of fisheries, with particular types of fish being expressly addressed, such as whales, dolphins and porpoises (cetaceans).\textsuperscript{135} The object here is to identify threatened species and to manage all fisheries so that they are sustainable. An ‘Australian Whale Sanctuary’ is established over the waters coterminous with the EEZ (the states’ three nautical mile limit area is included)\textsuperscript{136} and this sanctuary is managed and regulated under the Act. In those waters it is an offence to kill, injure, take, import or export a cetacean, unless approval is given or one of the exceptions applies.\textsuperscript{137} If a person does kill a cetacean in the said waters the property in that mammal vests in the

\textsuperscript{130} Section 5. See also s 158 of the \textit{Acts Interpretation Act} 1901 (Cth) which provides that, except where the contrary intention appears, the provisions of every Act shall be taken to apply in the ‘coastal sea of Australia’.

\textsuperscript{131} Section 3.

\textsuperscript{132} Part 3 Subdiv A.

\textsuperscript{133} Part 3 Subdiv F. A ‘Commonwealth marine area’ is the waters, seabed and airspace in the EEZ or outer continental shelf, except those vested in the States or NT under the \textit{Coastal Waters (State Title) Act} 1980 (Cth) and its NT equivalent; see also the \textit{Coastal Waters (State Powers) Act} 1980 (Cth). A ‘Commonwealth area’ is defined as the land, sea, seabed and airspace in the Commonwealth including the EEZ and continental shelf, except the ‘coastal sea’ of the States and the internal Territories; s 525. In considering jurisdiction of offshore areas regard must also be had to the \textit{Seas and Submerged Lands Act} 1973 (Cth).

\textsuperscript{134} Sections 23, 24, 245A. Under the \textit{Fisheries Management Act} 1991 the Australian Fisheries Area (AFZ) is coterminous with the EEZ; s 4, but excludes the ‘coastal waters’ which are the first three nautical miles offshore from the States or internal Territory; s 5.

\textsuperscript{135} Chapter 4 Pts 10, 11.

\textsuperscript{136} Sections 225-227.

\textsuperscript{137} Sections 229-235.
Commonwealth; but the Commonwealth is not liable, as are others under the Act, for thereby being in possession of that mammal.\textsuperscript{138}

Chapter 5 of the EPBC Act, a lengthy piece of legislation alone, deals with the conservation of biodiversity and heritage.\textsuperscript{139} It is concerned with recovery plans, threat abatement plans, wildlife conservation plans, international movement of wildlife, application under Australian law of CITES,\textsuperscript{140} management of heritage areas and, most importantly, giving statutory effect to the ‘precautionary principle’ in decision-making.\textsuperscript{141} The concluding parts of this massive Act make provision for enforcement, including boarding vessels, arrest, seizure, and penalties.\textsuperscript{142}

A perusal of the Act reveals that its regulatory provisions were not drafted from the point of view of protecting the marine environment from shipping offences. As an example, as a result of the grounding of the \textit{Bunga Teratai Satu} in the Great Barrier Reef (GBR) on 2 November 2000\textsuperscript{143} a review of the Commonwealth legislation was undertaken as the EPBC Act was seen as ineffective to deal with this shipping casualty situation. The \textit{Great Barrier Reef Marine Park Act} 1975 was amended to make it more effective in groundings situations in the GBR, where no oil is spilled, but the EPBC Act was not improved.

\section*{7.12 Conclusion}

The raft of Commonwealth legislation described above is, by and large, fairly effective and competent and it is backed by a Commonwealth

\textsuperscript{138} Section 246.
\textsuperscript{139} Australia was an active participant at the Rio Conference 1992 and is a party to the \textit{Rio Declaration on Environment and Development}, Agenda 21 and the \textit{Convention on Biological Diversity} 1992.
\textsuperscript{141} Sections 391, 391A.
\textsuperscript{142} Chapter 2 of the \textit{Criminal Code} (Cth) applies to offences; see s 7 of the EPBC Act.
\textsuperscript{143} On 2 November 2000 Mashkoor Hussain Khan, the first mate of the \textit{Bunga Teratai Satu}, pleaded guilty to an offence against s 38A of the \textit{Great Barrier Reef Marine Park Act} 1975 in that he did ‘negligently enter a Marine Habitat Protection Zone …, through the navigation of a ship, … other than [for] a purpose permitted under the zoning plan’, for which he was fined A$15,000 and ordered to pay costs. He also pleaded guilty on the same occasion to an offence against s 113 of the \textbf{GBRM} Regulations in that he ‘did damage coral in the Cairns Area Plan of Management’, for which he was fined A$1000. Mr Khan was then allowed to leave the country. Because the Commonwealth Government’s action was seen by the Queensland Government as ineffective, the Queensland EPA then laid charges which became the case of \textit{Williams v Malaysia International Shipping Corporation Berhad and Syed Naeem Jafar}, Cairns Magistrates Court, Schemioneck SM, Numbers MAG-214641 and 214607 of 2000(0). The charges were for offences against s 119 of the \textit{Environmental Protection Act} 1994 (Qld) in unlawfully causing serious environmental harm. On the master and owner pleading guilty to this charge the other charges were withdrawn.
administration that applies it reasonably well. The only limitation on this is the lack of legal maritime law skills in the various government departments, State and Commonwealth, although this is steadily being remedied.

This concludes the survey of Commonwealth legislation and the next chapter will deal with the States’ and Territories’ legislation.
Chapter 8

Australian Laws —
States and the Northern Territory

8.1 Introduction

As the Australian legal system is comprised of a federation of States, and as the Commonwealth and the States agreed in the Offshore Constitutional Settlement 1979 to a sharing of powers out to the three-mile limit, then each of the States and the Northern Territory parliaments have jurisdiction to pass their own legislation, including giving effect to the international marine pollution conventions. This they have all done. In some cases it has been well done and in others not so well. The main reason that the various parliaments have passed differing legislation is that it has been driven by local issues. (In this chapter, to save tedious repetition, the word ‘States’ will frequently include the Northern Territory).

There was considerable uniformity in the 1980s when the States gave effect to MARPOL, partly because a suitable draft Act was produced and all of the parliaments were encouraged to follow it. But during the 1990s the uniformity was left behind and each of the States now has legislation that only reflects the provisions of the relevant international convention to the extent that the parliaments of the day were informed of the need for conformity with those provisions and, if informed, were prepared to abide by them.

The relevant legislation in each of the States and the Northern Territory will now be addressed. It may be noted, however, that a more complete description will be made in the earlier sections (Queensland and New South Wales) but, to avoid repetition in the later sections, the common aspects will not be addressed in detail and only differences from the major State and Northern Territory aspects will be mentioned.

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1 Most of them had the title of or similar to Pollution of Waters by Oil and Noxious Substances Act of 1986 or 1987.
2 The NT Parliament had an Act that still gave effect to OILPOL 54 many years after MARPOL 73/78 had replaced OILPOL 54, so the NT Act was, in effect, nonsense. The effect probably was that, due to the ‘roll back’ provision, the Commonwealth Act applied MARPOL in the relevant jurisdiction.
3 The earlier legislation was addressed in White M, Marine Pollution Laws of the Australasian Region (Federation Press, 1994) Chapter 8.
8.2 Queensland

8.2.1 Introduction
Queensland has a long coastline which is dominated by the Great Barrier Reef (GBR) which is world heritage listed and a national park. The coast is also characterised by having the Torres Strait in the north, with its unique administration, the Gulf of Carpentaria to the west, noted for its shallower water and highly prized prawns, and, in the south, its famous surfing beaches. There are numerous Acts which bear on the topic of marine pollution but the main one dealing with pollution from ships will first be addressed.

8.2.2 Transport Operations (Marine Pollution) Act 1995
The main Queensland Act relating to the marine environment is the Transport Operations (Marine Pollution) Act 1995 (TOMPA). The Act follows the basic structure of MARPOL. It states that its overall purpose is to ‘protect Queensland’s marine and coastal environment by minimizing deliberate and negligent discharges of ship-sourced pollutants into coastal waters’ and it complements the approach adopted by the Commonwealth and other States.

The Act addresses the question of jurisdiction and refers to the limited jurisdiction granted to the State under the Coastal Waters (State Powers) Act 1980 (Cth) and that its jurisdiction deals with ‘discharges from ships that happen, or are taken to happen, in the first three nautical miles of the territorial sea and other coastal waters subject to the ebb and flow of the tide’. The term ‘coastal waters’ is defined in the Act’s dictionary by reference to the Acts Interpretation Act 1956 (Qld). In effect the Queensland coastal waters are the internal waters that are subject to the ebb and flow of the tide plus those out to three miles from the Queensland low water mark or baseline. Because of the large number of

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4 See Chapter 9.
5 Also addressed in Chapter 9.
6 Section 3(1).
7 Section 10(7).
8 Section 11.
9 Dictionary, Schedule. The Acts Interpretation Act 1954 (Qld) s 36, defines ‘coastal waters of the State’ as meaning: ‘(a) the parts of the territorial sea of Australia that are within the adjacent area in respect of the State, other than any part mentioned in the Coastal Waters (State Powers) Act 1980 (Cth) s 4(2); or (b) any sea that is on the landward side of any part of the territorial sea of Australia and within the adjacent area in respect of the State, but is not within the limits of the State’. The Coastal Waters (State Powers) Act 1980 s 4(2) provides, in effect, that if the territorial sea is extended from 3 nm to 12 nm references to ‘coastal waters’ for the States shall not thereby be extended beyond the 3 nm limit. Australia extended its territorial sea to 12 nm in 1990, as permitted by UNCLOS.
islands and cays, precisely identifying these waters is not always easy, even when using large scale charts.

It could well be that the Act is not fully accurate in describing the State jurisdiction in these terms as it omits any reference to jurisdiction under the ‘nexus’ principle established by the High Court in *Pearce v Florenca*. The Act asserts that it applies to ‘all ships in coastal waters’ and it deals with discharges of pollutants from ships or during their transfer operations. If the discharge is not from a ship other Acts apply, particularly the *Environmental Protection Act 1994 (Qld)*, as to which see below.

Part 4 Div 1 of TOMPA gives effect to MARPOL Annex I by providing that any discharge of oil from a ship into coastal waters is an offence by the owner, master and ‘another member of the ship’s crew whose act caused or contributed to the discharge, unless the member was complying with an instruction from the master or of someone authorised by the master to give the instruction’.13

It is a defence to a prosecution for a discharge offence if it was necessary to save the ship or life at sea, it resulted from damage, other than intentional damage and all reasonable precautions were taken to prevent or minimise the discharge, or if it was authorised for training purposes. Intentional damage is defined as where the relevant owner, master or crew acted ‘with intent’ or ‘recklessly and with knowledge that damage would probably result’.14 ‘Damage’ is defined in the Dictionary as not including ‘any existing defect in the ship or its equipment resulting from any event, a lack of maintenance or anything else’. This definition was amended in 2000 and, to some extent, it anticipated the *Sitka II Case* but it seems to lack some precision. One can expect it will be challenged at a high level as to its true meaning and effect in due course.

Regulations may exempt ships from the offence if the Regulations are in accordance with the relevant MARPOL Regulations. If those oil residues that cannot lawfully be discharged in compliance with the Act are not kept onboard the master and owner each commit an offence. The usual shipboard emergency plan is to be kept on board.18

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10 See Chapter 6.
11 Section 12.
12 Section 14.
13 Section 26. The section removes any defence based on the Queensland *Criminal Code* ss 23 (act or omission independently of the person’s will or by accident) and 24 (honest and reasonable, but mistaken, belief); s 26(2).
14 Section 28.
16 Section 29 and also see the *Transport Operations (Marine Safety) Regulations 2004*.
17 Section 27.
18 Section 30.
MARPOL Annex II is given effect under Pt 5 of the Act in dealing with noxious liquid substance discharges. The structure is familiar as the Act provides that if a noxious liquid substance is discharged from a ship into the coastal waters each of the owner, master and ‘another member of the ship’s crew whose act caused or contributed to it (unless under instructions) commits an offence. The usual defences are in place (saving life at sea, etc) and the Regulations are empowered to exempt the discharge if it is in accordance with the provisions of MARPOL.

MARPOL Annex III, prevention of pollution by packaged harmful substances, is given effect in Pt 6. Jettisoning a harmful substance carried as cargo in packaged form into coastal waters gives rise to an offence by the owner, master and ‘another member of the ship’s crew’. The defences in this case include securing the ship’s safety, saving life at sea, or, if the offence was washing leakages overboard, the act was done in accordance with the Regulations.

MARPOL Annex IV, prevention of pollution by sewage, is given effect in Pt 7. The framework and language is a bit different to the other parts, as is the framework in MARPOL, because it was drafted more recently than the other annexes. The Act provides that if untreated sewage is discharged from a ship into ‘nil discharge’ waters, each culpable person for the discharge commits an offence; respectively for raw and treated sewage. A slightly different offence is also provided in relation to sewage in that, if a ship is a ‘declared ship’, it is an offence to be in nil discharge waters unless fitted with a ‘sewage holding device’ appropriate for that ship’s capacity and that particular voyage. This provision makes sense, especially having regard to the large number of cruise and tourist passenger vessels that operate in the Great Barrier Reef and other areas of the Queensland coast. The Act also requires a shipboard sewage management plan to be carried, for the usual defences and that relevant equipment must be functioning. Importantly, Pt 7 does not prevent more stringent requirements for sewage discharge for special areas, so that if a local waterways law so provides then compliance with it is not exempted by reason only of compliance with TOMPA.

Part 8 of TOMPA gives effect to MARPOL Annex V, prevention of pollution by garbage. ‘Garbage’ is defined in the terms set out in MARPOL to which is added that it includes plastics. The main section

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19 Section 35(1). Sections 23 and 24 of the Queensland Criminal Code do not apply; s 35(2).
20 Sections 42-44.
21 A ‘culpable person’ is defined as the owner, master of ‘another person’ in the usual way; s 45.
22 A ‘declared ship’ is defined as one so declared under the Regulations; ss 45, 49(4).
23 Section 49(2).
24 Section 51C.
25 Dictionary and s 53.
provides for an offence by the owner, master and ‘another person’ if garbage is disposed of from a ship into coastal waters.\textsuperscript{26} There is no minimum ship tonnage for that offence, but the requirement to carry on board a shipboard waste management plan and to have the prescribed equipment only applies to a ship with a gross tonnage of at least 400 tons or designed to sleep at least 15 persons.\textsuperscript{27} The usual defences are available but, because the Act and MARPOL prohibit any plastic going into the sea, the defence of accidental loss of a synthetic fishing net is only available if ‘all reasonable precautions were taken to prevent the loss’. Exemptions may be provided for in the Regulations provided they give effect to relevant Regulations under MARPOL or if they relate to fishing or tourism operations.\textsuperscript{28}

MARPOL Annex VI (air pollution) is expected to be incorporated into the Act in due course.

Section 9 is of interest in that it deems spills outside coastal waters that enter coastal waters to be spills in coastal waters. This is of particular effect where a spill is in the Great Barrier Reef Marine Park (GBRMP) and the GBRMP Act applies, prevailing over TOMPA, and then the spill crosses the line and TOMPA can apply. Amendments to the Act in 2006 removed the devolution to port authorities for spill response within port areas, provided whistleblower protection for persons, including crew, for reporting illegal discharges, created the capacity to make enforcement orders (much like the Environmental Protection Agency can under the \textit{Environmental Protection Act 1994}) to ensure compliance with the Act, and the compulsory insurance requirement applied down to the reduced vessel length of 15 metres LOA (Length Overall). These amendments arose out of the 10-year review of the Act as required by s 135.

Much of TOMPA deals with the regulatory and enforcement aspects. Part 9 deals with transfer operations from or to ships and makes it an offence if a discharge occurs and none of the defences apply. It is an offence to conduct transfer operations at night for certain ships unless authorised and adequate records of transfers are to be kept.\textsuperscript{29} In relation to shore port reception facilities for ships to discharge pollutants ashore, TOMPA provides that the ‘general manager’ may direct an owner or occupier of a port, terminal or establishment to provide such facilities or ensure they are provided.\textsuperscript{30} In many ports the services are available from private contractors and the issue often is whether there is an obligation on the state party to ensure that the services are prompt and the charges

\begin{footnotesize}
\begin{enumerate}
\item Section 55(1). Sections 23 and 24 of the Queensland \textit{Criminal Code} do not apply; s 55(2).
\item Section 55A.
\item Sections 56, 57.
\item Sections 61-65.
\item Section 66.
\end{enumerate}
\end{footnotesize}
reasonable. If the services are slow or the charges too high there is an incentive for persons to breach the provisions and unlawfully and covertly discharge into the sea. The records play an important part here as inspectors may check the records and, if the records do not accord with the general characteristics of ship operations, it is prima facie evidence of an unlawful discharge of pollutants.

Part 11 of TOMPA requires unwarranted discharges to be reported to the coastal authorities and Pt 11A is the port state control requirement for compulsory insurance to cover clean up costs and damages in the event of a discharge.

Part 12 of TOMPA is concerned with the powers and structures for investigation and enforcement of the other provisions of the Act. It creates ‘authorised officers’ who are empowered to investigate matters, monitor performance, examine ships, detain them, enter on premises and require answers to questions. There are some safeguards for personal liberties in that a warrant from a magistrate is required to enter premises without the owner’s or occupier’s consent. The officers may, however, board a ship ‘at any time’ to investigate compliance with the Act if there are reasonable grounds to suspect that the ships is or has been used in the commission of an offence or there is relevant evidence on board. There is power to detain a ship if there are ‘clear grounds for believing’ a discharge offence has occurred but it may be released on appropriate security being given.

In Pt 12, Div 6 addresses the powers to give directions and to coordinate a response to a pollutant spill. The minister may make an ‘emergency declaration’ and, in that case, it overrules local laws. The declaration may not be in force for longer than 14 days. Division 6 also creates the position of marine pollution controller who is to be the general manager of marine pollution spills for which the State has responsibility. This person and all acting under his or her direction are given statutory protection from civil (but not criminal) liability. The general manager is the person given extensive powers under TOMPA to deal with a marine pollution spill. The Act also makes provision for the relevant port authority to be involved, which is important as port authorities have been privatised.

Division 7 of TOMPA gives effect to the Intervention Convention so that the general manager of Maritime Safety Queensland (MSQ) has wide

31 ‘Authorised officers’ may be drawn from all or any of the public service, a port authority, Maritime Safety Queensland (in the Queensland Department of Transport) or other persons; s 72.
32 Section 78.
33 Section 80.
34 Sections 84, 85, 113.
35 Sections 92-96.
36 See Chapter 3.
powers if satisfied there is a maritime casualty and there is ‘potentially serious danger’ to the Queensland coastline or to related Queensland interests.\(^{37}\) It is an offence not to obey these orders, which may be given to a wide variety of people about their conduct, and about ships, cargo and other property.

Importantly for innocent persons who may be caught up in a pollutant spill, if a proposed amendment is passed there will be power in the court to award compensation against the State. The court must be satisfied that ‘it is just to make the order in the circumstances of the particular case’ and the Regulations may prescribe what matters should be taken into account.\(^{38}\)

Part 13 is directed at the State or the relevant port authority seeking to recover the costs and expenses of dealing with a pollution discharge (‘discharge expenses’).\(^{39}\) Bearing in mind that most ships should have insurance against these claims and that the relevant international conventions\(^{40}\) make provision for this, the provisions of the Act are effective but balanced. Under this Part the ship may be detained until financial security is provided and then it must be released. What usually happens is that MSQ, or some similar body, assists the various ports and other agencies to prepare the claims for clean up costs and rehabilitation and then presents and negotiates with the relevant P&I Club and/or the Fund. Usually the settlement is about 80% to 90% of the claim but, it is suggested, if more precise records were kept probably a higher percentage would be recovered. If the parties cannot settle the claim, then the claim may be a debt payable to the State jointly and severally by the owner and master of the ship.\(^{41}\) The State can enforce against the ship or the security and the onus then lies on the P&I Club and/or the Fund to commence litigation by way of ‘appeal … to the appropriate court within 30 days’.\(^{42}\)

A new Pt 13A provision in TOMPA, inserted in 2006, provided for the District Court to have jurisdiction to ensure compliance with the Act. On application of the general manager, or others set out in the Act, the court may order persons to start, to stop or to refrain from relevant activities. Further, the general manager may seek a written undertaking from a person that he or she will not contravene the Act and any breach of the undertaking permits the general manager to seek an enforcement

\(^{37}\) Section 98.

\(^{38}\) Section 110.

\(^{39}\) Sections 111-117, 122.

\(^{40}\) For discussion of the CLC, the Fund Convention and the Bunkers Convention, see Chapter 4.

\(^{41}\) Section 192.

\(^{42}\) Section 115. The appropriate court is the Queensland District or Supreme Court, depending on the amount in dispute; s 116.
order from the District Court. These are all sensible provisions and are to be encouraged.

Part 14 is a mixture of various provisions about legal proceedings. Certain reports and analyst certificates are made *prima facie* admissible, but their contents can be challenged with other evidence. There are some important provisions about the liability of corporations and their ‘executive officers’; that is anyone concerned in the management of the corporation. A relevant person’s state of mind may be proven if it was within the person’s actual or apparent authority and a representative of the person had that state of mind. Further, the executive officers of the corporation ‘must ensure that the corporation complies with the Act’ and if the corporation commits an offence ‘the executive officers of the corporation also commit an offence’, which is the offence of failing to ensure that the corporation complied with the Act. It can be seen from these provisions that TOMPA is not timid about lifting the corporate veil and is far reaching into a corporation’s structure. It follows that there is no limit to the number of persons who may be liable who have any role in the management of a company, although, if the numbers are large, one would expect charges only to be laid against those considered by the authorities to be the most culpable. There are, however, some defences which include proving that:

(a) the officer took all reasonable steps to ensure the corporation complied with the provision; or

(b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

Division 2 relates to the legal proceedings for recovery of discharge expenses, which are as a debt and the State is empowered to act for a port authority in such proceedings. Proceedings may be commenced by way of indictable or summary proceedings. However, if an indictment is presented there is an option for the prosecutor still to proceed in a summary way under the *Justice Act* 1886, but not if the defendant objects or the magistrate considers the charge should continue as an indictment. The time limitation to bring proceedings is two years from the offence, or within three years of the prosecutor knowing of the offence. A court

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43 An ‘executive officer’ of a corporation is defined as a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer; Dictionary.

44 ‘Representative’ is defined as an executive officer, employee or agent; Dictionary.

45 Section 120.

46 Section 121.

47 Section 121(4).

48 Section 124.
hearing proceedings may order payment of the discharge expenses and rehabilitation of the marine and coastal environment. If the matter is by indictment it goes to the District (or, rarely, the Supreme) Court, where it is heard with a jury. If it proceeds summarily, it is dealt with by a magistrate and this has the advantage of being speedier and cheaper, and the maximum penalty is lower.

Other parts of the Act deal with administrative and other provisions, which are important to consider if a prosecution is on hand, but which will not be further described here.

The Regulations to TOMPA amount to some 56 sections and 10 schedules. They are set out in an orderly fashion, with the early parts dealing with the various annexes to MARPOL. Parts are also directed to transfer operations, reporting requirements, devolution of powers to port authorities, samples and to general aspects. MARPOL itself is Sch 1 and there are numerous other schedules that set out details, of which many would be better removed from the Regulations because they are voluminous and liable to frequent change.

TOMPA is mainly administered by MSQ, which is an agency in the Queensland Department of Transport. MSQ also administers, and brings prosecutions under other Queensland maritime legislation.

This then is the overall description of the main Queensland Act that deals with pollution from ships into the coastal waters off the Queensland coast. It is well drawn and is one of the most careful and well managed of the States’ legislative structures. It is frequently used to bring prosecutions, mainly in the Queensland magistrates courts. Very few of the prosecutions are contested and the main issues usually go to the appropriate penalty and the amount of the costs of rehabilitation of the marine environment. There has not been any claim so high that it needed to involve the Fund, so they have all been dealt with by the P&I Clubs with whom the offending ships have been entered. It seems a general policy of the P&I Clubs to avoid litigation as their long experience indi-

49 Section 127.
50 Under s 134 government ‘defence ships’ are exempt from the provisions of the Act. Part 17 deals with the transition from the former legislative provisions to the new ones in the 2006 amendments, including transferring the powers and function of the former chief executive of MSQ to the new title general manager. As previously mentioned, the Schedule to the Act is the ‘Dictionary’.
51 Transport Operations (Marine Pollution) Regulation 1995, as amended. These Regulations are the subject of a 10-year expiry if not extended or replaced as required by s 54 of the Statutory Instruments Act 1992 (Qld).
52 Parts 6-10.
53 The MSQ was established under the Maritime Safety Queensland Act 2002; see also the Transport Infrastructure Act 1994 and the Transport Planning and Coordination Act 1994.
54 The main other Act the MSQ administers is the Transport Operations (Marine Safety) Act 1994.
cates that, in most cases, they will lose because, after extensive legal costs, their client ship owner and master is usually found guilty.\textsuperscript{55}

But Queensland, like all of the Australian States, has a raft of other Acts that are relevant to the protection and preservation of the marine environment. The most prominent of these, for present purposes, is the \textit{Environmental Protection Act 1994} (Qld) to which attention will now be turned.

\subsection*{8.2.3 Environmental Protection Act 1994}

The \textit{Environmental Protection Act 1994} (Qld) (EPA) is a very large piece of legislation, comprising 643 sections and three schedules, totalling over 500 pages. Its relevance to the marine environment and pollution from ships is that its jurisdiction is offshore as well as onshore. Like its Commonwealth counterpart,\textsuperscript{56} the EPA is not well suited to offshore marine environmental protection from ships but it was used with some success in the \textit{Bunga Teratai Satu} grounding in 2000.\textsuperscript{57} The EPA does not apply where TOMPA and certain other named Acts apply.\textsuperscript{58}

The EPA claims wide jurisdiction in that it binds the Commonwealth and all the other States so far as the legislative power of the Queensland Parliament permits. It operates extra-territorially in that, if a person engages in environmental harm outside the State which causes harm within it, the person is liable.\textsuperscript{59}

The key provisions for present purposes are in Chapter 8, which address ‘General Environmental offences’. The structure of the Act is that harm done to the environment is graduated, in this case serious environmental harm, material environmental harm, environmental harm and environmental nuisance.\textsuperscript{60} An act or omission that causes serious or material environmental harm is unlawful unless authorised or one of the defences apply.\textsuperscript{61} The defences include if the harm was caused whilst an

\begin{thebibliography}{99}
\bibitem{55} It is worth noting that the penalties for marine pollution are rising world wide and TOMPA is no exception to this. At time of writing the maximum is 3500 penalty units (presently $75 per penalty unit) for an individual and five times that amount for a corporation. The present cover with the P&I Clubs includes paying such fines and legal costs but this, of course, raises the premiums in due course. Further, the errant companies usually have considerable costs that fall on the company in dealing with the spill and its aftermath. There is an argument that fines for criminal activity should not be the subject of insurance although this argument has not prevailed in marine pollution circles as most of the time the spills are by accident, or if otherwise they are conducted by persons who are not the ‘controlling mind’ or the management of the company.
\bibitem{56} The EPBC Act, see Chapter 7.
\bibitem{57} See Chapter 7 for some detail about this grounding.
\bibitem{58} Section 23(2).
\bibitem{59} Section 25.
\bibitem{60} The definitions of these terms are in ss 14-17.
\bibitem{61} Section 436.
\end{thebibliography}
otherwise lawful act was being carried out or if an approved code or practice was being followed. Serious environmental harm that is ‘wilfully and unlawfully’ caused carries a higher penalty than such harm that is only ‘unlawfully’ caused and there is a similar graduation for ‘material environmental harm’ down to an ‘environmental nuisance’. The penalty includes provision for imprisonment. In this context one notes that the ‘executive officers’ of a corporation must ensure that the corporation complies with the Act and if the corporation commits an offence each of them also commits an offence; that of failing to ensure the corporation complied with the Act. It is a defence to prove the officer was not in a position to influence the conduct or, if the officer was, that all reasonable steps to try to ensure compliance were taken.

A prosecution may be brought by indictment but, as under TOMPA, there is a discretion to proceed in a summary way if the prosecutor, the defendant and the magistrate all agree. Lesser maximum penalties apply in summary proceedings.

These then are some of the key provisions about a prosecution for environmental harm in the coastal waters, rivers, bays, harbours and ports in Queensland. However, there is more. Rather than prosecute, a restraining order, including an interim one pending full proceedings, may be sought from the Queensland Planning and Environment Court, which is part of the Queensland District Court. Any of the minister, an administering authority, someone whose interests are affected or, by leave of the Court ‘some else’, can bring such proceedings. It can be seen that these provisions leave it open for court orders to be made which have far reaching effect and which do not have to be proven to the standard of proof of a prosecution. Also, by leave of the court any of the relevant environmental bodies may seek to protect the environment. There is a check, however, in that if the plaintiff brought the proceeding ‘for obstruction or delay’ then the court must order costs against it. It is an offence to contravene any order made under such proceedings. This is a useful environmental instrument for interested parties to seek relief if they consider the environment is at risk.

There is also power to bring proceedings in court for an ‘enforcement order’, which allows for an order to remedy or restrain the commission of a ‘development offence’. It may be noted that, from the marine environment point of view, this would be relevant for any development which

62 Section 437.
63 Sections 438-440.
64 Section 493.
65 Sections 494, 495.
66 In the Dictionary Sch 3, ‘court’ is defined as the Planning and Environment Court.
67 Sections 55, 56.
damaged the marine environment in a river, bay, harbour or port, such as a marina or canal development.\textsuperscript{68}

There is another proceeding that is also used from time to time, which is the ‘environmental protection order’, under which the administering authority may issue an order to comply with some aspect of the Act. The recipient must not contravene it and the penalty is higher if the contravention is wilful.\textsuperscript{69} Enforcement or prosecution for non-compliance may then be brought in the Planning and Environment Court.

It may be seen that the provisions of the EPA have a wide purview. Provided any action by a ship, port, harbour or other body does not come within TOMPA, then the EPA may well apply.

Having dealt with the two main Queensland Acts, it is convenient to mention other legislation that may have some bearing on the marine environment.

\subsection*{8.2.4 Other Legislation}

The complementary legislation to TOMPA in the Queensland suite of acts is the \textit{Transport Operations (Marine Safety) Act 1994 (Qld)} (TOMSA), which deals, as the name indicates, with the regulation of the maritime industry to ensure safety of ships in the coastal areas. There are some 200,000 vessels of various sizes that operate off the Queensland coast. Many of them are not much more than runabouts, but there are also many large vessels operating in the fisheries and tourism sectors. TOMSA sets out general safety obligations, a framework for registration and regular survey of these vessels, regulation of pilots and the pilotage structure for the Queensland ports,\textsuperscript{70} harbourmasters’ powers, the Marine Board, a structure for marine inquiries and a framework for inspectors. TOMSA is quite extensive and has a wide jurisdiction in that it operates according to its tenor in the inland waters, the ports and harbours and out to the three nautical mile limit and, where the nexus is established, beyond that.\textsuperscript{71} Vessels with international or inter-State links fall more under the Commonwealth \textit{Navigation Act 1912} than under the State Acts such as TOMPA. Much of the administration is done by MSQ.\textsuperscript{72}

\textsuperscript{68} Sections 507-513.

\textsuperscript{69} Sections 358-363.

\textsuperscript{70} Port pilotage structures are quite separate from the reef pilotage ones. For some discussion on pilotage in the Australian context see White M, ‘Salvage, Towage, Wreck and Pilotage’, Chapter 9 in White M (ed), \textit{Australian Maritime Law} (Federation Press, 2nd ed, 2000).

\textsuperscript{71} The ‘nexus’ provision and jurisdiction offshore generally, including the Offshore Constitutional Settlement 1979 the \textit{Constitutional Powers (Coastal Waters) Act 1980}, are complex. The regulation of offshore petroleum exploration and exploitation comes under the \textit{Petroleum (Submerged Lands) Act 1982}. For discussion on offshore jurisdiction, see Chapter 6. There are, of course, numerous Regulations under TOMSA.

\textsuperscript{72} Established under the \textit{Maritime Safety Act 2002 (Qld)}.
On the environmental side, there is also the *Coastal Protection and Management Act* 1995, which deals with the coast and the ‘coastal zone’, comprising the coastal waters and all of the waters to the landward side of them, and claims jurisdiction over the land down to the high water mark.\(^{73}\) The Act seeks to protect and conserve the coast and coastal areas and achieves this by having an administrative structure of management plans for districts, regions and such like, including special provision for the Torres Strait area.\(^{74}\) Its impact on ships and other vessels is probably restricted to their operations in waterways, especially canal developments, and dredging activities. Like the EPA, provision is made in it for restraining orders and there is a considerable administrative and legal detail about prosecutions, evidence and appeals. As most marine pollution of coastal seas comes from the land, this Act is directed at a major marine environmental problem but it is more about land pollution issues than those relating to ships and shipping.

There are, of course, marine parks established by the Queensland Government\(^ {75}\) and the *Marine Parks Act* 2004 (Qld) is the main Act. Its provisions include establishing marine parks and also a regulatory structure for managing them, by having zones and restrictions on activities that may be conducted in them without a licence. There is also extensive power to make orders for interested parties to remove abandoned, stranded, sunk or wrecked property and this is done from time to time when a vessel or barge strands in a marine park, or sinks or is abandoned in one.\(^ {76}\)

The offences under the *Marine Parks Act* 2004 relate to conducting unauthorised activities in them or providing false or misleading information. Wide powers are given to inspectors. There is power for the authorities to issue, and to enforce if necessary, Compliance Notices against an activity that is likely to occur or is likely to continue occurring.\(^ {77}\) The Act also makes provision for the chief executive or an inspector to apply to the court for an Enforcement Order, under which the offending party is ordered to remedy or restrain from committing an offence.\(^ {78}\) The *Marine Parks Act* 2004 provides for appeals from a compliance or removal notice (under Pt 8) by way of an internal review, the appointment of a mediator or case appraiser, or by appeal to the magistrates court. Prosecutions, as for the other legislation, may be by indictment or summary proceedings.\(^ {79}\)

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73 Sections 11-17.
74 For discussion of the Torres Strait area, see Chapter 9.
75 The Great Barrier Marine Park is under the Commonwealth legislation; see Chapters 1 and 9.
76 Part 6 Div 4.
77 Section 93.
78 Sections 111-115. This application is to the Planning and Environment Court; see s 110.
79 See Pt 9 Div 2.
Readers will know that the inter-tidal areas on the Australian coast have never been the subject of a definitive decision about jurisdiction between the States and the Commonwealth. This area, between the high water and low water marks on the coasts has, traditionally, been part of the maritime jurisdiction that turns on the old and much-used term, the ‘ebb and flow of the tide’. On the other hand, this intertidal area was not part of the High Court decision in The Seas and Submerged Lands Act Case\(^80\) as it held the Commonwealth had jurisdiction from the low water mark of historic boundaries. This issue is legislatively addressed in Queensland by the Marine Parks Act 2004 substantially amending\(^81\) and replacing the Marine Parks Act 1982, but the latter still continues to establish power in relation to tidal lands and waters and gives power to set them aside as marine parks. Probably, however, the Coastal Waters (State Powers) Act 1980 (Cth) and its equivalent State Titles Act give jurisdiction to the States and NT of this intertidal area under the definition of ‘coastal waters of a State’.

Regulation of the Queensland offshore fisheries comes under the Fisheries Act 1994 (Qld), but those fishing vessels that have inter-State or international operations come under the Commonwealth Fisheries Management Act 2000. Finally, this book does not deal with crimes in the more general sense beyond those that are offences against the marine environmental legislation. Many crimes come under the Crimes At Sea Act 2001, which is a cooperative regime with the Commonwealth to extend the criminal laws of the States and the Northern Territory, with some exceptions, offshore to the limits of the EEZ.\(^82\)

The above description of the other legislation does not, of course, cover all of the legislation that may possibly become relevant to the protection and preservation of the marine environment. It does, however, set out the main structure and mentions the various provisions. Attention will now be turned to the adjoining southern State, that of New South Wales.

### 8.3 New South Wales

#### 8.3.1 Introduction

New South Wales is the most populous State in Australia and its legislation is structured to include protecting its coastal waters as well as its ports, harbours and inland waters. The New South Wales Government has been zealous in prosecuting offenders, which has given rise to a

\(^{80}\) NSW v Commonwealth (The Seas and Submerged Lands Act Case) (1975) 135 CLR 337; discussed in Chapter 6.

\(^{81}\) Parts 13, 14. The Marine Parks Act 2004 claims legislative effect over all waters off the Queensland coast that are subject to tidal influences; s 8, and see also the relevant definitions in the Acts Interpretation Act 1954 (Qld), in its Dictionary.

\(^{82}\) See Crimes at Sea Act 2000 (Cth).
considerable body of case law. With major ports in Sydney, Botany Bay, Newcastle and Port Kembla there is a considerable amount of international shipping operating off, into and out of New South Wales coastal waters. To this is added the recreational, fisheries and tourism vessels so they all combine to make for a great deal of offshore and port activity.

The jurisdictional issues for all of the States are similar, so this section will not repeat what has been mentioned in dealing respectively with Queensland and the Commonwealth. Suffice to note that the Interpretation Act 1987 (NSW) applies the laws of New South Wales to the coastal waters, ‘as if the coastal waters … were within the limits of the State’.

8.3.2 Marine Pollution Act 1987 (NSW)

The main Act, and the one which gives effect to MARPOL, is the Marine Pollution Act 1987 (NSW). The Act applies in New South Wales State waters and ships are defined not to include pleasure craft. The Act provides that ‘State waters’ include the territorial sea and the latter is the ‘territorial sea of Australia’ and the legislation gives effect to the Offshore Constitutional Settlement 1979 by reference to the various definitions in the Interpretation Act 1987 that link in with the MPA.

MARPOL Annex I is given effect in the MPA Pt 2 ‘pollution by oil’. The first of the two key sections relating to prosecutions provides that if any oil or any oily mixture occurs from a ship into State waters the master, owner and relevant crew member are each guilty of an offence. Some of the usual MARPOL defences are enacted, such as securing the safety of the ship or saving life at sea, or the oil or mixture escaped in consequence of damage to the ship and all reasonable precautions were taken, before and after, or if the discharge of any oily mixture was approved.

It is not possible to cover the case law in this book, but readers should be aware that recent cases would need to be checked when researching the area and that, being a litigious jurisdiction, the case law in NSW is extensive. Prosecutions in NSW under this legislation are taken in the Land and Environment Court.

For Queensland see Section 8.2 and for the Commonwealth see Chapter 3.

Section 59. ‘Coastal waters’ is defined in s 58 as those in the ‘adjacent area’ to the State except those mentioned in s 4(2) of the Coastal Waters (State Powers) Act 1980 (Cth). The ‘laws of the State’ are also defined in s 58 as the laws written or unwritten and whether substantive and procedural but they do not include the laws of the Commonwealth.

‘State waters’ is defined as the territorial sea and waters to its landward side; s 3.

Section 3.

Section 3.

See discussion in Chapter 6.

Part 10.

Section 8(1).
The MPA was amended in 2002 to increase penalties substantially, reduce the scope of the statutory defences and, more relevant for immediate purposes, redefine ‘damage’. The definition of ‘damage’ under this Act, and also under the CLC and the Fund Convention, was the subject of an important judgment of the High Court in 2002 in Morrison v Peacock (The Sitka II Case). The ratio of the decision was that wear and tear did not amount to damage and that the defence of ‘damage’ meant a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some event, whether the event was external or internal to the ship or its equipment. In that case some five litres of oil escaped from a working ship’s crane over the side into the sea at Norfolk Island after the hydraulic hose on the crane burst, due to fair wear and tear and the defence was that the discharge was caused by ‘damage’ to the ship’s equipment. Taking this minor oil spill case to the High Court has to be one of the major wastes of legal costs in Australia. The Act was amended anyway; the outcome of the case was in accordance with the understanding of the convention and back in the sentencing court, in the end, the court saw fit to dismiss the charge without recording a conviction.

The amended Act defines the meaning of ‘damage’, as follows:

(3) For the purposes of subsection (2)(b), damage to a ship or its equipment does not include the following:

(a) damage arising as a result of the master or owner of the ship, or another person acting under the direction of the master or owner of the ship:
   (i) acting with intent to cause the damage, or
   (ii) acting recklessly and with the knowledge that damage would probably result, or
   (iii) acting negligently,
(b) damage arising from a failure to maintain the ship or equipment,
(c) damage arising through wear and tear,
(d) defects that develop during the normal operation of the ship or equipment.

It can be seen from this, therefore, that the New South Wales law on this aspect clarifies the provisions in MARPOL, but adds its own gloss to those provisions and thus departs from it. The MPA goes on to provide for the usual rules from MARPOL to allow discharging at sea if the ship is underway and the discharge is not above the prescribed limit.

93 Morrison v Peacock and Roslyndale Shipping Co Pty Ltd [2003] NSWLEC 68, Pearlman J. Even then the NSW DPP could not let the matter rest and took two appeals, DPP v Roslyndale Shipping [2003] NSWCCA 356 and DPP v Roslyndale Shipping [2004] NSWCCA 262, the merits of which appeals substantially escape the author and, for the most part, they also escaped the court.
94 Section 8(3).
Also different to the provisions of MARPOL are those in the MPA that provide for liability on the part of persons other than the owner or master. If a relevant discharge occurs ‘each crew member of the ship, and each person involved in the operation or maintenance of the ship, whose act caused the discharge is guilty of an offence’.95 It can be seen from this that personal liability not only lies with the person on board (officers and crew) who ‘caused’ the discharge, but it also extends to persons ashore who are involved with the maintenance of the ship, or who were or are involved with its ‘operation’. These provisions cast a very wide net. One example was when the Laura D’Amato oil spill occurred in Sydney harbour, causing wide-spread damage, in which the Chief Officer was convicted (along with the owner).96

In such proceedings the MPA provides that it is sufficient for the prosecution to allege and prove that a discharge of oil or an oily mixture occurred from a ship into state waters and the crew member or person involved in the operation or maintenance of the ship committed an act that caused the discharge.97 In effect the evidentiary onus then shifts on to the accused to prove that one of the defences apply; for example that it was not with intent to cause the discharge, that it was not done recklessly and with knowledge or was not done negligently.98

Certain oil residues that cannot be discharged into the sea at all must be discharged ashore and there is a duty to report incidents and to keep the usual, accurate, oil records.99 Part 2 Div 2 is directed at the need for ships to carry adequate insurance for an oil spill and requires that a ship over 400 tons must not be in state waters unless it has in place suitable insurance with a P&I Club and carries on board an insurance certificate as evidence of it.100

Part 3 of the MPA gives effect to MARPOL Annex II (noxious liquid substances). The key provision is that ‘if any discharge of a liquid substance, or of a mixture containing a liquid substance, being a substance or mixture carried as cargo or part cargo in bulk, occurs from a ship into state waters, the master and the owner of the ship are each guilty of an offence’.101 Similar defences apply and Pt 3 has the same definition of ‘damage’ as that in relation to oil. There is the usual obligation to report incidents and to keep accurate records.

95 Section 8A(1).
96 See Filipskowski v Fratelli D’Amato [2000] NSWLEC 50, Talbot J. The charge against the master was dismissed as, though he was technically liable, the court exercised its discretion in his favour as he had no direct involvement in the discharge having occurred.
97 Section 8A(2).
98 Section 8A(4).
99 Sections 9-12.
100 Sections 13A, 13B.
101 Section 18(1).
Part 4 relates to transfer operations to and from ships, which is usually by pipeline. The Part does not apply to a discharge that occurs on the landward side of the first isolating valve. The key provision is familiar in providing that each appropriate person in relation to the discharge, and any other person whose act caused the discharge, are each of an offence. The owner of the pipeline is liable, liability can be several between owners of pipelines and of ships and there are restrictions on transferring at night. The usual obligations are set out to report incidents and keep accurate records.

Part 5 of the MPA addresses the construction requirements for relevant ships that relate to segregated ballast tanks, dedicated cleaning tanks and crude oil washing. The relevant ships are defined to reflect the separation of powers between the Commonwealth and the States. The New South Wales Act only applies to intra-State (New South Wales in this case) trading ships, fishing vessels that are not overseas vessels or pleasure craft. In Pt 5, Div 2 applies to ships carrying oil, giving effect to MARPOL Annex I, and Div 3 to chemical tankers (hazardous noxious substances), giving effect to MARPOL Annex II. The Act makes provision for Regulations relating to the position and construction of tanks, ship construction and other certificates that the ship must have and carry certificates showing that it has complied with these requirements and has had periodical surveys.

Part 6 of the MPA deals with miscellaneous matters of which some only will be mentioned. The minister may provide, or direct the provision of, reception facilities, which gives effect to MARPOL Annex I reg 1 which is that state parties are to provide reception facilities for ships to discharge oily sludge ashore. It is an offence, usually by the port authority, not to provide the reception facilities if the minister gives a direction. The recovery of costs by the State after taking steps to prevent or clean up an oil or noxious substance spill needs statutory provision and in New South Wales this is set out in ss 46-51. It is of interest that s 51 not only allows the minister to seek damages and costs from the owner or master if there is a discharge which is prohibited by the Act, but it extends to ‘any person whose act caused the discharge’. This is a very wide ranging provision as it takes the matter beyond the framework of the IMO conventions (CLC, Fund and Bunkers). Part 6 also has provisions for detention of ships if there has been an unauthorised discharge or if a required security has not been lodged for the likely

102 Section 27.
103 See the requirements for this in reg 13 of MARPOL Annex I, to which Pt 5 gives effect.
104 Section 34.
105 Section 45
106 See details in Chapter 4.
costs and damages. Part 6 also contains other noteworthy provisions, including a two year time limit for prosecutions, evidence, powers of inspectors and their immunity from suit, and liability of the management of a corporation if the offending discharge was ‘knowingly authorised or permitted the contravention’. The schedules to the MPA incorporate MARPOL with its relevant protocols together with the usual repealing and saving provisions. The NSW MPA appears to be in need of amendment so that it also gives effect to Annexes III, IV and V of MARPOL (and of course, Annex VI when it comes into force in Australia).

8.3.3 Other New South Wales Legislation

There are, of course, a significant number of other Acts in New South Wales that touch on pollution of the sea, harbours, bays and rivers. They are too numerous to go into but, depending on the circumstances, they may have relevance as they can impinge on the protection and preservation of the marine environment.

8.4 Victoria

The Victorian legislation follows fairly closely that of the other States and the Commonwealth so it is not necessary to mention aspects that have been set out above. The main Victorian Act is the Pollution of Waters by Oil and Noxious Substances Act 1986 (the Pollution Act). The Pollution Act in its initial form gave effect to the standard legislation recommended when MARPOL came into force. It has since been amended to take account of noxious substances other than oil and is the main Victorian Act that relates to pollution from ships.

The Act gives effect to MARPOL and does so in a simple and straightforward manner. Part 2 Div 1 gives effect to MARPOL Annex I (oil) and provides that the master and owner are each guilty of an indictable offence if a ship discharges oil or an oily mixture into ‘State waters’. These waters are defined as ‘the territorial sea’ adjacent to the State and to the landward side thereof.

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107 Sections 52, 52A-52C.
108 Section 56.
110 Section 3. It should be noted that the ‘territorial sea’ for relevant purposes only refers to the sea out to the three-mile limit; see s 4 Constitutional Powers (Coastal Waters) Act 1980, Schedule. For discussion on the Offshore Constitutional Settlement 1979, to which this relates, see Chapter 6.
The *Pollution Act* provides for the usual ‘defences’ set out in MARPOL. In relation to the defence of the escape being due to ‘damage’, the definition of ‘damage’ is that set out in MARPOL and the Act has not been amended to accord with the High Court decision in the *Sitka II Case*.111 This is of no consequence as the High Court has settled the law in this regard by its decision in that case.

Part 2 Div 2 sets out the MARPOL provisions relating to Annex II (noxious liquid substances) and prohibits a discharge into State waters.112 Division 2A gives effect to MARPOL Annex V (garbage) and Division 2B to MARPOL Annex III (packaged harmful substances). Division 2C gives effect to MARPOL Annex IV (sewage). Care has to be taken with Div 2D, which deals with ‘Discharges’. One notes that the definitions included in it relate only to that Division and also that if there be inconsistency with the *Environment Protection Act 1970* (Vic) then the latter prevails.113 Division 2D is concerned, in part, with discharges when ‘apparatus’ is involved, meaning that it relates to transfers to and from ships and also in defining that the relevant ship, if the discharge is from other than an oil tanker, is one of a gross tonnage of not less than 400 tons.114

The *Pollution Act* has the miscellaneous provisions in Div 3, which include the powers and immunities of authorised officers, evidence and reception facilities. Points of note in this division include that this Act does not affect the operation of parts of the *Marine Act 1988*;115 that a prosecution may be brought at any time (that is, there is no time limit) and that Regulations may be made. Part 3 deals with regulating ships carrying or using oil and gives effect to the ship construction, certification and other requirements in the relevant Regulations of MARPOL Annexes I (oil), II (chemicals), III (bulk harmful substances) and IV (sewage).

Mention has been made of the Victorian *Environment Protection Act 1970* and its main features deserve to be examined. Its objects are to establish an environmental protection authority and generally to regulate activities and provide for penalties relating to protection of the environment. It is mainly concerned with land environments but it does extend to the ‘territorial seas adjacent to the coasts of Victoria’.116 Unlike the Queensland Act, it does not exclude its application when marine pollution legislation applies and therefore sits, most uncomfortably, with the Victorian *Pollution Act*. The EPA is in need of revision from the marine environmental point of view as it has a quite different structure.

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112 Section 18.
113 Section 23I.
114 Section 23K.
115 Sections 45-57.
116 Section 3(1).
and emphasis which include that the defences under the EPA are quite different to those under the Pollution Act. Discharges into a place where they could pollute waters is an offence,\textsuperscript{117} as is transport of prescribed waste without a permit.\textsuperscript{118} Both the master and the owner are guilty if there is a wrongful discharge from a ship\textsuperscript{119} and there are penalties for failing to obey an order to abate the pollution.\textsuperscript{120}

Naturally, there are many other acts that touch on the protection and preservation of the marine environment off the Victorian coast\textsuperscript{121} but the main two have been mentioned.

### 8.5 Tasmania

The Tasmanian legislation is contained in two main acts, the first of which is the Pollution of Waters by Oil and Noxious Substances Act 1987 (the Pollution Act); the objects of which are to protect Tasmanian waters and give effect to MARPOL. The initial Act closely followed the pro forma for the States implementing MARPOL and there have been subsequent amendments. The State authorities are to be commended on following the international convention with no relevant departures. Of all the Australian legislation giving effect to MARPOL this seems to be amongst the clearest and best.

The structure of the Pollution Act sets out the enforcement of MARPOL in a logical manner with Pt II, Div 1 giving effect to MARPOL Annex I (oil), Div 2 giving effect to Annex II (noxious liquid substances), Div 2AB giving effect to Annex IV (sewage), Div 2B to Annex V (garbage) and Pt III giving effect to the MARPOL construction, survey, certification etc requirements. Division 3 of Pt II has the miscellaneous provisions, of which the noteworthy ones are that there is no time limit within which to bring relevant prosecutions,\textsuperscript{122} evidentiary provisions, immunity for authorised officers acting in good faith and, importantly, the creation, powers and procedures for a ‘State Marine Pollution Committee’. This committee is a Tasmanian creation and its function is to advise the government and prepare and update a plan to combat marine pollution. It must convene if a spill of more than 10 tonnes occurs or is likely to occur, and its functions in that case are expressly and sensibly laid down.\textsuperscript{123}

\begin{itemize}
  \item \textsuperscript{117} Sections 38, 39.
  \item \textsuperscript{118} Part IXA.
  \item \textsuperscript{119} Section 63.
  \item \textsuperscript{120} Section 64.
  \item \textsuperscript{121} See Catchment and Land Protection Act 1994; Marine Act 1988; Planning and Environment Act 1987; Water Act 1989; and Port Services Act 1995.
  \item \textsuperscript{122} Section 27.
  \item \textsuperscript{123} Section 37.
\end{itemize}
The Pollution Act has territorial application in Tasmanian ‘State Waters’.124

The second main relevant Tasmanian Act is the Environmental Management and Pollution Control Act 1994 (the ‘Environmental Management Act’). The Act is comprehensive in that, like its equivalent in other Australian States, it has a management and regulatory structure that controls applications, approvals, environment impact statements, audits, enforcement and penalties. However, this Act has the sensible provision that it does not apply if the Pollution of Waters by Oil and Noxious Substances Act 1987 applies.125 The result is that if there is a discharge then the Pollution Act applies but if the pollutant discharged is not covered by that Act then the Environment Management Act applies.

There are other Tasmanian Acts that have some bearing on the subject of marine environment protection126 but as they are less directly relevant to the marine environment from ships’ pollution topic it is not intended to discuss them.

8.6 South Australia

The South Australian suite of legislation is very sound and has been so for quite some time. The main relevant Act is the Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987 (‘Pollution from Ships Act’), which gives effect to MARPOL, except that sewage (Annex IV) is not yet covered and nor, of course, air pollution (Annex VI). The jurisdiction of the Pollution from Ships Act is over the ‘State waters’, as defined from place to place, but basically gives effect to the Offshore Constitutional Settlement 1979 under the Off-Shore Waters (Application of Laws) Act 1976 (SA).127 The net effect is that jurisdiction extends out to three nautical miles from the baselines128 but it has to be kept in mind that the

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124 ‘State waters’ are defined as in the ‘territorial sea adjacent to the State’, but the Act itself does not limit the power to the three-mile limit. One has to trail through the Coastal and Other Waters (Application of State Laws) Act 1982 which is being replaced by the Offshore Petroleum Act 2006 (Cth); as to which see Section 6.2 in Chapter 6 and the Offshore Waters Jurisdiction Act 1976 until one finally finds the limitation of the three-mile limit in s 3(2) of the Petroleum (Submerged Lands) Act 1982. Of course, this same problem is found in the Commonwealth legislation and while it may be acceptable for skilled lawyers with some knowledge of the constitutional limitations it is not sufficiently clear and simple for others.

125 Section 9(2).


127 See also the Petroleum (Submerged Lands) Act 1982. The ‘request and consent’ Act to give effect to the Offshore Constitutional Settlement 1979 was the Constitutional Powers (Coastal Waters) Act 1979 (SA).

128 See Chapter 6 for a discussion of the offshore zones.
South Australian and Commonwealth governments have entered into an agreement for the extension of the South Australian jurisdiction to the south and east of its offshore waters for fisheries purposes. The South Australian Off-Shore Waters (Application of Laws) Act 1976 also deals with the ‘nexus’ provision, which was established under *Pearce v Florenca*. The *Pollution from Ships Act* sets out the primary provisions of MARPOL very nicely, whereby it is an offence for a vessel to discharge oil, noxious liquid substances, packaged harmful substances or garbage into State waters, for which both the owner and the master are liable. The usual defences are provided for, in a welcome affinity with international comity, but there are some provisions that are worthy of note. One is that the defence of damage arising from ‘damage to the ship or its equipment’ etc is negated as a defence where the damage to the ship or equipment arose from the ‘negligence’ of the master, owner, employee or agent. A similar provision is made concerning a defence to a discharge of noxious liquid substances.

Part 3A deals with the usual requirements for the relevant vessels to be constructed to meet the MARPOL requirements and for inspections to be carried out and certificates of compliance issued. Part 4 has numerous miscellaneous provisions, some of which are quite important. Prescribed incidents are to be reported, a South Australian Marine Spill Contingency Action Plan must be developed, the minister may clean up spills and recover expenses and costs from the offender and oil reception facilities are to be provided. It is noteworthy that ‘a person’ who suffers loss or damage from an prescribed spill may also recover, under this Act, from the offender. All such damages, expenses and costs may be recovered as a ‘debt’ against the offender, which can be done by summary proceedings.

The South Australian Government is unusual amongst the States in that it has kept its own legislation to give effect to the *London Convention*, rather than leave it to the Commonwealth legislation, which SA has done in the *Environment Protection (Sea Dumping) Act* 1984. The Act, however, has never come into operation. The Act provides for jurisdiction over ‘coastal’ waters, which is defined to mean those waters under the *Coastal Waters (State Powers) Act* 1980 (giving effect to the Offshore Constitu-
tional Settlement 1979). Under the Sea Dumping Act the usual offences are set out for dumping, incinerating or loading prescribed wastes unless a permit is obtained and its provisions followed. The usual defences of securing the safety of human life, or of a vessel, etc are also set out. An offender is liable to pay a penalty and the costs of restoration etc of the environment. A right of appeal lies to the Supreme Court.\textsuperscript{135} As this Act is unlikely to be given effect it is best repealed and taken off the books.

The other main Act is the Environment Protection Act 1993 (SA), which is the usual large piece of legislation but it is sensibly drafted for the most part. Its many provisions regulate the human activities that may touch on the environment. Its jurisdiction extends to the ‘coastal’ waters of the State which include the air above and the land beneath (seabed and subsoil).\textsuperscript{136} It also extends to the ‘marine’ waters, which are the coastal waters plus the estuarine or tidal waters.\textsuperscript{137} It should be noted that the definition of ‘vehicle’ includes ‘any vessel or aircraft’. \textit{Prima facie} the person responsible for any pollution is the ‘occupier or person in charge’ of the relevant place or vehicle, but this does not preclude other persons also being liable.\textsuperscript{138} The offences centre around a general environmental duty and any ‘environment harm’ being caused, which is categorised in descending order of seriousness from ‘material’ or ‘serious’ harm to an ‘environmental nuisance’.\textsuperscript{139} The EPA does not apply where the Sea Dumping Act applies,\textsuperscript{140} but no exception is made for the Pollution from Ships Act. The EPA is too compendious to describe in any detail, but suffice to say that it has the usual, but in this case sensible, provisions for regulation and enforcement in relation to the protection and preservation of the environment, including the marine environment. Not unusually with Acts such as this in Australia, there is provision for the EP Authority to proceed against a relevant person with an environmental protection order, an interim order, an interim injunction or for the offence of not complying with any of them, or for a civil remedy (which remedy can include an award of exemplary damages).\textsuperscript{141} The EPA repeals, amongst others, the Marine Environment Protection Act 1990.

Appeals from orders made under the EPA lie to the specially created Environment Resources and Development Court,\textsuperscript{142} established under its own Act of that name.\textsuperscript{143} This court is comprised of judges from the

\begin{itemize}
\item\textsuperscript{135} Section 27.
\item\textsuperscript{136} Section 3. The definition gives effect to ‘coastal’ waters under the Coastal Waters (State Powers) Act 1980, mentioned above. See also s 9.
\item\textsuperscript{137} Section 3.
\item\textsuperscript{138} Section 4.
\item\textsuperscript{139} Sections 5, 25, 79-84.
\item\textsuperscript{140} Section 7(2).
\item\textsuperscript{141} Part 11 – Civil Remedies.
\item\textsuperscript{142} EPA Part 13 – Appeals to Court.
\item\textsuperscript{143} Environment, Resources and Development Court Act 1993.
\end{itemize}
District Court, the Magistrates Court or Commissioners. Only judges may rule on law but two Commissioners may sit without a judge and, in this case, an umpire judge may be appointed in event of disagreement. Suitable cases may be referred to the Supreme Court and appeals lie to that court, being heard by a single judge or the Full Court as appropriate and as provided in the Act.\textsuperscript{144}

There are, of course, other Acts that touch on the marine environment and pollution from ships but they are footnoted and space precludes dealing with them.\textsuperscript{145}

\section*{8.7 Western Australia}

The main Western Australian Act relating to pollution from ships is the \textit{Pollution of Waters by Oil and Noxious Substances Act 1987} (the \textit{Pollution Act}), which gives effect to MARPOL. The \textit{Pollution Act} follows the structure of the other State Acts mentioned above. Its jurisdictional claim is that it is an offence to discharge certain matters, to be mentioned shortly, into ‘State waters’ which are defined in the Act as the territorial sea adjacent to the State and the sea on its landward side.\textsuperscript{146} The main Act giving offshore jurisdiction is the \textit{Off-Shore (Application of Law) Act 1982}, which gives effect offshore to the Western Australian legislation. It also defines ‘adjacent area in respect of the State’ and ‘coastal waters’, which are given their meaning as in the Commonwealth \textit{Coastal Waters (State Powers) Act 1980}.\textsuperscript{147}

The \textit{Pollution Act} provides for an offence if there be a discharge from a ship into State waters, or a discharge that has the result that it enters State waters,\textsuperscript{148} and in relation to an oil discharge the provisions follow those in MARPOL Annex I, as do the defences and the provisions regarding the defence of ‘damage’ to a ship or its equipment.\textsuperscript{149} Section 8(3) addresses a discharge from ‘any apparatus’, which refers to transfer operations to or from a ship, although the offence provision about a discharge during transfer operations is set out in s 9. The \textit{Pollution Act} has

\begin{flushleft}
\textsuperscript{144} Part 7 – Appeals and reservations of questions of law.
\textsuperscript{146} Section 3.
\textsuperscript{147} Sections 2, 3, 3A. Section 2 also define ‘Shipping matters’. The request and consent Act to give effect to the Offshore Constitutional Settlement 1979 is the \textit{Constitutional Powers (Coastal Waters) Act 1979 (WA)}; discussed in Chapter 6 above.
\textsuperscript{148} Section 3(5).
\textsuperscript{149} Section 8. Section 8(3) also addresses a discharge from ‘any apparatus’, which refers to transfer operations to or from a ship.
\end{flushleft}
an express provision against discharging prescribed ‘oil residues’.\textsuperscript{150} The Act also has the usual provisions about keeping oil record books and reporting discharges.

Part III of the Pollution Act addresses discharge of noxious substances and essentially follows the MARPOL Annex II provisions. Part IV deals with ‘Miscellaneous’ matters, including recovery of expenses for cleaning up discharges, inspectors and their powers. There is no time limit within which a prosecution must be brought and the Act deals with some aspects of evidence. The schedules to the Act set out the various parts of MARPOL as well as certain protocols and MEPC resolutions that underpin the provisions of the Act. The Western Australia Government provisions are sound, but it is unfortunate that it has not yet taken legislative steps to implement Annexes III, IV and V of MARPOL.

The Western Australian Environmental Protection Act 1986 (the EPA) follows a similar model to that of the other States, discussed above. It deals with establishing a new environmental protection authority, a policy, environmental impact assessments, environmental regulation, legal proceedings and appeals. The EPA’s jurisdiction offshore is not to be found in the EPA itself but in the Off-Shore (Application of Laws) Act 1982 (WA).\textsuperscript{151} Its definition of ‘vessel’ follows that set out in the Western Australian Marine Act 1982 and its definition of ‘waters’ includes waters in the sea.\textsuperscript{152}

The EPA defines ‘environmental harm’ as either ‘material’ or ‘serious’ and the offences are listed as Tiers 1, 2 or 3, in order of seriousness for penalty purposes.\textsuperscript{153} If the EPA is inconsistent with any other law, then the EPA prevails.\textsuperscript{154} The EPA continues the existence of the former Environment Protection Authority and makes provision for its functions and other aspects, including empowering it to publish policies. A Committee of Inquiry may be appointed to inquire into any such policy\textsuperscript{155} and make recommendations about the policy. There is the usual extensive provision for environment impact statements and overview, proposals and decision-making flowing from them. Under the regulatory aspects of the EPA, it is an offence to ‘intentionally or with criminal negligence’ cause pollution or allow pollution to be caused, or environmental harm, either serious or material.\textsuperscript{156} Work approvals, licences, protection notices, stop orders and prevention notices are all provided for in the regulatory basket of options. Defences to these offences place the onus on

\begin{footnotesize}
\textsuperscript{150} Section 10. \\
\textsuperscript{151} Section 4. \\
\textsuperscript{152} EPA s 3. \\
\textsuperscript{153} Section 3A and Sch 1. \\
\textsuperscript{154} Section 5. \\
\textsuperscript{155} Section 29. \\
\textsuperscript{156} Sections 49, 50A, 50B.
\end{footnotesize}
the defendant and relate to danger to human life, result of an accident (but not negligence) and reasonable precautions being taken and these all require notification being given by the alleged offender.157

Under the Western Australian EPA the provision for appeals is slightly unusual in that appeals from decisions of the Authority go to the minister, not an independent court or tribunal.158 Further, the EPA provides that an ‘Appeals Convenor’ may require reports to be made, consult with the appellant, report to the minister and appoint an ‘Appeals Committee’ to hear the matter.159 Part VIII has the general provisions, including those related to legal proceedings, and preserves rights at law other than under the EPA, removes the right of self-incrimination, sets no time limit to prosecute for Tier 1 charges but otherwise sets 24 months and it also gives an immunity in tort against breaches of the Act done in good faith in performance of a function. There are a number of schedules, including one about the Appeals Convenor.160

Another Act that should be mentioned is the Western Australian Marine (Sea Dumping) Act 1981, which gives effect to the London Convention.161 The key provisions are that dumping of wastes or other prescribed matter, or incineration at sea, or loading with the intent to dump at sea, are offences unless there is a suitable permit. These offences occur if the prescribed conduct occurs in ‘coastal waters’162 or in ‘port waters’163 and apply to a vessel, aircraft and offshore platform. The defences are those to be found in the London Convention; namely, the saving of life, the vessel, aircraft or platform etc, provided damage is minimised and the incident is reported.164 The minister is empowered to clean up and to seek the costs back from the offender; the usual powers are given to inspectors and extensive provision is made for seeking permits relating to the substances listed in various categories in the annexes to the convention. Special arrangements may be made about radioactive wastes.165 It is noteworthy that the inspectors may arrest and the minister or any interested person may seek an injunction from the Supreme Court.

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157 Sections 74-75.
158 Part. VII.
159 Sections 107-110.
160 Schedule 7.
161 The other States are content to leave this aspect of regulation of the marine environment to the Commonwealth legislation.
162 ‘Coastal waters’ are defined as in the Coastal Waters (State Powers) Act 1980 (Cth); see s 2(1).
163 ‘Port waters’ are defined as in the Shipping and Pilotage Act 1967 (WA); see s 2(1).
164 Section 10.
165 Section 17.
There are, of course, other Acts that are relevant but there is no need to more than footnote them for present purposes.\footnote{166}

8.8 Northern Territory

The major relevant Northern Territory legislation is the Marine Pollution Act (MPA), which gives effect to most aspects of MARPOL and the MPA states in various parts that this is its intention. However, scrutiny of the Act shows that the drafter has seriously interfered with MARPOL’s main provisions, so the international comity that one seeks in the international shipping industry is lost. The MPA provides for offences if prescribed discharges occur into ‘coastal waters’\footnote{167} or into waters outside them if the pollutant subsequently enters coastal waters.\footnote{168}

Before dealing with the provisions of the MPA itself, in relation to Northern Territory jurisdiction of the MPA and other maritime acts, this is dealt with in the Off-shore Waters (Application of Territory Laws) Act, which was enacted in its original form in 1985. It is short and it applies Northern Territory laws in coastal waters and acts or omissions in ports, harbours and offshore facilities and also in the ‘adjacent waters’ beyond the outer limits of the coastal sea. This does not apply to criminal laws, which come under the Crimes at Sea Act 2000.\footnote{169}

In the MPA itself, in relation to oil, it is an offence for the ship’s owner or master to ‘intentionally cause or permit the discharge of oil from a ship into coastal waters’ if it causes ‘serious’ or ‘material’ environmental harm and he or she knows, or ought reasonably be expected to know, that such harm will or might result.\footnote{170} This applies to offences at Levels 1 to 3, where there is no intention the penalty is less. For more minor offences, designated as Level 4, the MPA provides that the ship’s owner and master ‘must ensure that oil is not discharged from the ship’.\footnote{171} It can be seen that these drafting provisions have very little, if any, connection with the wording of Annex I of MARPOL.

The defences to an oil discharge are similar to those set out in MARPOL, but once again the drafter has substantially departed from the MARPOL wording. The familiar defences of saving life at sea, etc, are


\footnote{167} Section 6(1) defines ‘coastal waters’ in terms of the Coastal Waters (Northern Territory Powers) Act 1980 (Cth), together with the waters within the NT that are subject to the ebb and flow of the tide.

\footnote{168} Section 9.

\footnote{169} Section 3(3).

\footnote{170} Section 14.

\footnote{171} Section 14(5).
there, and the ‘damage’ to ship or equipment defence is included without
the changes arising from the High Court decision in the Sitka II Case.172
However, the drafter does touch on this issue as the MPA introduces the
new defence of an ‘adequate and regular inspection and maintenance’
and that the damage should not ‘reasonably be expected to be detected
and repaired’ in the course of such inspection and maintenance.173 The
lengthy MARPOL regulatory provisions for a ship to discharge certain,
low, quantities of oil offshore from land is left to be set out in the
Regulations.174

In relation to noxious liquid substances, the MPA follows a similar
wording to that used in dealing with discharges of oil175 and the same
may be said of the provisions about jettisoning harmful substances into
coastal waters176 and discharging sewage.177 However, in relation to dis-
charge of sewage, the Act introduces the concept of discharges by a
‘small ship in a sensitivity zone’,178 which gives effect to a structure
unique to the Northern Territory. The regulation of the disposal of
garbage is set out in Pt 5, where the drafting has followed the structure in
the rest of the MPA, although it does give effect to MARPOL Pt V after its
own manner. Transfer operations (for a ship loading from, or discharging
to, shore) are covered in Pt 7.

The MPA gives the CEO power to direct that ports, owners etc pro-
vide reception facilities ashore for ships and it has the usual provisions
about enforcement and emergencies.179 ‘There are very sensible provi-
sions for a person who claims compensation for loss or damage caused
by actions under the MPA to seek compensation from the Northern
Territory Government and granting jurisdiction to the court to award
them if ‘it is satisfied it is just’.180 The MPA seems to be fair and sensible
in balancing the powers needed to regulate marine pollution from ships
and the need to compensate persons who may suffer loss or damage in
their wrongful exercise.

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172 Morrison v Peacock (2002) 210 CLR 275; [2002] HCA 44. See discussion in this
chapter at Section 8.3.
173 Section 15(2)(b),(c).
174 Section 16. The Marine Pollution Regulations deal with oil in Pt 2, with noxious
liquid substances in Pt 3, with packaged harmful substances in Pt 4 and Garbage
in Pt 5.
175 Part 3.
176 Part 4; which gives effect to MARPOL Annex III.
177 Part 5; which gives effect to MARPOL Annex IV.
178 Section 31. The Act applies to ships over 400 tonnes, following MARPOL, and a
‘small ship’ is one under that tonnage. Setting out ‘sensitivity zones’ is left to the
Regulations; see definitions in s 30.
179 If asked, a person must help an authorised officer in an emergency unless the
person has a reasonable excuse; s 73. See also s 81 and following about the
powers given to the CEO and the minister if there is a maritime casualty.
180 Section 84.
Whilst there are environmental procedures in the Northern Territory, there is no Act as extensive in this regard as in the States. Suffice to note in conclusion, therefore, that there are other Acts that touch on this aspect but it is not intended to describe their provisions.  

8.9 Conclusion

As mentioned at the outset, this chapter sets out the various laws of the Australian States and the Northern Territory giving effect to the various marine environmental conventions. It may be seen from this exercise that the Australian offshore jurisdiction is confused and confusing. Hardly any State parliament has failed to interfere with the terms of the international conventions. This offends against the international law principle of comity, but more importantly, it makes the conduct of international trade by sea very difficult. The complexity of these laws adds to the costs of sea carriage of goods, fisheries and general maritime commerce.

The Australian offshore jurisdiction is badly in need of reform so that it is simplified and this chapter, when combined with the chapters on the offshore jurisdiction (Chapter 6), on the Australian Commonwealth laws (Chapter 7), demonstrate that in Australasia there is an urgent need for expert attention to be given to simplify the laws implementing the marine environmental international conventions. The New Zealand situation is dealt with in Chapter 10.

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181 Crimes at Sea Act 2000; Energy Pipelines Act; Environmental Assessment Act; Environmental Assessment Administrative Procedures Act; Environmental Offences and Penalties Act 1996 (which sets out the penalties for Tiers 1-4 offences); Marine Act; Petroleum (Submerged Lands) Act; and Water Act.
Chapter 9

Australian Sensitive Marine Areas

9.1 Introduction

The Australian coastline has, like many countries, a number of offshore areas that have particular characteristics from the marine environmental and shipping point of view. There are numerous offshore marine parks around the Australian coastline, but their protection is not the point of this work except where shipping is a significant factor. In Australia’s case there are three areas that are worthy of mention from the point of view of special sensitivity to marine pollution from ships and that have complex legal regimes. The first is the Great Barrier Reef (the GBR), which is one of the marine wonders of the world and which has its own special regime concerning its protection and preservation. The second is the Torres Strait, which is also a major tropical reef area which is subject to its own special regime, including a treaty with Papua New Guinea. The third is the offshore oil and gas areas, especially in the Timor Sea and the North West Shelf in the Indian Ocean. Those in the southern waters, mainly the Bass Strait area, have significant quantities of shipping going past them but this is a stable jurisdiction and, whilst the usual offshore laws apply in these waters, this chapter will concentrate on the three more complicated situations in the northern Australian waters.

These three areas each have very different relationships with shipping. The GBR and the Torres Strait are important shipping routes and significant ship movements take place directly through them. At the same time they are sensitive marine areas so any shipping casualty in them is a major threat to the marine environment. The third area, the northern offshore oil and gas rigs, are not so closely involved with major shipping movements, although some of them are close to shipping routes and some have significant service shipping proceeding to and from them. Many of the areas also have offload tankers servicing them that are potential threats to the marine environment. This area also involves the matter of the maritime boundary with Timor-Leste and the oil and gas deposits in the Timor Sea, a developing issue of considerable interest.

These three sensitive marine areas will be dealt with individually as they all involve quite separate areas and issues.
9.2 Great Barrier Reef

Australia has been blessed with the GBR which is situated off the State of Queensland on the north-east of the country. It stretches for 2340 kilometres, covers approximately 344,400 square kilometres, contains 2900 reefs, some 300 coral cays and about 600 islands. It has economic significance for tourism and fishing and, for good or bad, encompasses the major shipping channel that passes up the east coast of Australia (the inner route). There are more than 7000 shipping movements a year in the GBR and Torres Strait of ships over 50 metres, so the ship movements in the GBR are significant. Some of them are using the Queensland ports and some are just on transit passage through the area to and from more distant ports. The GBR is commercially important to Australia, employing about 50,000 people in tourism and fisheries with an economic value of about $4.5 billion per annum.

As the world’s first large-scale marine protected area based on an ecosystem approach to management, the importance of the GBR has long been recognised. It was declared a World Heritage Area in 1981 and a Particularly Sensitive Sea Area in 1990.

The various maritime zones in the GBR, mentioned in Chapter 6, amount to a complex matrix of zones and jurisdictions. The Australian baseline runs up the Queensland coast, with most of it on the inner part of the GBR. From an international maritime law point of view, those areas that are within the baseline are internal waters, the area to the seaward from the baseline is territorial sea for 12 nautical miles, then comes the contiguous zone, then the EEZ and then the outer continental shelf. The outer shipping route runs through the Coral Sea, which is mainly in the Australian EEZ but which also runs into the waters of neighbouring countries.

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3 Most ships use the inner route of the GBR, with the balance entering or departing through Hydrographers, Palm and Grafton Passages. About 20% are on transit through the GBR and do not call at any Queensland port. See ‘Great Barrier Reef & Torres Strait Shipping Impact Study’, AMSA, 2002, pp 3, 7; see also the ‘Great Barrier Reef and Torres Strait Management Plan, 2003-05’, AMSA, 2003, website <www.amsa.gov.au/Shipping_Safety/Great_BARRIER_Reef_and_Torres_Strait>.
Map of the Great Barrier Reef and World Heritage Area

Source: Great Barrier Reef Marine Park Authority
About 98.9% of the Great Barrier Reef Marine Park is within the Great Barrier Reef World Heritage Area.\(^6\) Most of the islands,\(^7\) the waters within three miles of the islands and the internal baselines are in Queensland jurisdiction.\(^8\) The majority of the waters within Queensland ports are in Queensland jurisdiction, although some of the port limits extend into the Marine Park.\(^9\) From a constitutional law point of view and the legislative consequences of the Offshore Constitutional Settlement 1979, the rest of the GBR comes within the Commonwealth jurisdiction. Various intergovernmental agreements set out the management arrangements for the area.\(^10\)

The *Great Barrier Reef Marine Park Act 1975* (Cth), administered by the Great Barrier Reef Marine Park Authority (GBRMPA) based in Townsville, provides for the establishment, management, care and development of the Marine Park within the GBR region.\(^11\) The *Great Barrier Reef Marine Park Zoning Plan 2003*, in which almost one-third of the park is protected by a network of highly protected zones, is the principal planning instrument for regulating uses of the area, including by ships. The zoning plans do allow the longer ships over 50 metres and certain classes of specialised product carriers\(^12\) to transit the Marine Park without a permit, as shown in the map (opposite) (shipping areas are shaded), but pilotage requirements do apply, see below.

The GBR’s vulnerability to ship pollution, particularly to oil and chemical spills, has resulted in the Australian Government taking action through the IMO. In the early 1970s, the issue of its special protection was dealt with in MARPOL in the definition of ‘nearest land’. In Annexes I, II, IV and V the nearest land is defined generally as meaning from the

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\(^7\) The Commonwealth has jurisdiction over 70 islands within the GBRMP, two of which are partly owned by Queensland.
\(^8\) Because of the large number of islands, cays etc and some doubts as to the accuracy of the areas and boundaries under the Queensland Letters Patent issued to the Queensland Colonial Government the exact areas and boundaries remain to be confirmed by future surveys and consequential government action.
\(^11\) GBRMPA has many publications setting out its structure and activities; see its website, above.
\(^12\) The definition of ‘ship’ for these purposes includes ships over 50 metres in length, all oil, chemical and liquefied gas carriers, and tows over 150 metres long. The definition excludes defence vessels and ‘super-yachts’ (private recreational vessels over 50 metres long). For detail see the GBRMPA website; <www.gbrmpa.gov.au>, and the *Great Barrier Marine Park Regulations 1983* (as amended).
baseline of the territorial sea. However, for the north-east coast of Australia it is given a special definition by drawing a line, by reference to latitude and longitudinal points, which is outside the outer reef of the GBR.13 This gives protection to the GBR area by severely restricting the discharge activities of ships in the reef area.

13 For the definition of ‘nearest land’ see MARPOL 73/78 Annex I reg 1(9).
When dealing with the GBR, mention should also be made of the National Plan; the plan setting out responsibilities of government and industry for clean up of any oil or other pollution spills. The contingency plan for the GBR area is referred to as the Queensland Coastal Contingency Action Plan and REEFPLAN.14

There has been a system of pilotage through the GBR since gazettal of Queensland Governmental Regulations in 188415 and this system has provided an invaluable service. Regulation of the pilotage service was transferred from the Queensland Government to that of the Commonwealth, under which it is administered by AMSA. It was once a monopoly but the service has been privatised and there are now three main companies16 which provide pilotage service through the inner route to ships requiring pilots.

Compulsory pilotage through certain areas of the GBR was introduced in 1991 following the designation of the area as a Particularly Sensitive Sea Area in 1990. The present situation is that all vessels of 70 metres or more in length and all loaded oil tankers, chemical carriers and gas carriers of any length, must use the services of a pilot licensed by AMSA when navigating through specified areas.17

In 1996 a compulsory reporting system of ships in the Inner Route, known as REEFREP, was established in the GBR.18 Under REEFREP, all ships over 50 metres long, all oil tankers, liquefied gas carriers, chemical tankers or ships coming within the INF Code regardless of length, and those ships engaged in towing or where the tow is over 150 metres long,19 are to report by radio at designated reporting points and when entering or leaving ports. Information is passed back to other ships in the area to assist with their safe passage.20 It is, in effect, a mandatory ship

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14 For mention of the Australian National Plan on pollution spills, see Chapter 11.
15 A sound history of pilotage in the Torres Strait and the GBR is in Foley J, Reef Pilots (Banks Bros & Street, 1982).
16 The three main pilotage companies are Queensland Coastal Pilotage Services Pty Ltd (Coastal Pilots); Australian Reef Pilots (Reef Pilots), formerly Queensland Coast and Torres Strait Pilots Association; and Hydro Pilots (Australia) Pty Ltd (Hydro Pilots).
17 Compulsory Pilotage is not the complete answer to maritime casualties in the GBR. A study has found of an average of 1.8 incidents a year of which about 1.1 on average are vessels with pilots onboard; see Det Noritas Consultancy Services Report ‘Great Barrier Reef: Pilotage Fatigues Risk Assessment’, 1999, AMSA, p 7, Table 3.2. For accident reports since 1999, see generally the Marine Safety Investigation Reports, available on the ATSB website at <www.atsb.gov.au>.
18 REEFREP is an interactive mandatory ship reporting system, established in accordance with SOLAS Chapter V reg 8-1, that was adopted by resolution of the IMO Safety Committee (MSC52.66).
19 Other vessels are encouraged to participate. Defence ships are not included but the Australian Defence Force requires that its ships comply with the system, for obvious safety reasons for all.
reporting system that applies to the GBR and the Torres Strait\textsuperscript{21} and is a joint initiative of the Queensland Government and AMSA. It is integrated with AUSREP, which covers the remainder of the Australian coastline.\textsuperscript{22}

In 2006 this system was extended to become the Great Barrier Reef and Torres Strait Vessel Traffic Service (REEFVTS) under which REEFREP was continued, but added to it were monitoring and surveillance systems made up of radar, automatic identification system (AIS) and automated position reporting (under Inmarsat C, or VHF).\textsuperscript{23} REEFVTS is operated under a joint scheme by the Commonwealth and Queensland governments, through AMSA and Marine Safety Queensland (MSQ), and covers the same area as REEFREP.\textsuperscript{24} The services provided are ship traffic information, navigational assistance and maritime safety information.

### 9.3 Torres Strait

The Torres Strait, between the north of Cape York and Papua New Guinea, has always been a sensitive marine area. Historical reasons saw the Queensland Colony make its maritime boundaries close to the Papuan coast in the late 19th century. After Australian federation in 1901 the sea boundary for Australia, therefore, was established close to the coast of what later became Papua New Guinea (it became independent in 1975). To make special provision for the peoples of the Torres Strait, who are Australians but have particular ties with the people of Papua New Guinea and also with the sea, Australia and Papua New Guinea entered into the 1978 Torres Strait Treaty.\textsuperscript{25}

Under the Torres Strait Treaty doubts as to sovereignty and sea boundaries were settled and provision was made for a protected zone where the customary traditional rights of the inhabitants were preserved. Mining and any oil drilling in the Strait were banned for an initial period

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\textsuperscript{21} This mandatory reporting system was established consistent with SOLAS Chapter 5 reg 8-1 and approved by the IMO in 1996; see the booklet ‘Reef Guide’, above, ‘Foreword’.

\textsuperscript{22} Australian Ship Reporting System, administered by AMSA.

\textsuperscript{23} Under SOLAS Chapter 5 a VTS system may be established when the volume of traffic or the degree of risk justifies it. Its Australian legislative basis is under the Navigation Act 1912 (Cth) (s 191 and s 425(1AA) for marine orders). Marine Order 56 gives regulatory authority to the system.

\textsuperscript{24} AMSA is described in Chapter 11. The MSQ is an agency in the Queensland Department of Transport.

\textsuperscript{25} The Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as the Torres Strait, and Related Matters signed at Sydney on 18 December 1978 and which entered into force on 15 February 1985. For more complete discussion see Kaye S, The Torres Strait. International Straits of the World Series, Vol 12 (Martinus Nijhoff Publishers, 1997); Kaye S, Australia’s Maritime Boundaries: Wollongong Papers on Maritime Policy No 4 (Centre for Maritime Policy, University of Wollongong, 1995). Also see the material on the DFAT website; <www.dfat.gov.au> and follow prompts to ‘Torres Strait Treaty’.
Australia's Maritime Zones in the Torres Strait

Source: Geoscience Australia (© Commonwealth of Australia, Geoscience Australia (2007))
of 10 years, which has since been extended. A Torres Strait Joint Advisory Council was established and an administrative commission provided the regulatory and administrative structure. The treaty establishes a sea boundary between the two countries, provides for certain free movement of Torres Strait Islander and Papua New Guinea nationals in the area without the need for visas (Torres Strait Protected Zone), regulates and shares fisheries resources and protects the traditional way of life and rights of the Strait’s inhabitants. Whilst the seabed jurisdiction zone marks the maritime boundary, there are Australian islands to its north, suitably marked and identified, which are Australian. All of the recognised islands generate a territorial sea of three nautical miles (unlike the rest of the Australian territorial sea of 12 miles).

Because of its international aspects and the 1978 Treaty the Torres Strait did not come within the GBR structure even though the importance of the marine environmental aspects otherwise warranted it. A recent initiative by the Australian and Papua New Guinea governments has, however, moved some way to protect the Strait’s waters from risks associated with shipping casualties. Acting on a submission from the two governments the IMO, in reliance on the powers under MARPOL Annexes I, II and V and the IMO Guideline A.927(22), declared the Torres Strait a Particularly Sensitive Sea Area (PSSA). This empowers the riparian states to take steps for its protection.

In 2006 the Australian government issued Marine Notices advising international shipping that the compulsory pilotage system used in parts of the GBR would be applied in the Torres Strait. This was in reliance on the IMO resolutions by the Marine Safety Committee and the Marine Environment Protection Committee that Australia could do so. The compulsory pilotage system requires all ships over 70 metres and all loaded oil, chemical and liquefied gas tankers to take pilots. The Navigation Act 1912 (Cth) was amended to make it an offence not to do so, with

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26 To give effect to the provisions of the Torres Strait Treaty the Commonwealth passed the Torres Strait Treaty (Miscellaneous Amendments) Act 1984 and Queensland passed the Torres Strait Fisheries Act 1984.

27 For full details, see the IMO MEPC 53rd Session, Agenda Item 24, 25 July 2005, including Annex I, ‘Description of the Particularly Sensitive Sea Area: Torres Strait’. The inclusion of the Torres Strait as a PSSA was, in fact, an extension of the GBR PSSA to the north. The eastern and part of the western boundary of the new PSSA aligns with the ‘nearest land’ definition included in Annexes I, II, IV and V of MARPOL; see Annex I, above, p 1. The author is indebted to Mr Paul Nelson, AMSA, for assistance in obtaining material on this aspect.


29 MSC Resolution in December 2004 in its 79th Session; MEPC Resolution on 22 July 2005 in its 53rd Session, Resolution MSC 79/223 para 10.13 and MEPC Resolution 133(53).

30 Section 1861 was inserted into the Navigation Act 1912 to this effect.
a prosecution to follow on any subsequent visit to an Australian port. Defence and government vessels not engaged in commercial service are excepted from the regime, as are vessels with approved masters who may obtain an exemption because they are sufficiently familiar with the area.

Making pilotage compulsory in an international strait is a matter of some controversy. Its proposal in the IMO committees was strongly opposed by some representatives as not being lawful in international maritime law. Australia relies on UNCLOS Arts 42 and 44 as inferring that compulsory pilotage is lawful as it is not prohibited in UNCLOS and that protection of the delicate marine environment in the Torres Strait allows this reasonable and proportionate measure. The argument advanced against this is that neither of Arts 42 or 44 allows this and, in fact, compulsory pilotage in an international strait may be regarded as hampering transit passage, which Art 44 expressly prohibits. There the matter rests and it remains to be seen if action is taken by any flag state against the Australian government if one of its ships is prosecuted for failing to take a pilot. It seems likely that the Australian domestic courts would uphold the conviction as their jurisdiction does not extend to deciding the validity of international conventions if the Australian parliament passes a valid law. In an international court, such as ITLOS or the ICJ, it is entirely another matter as domestic laws are no defence to breaches of international law.

The risks of pollution in the Torres Strait have to be borne in mind as navigation is difficult, with strong currents and many navigational hazards. This shipping traffic has increased since the establishment of an offshore oil loading terminal on the Papua New Guinea side of the Strait. There are currently plans for a gas pipeline from Papua New Guinea, under the Torres Strait, and up onto Australian land at the northern tip of Cape York although an escape of gas is, of course, more benign to the marine environment than one of oil. There has only been one significant oil spill from a shipping casualty, which was the tanker the Torrey Canyon in 1969. This casualty gave rise to much activity by Australia, including the formation of the National Plan, of which the part concerned with the Torres Strait is known as TORRESPLAN.

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31 See, for example, the Note by Professor Robert Beckman of the National University Singapore, ‘Australia’s Pilotage System in the Torres Strait: A Threat to Transit Passage’, IDSS Commentaries (125/2006).
33 See Chapter 11 for the mention of the National Plan.
9.4 Northern Offshore Oil and Gas Areas

The marine offshore areas to the north and north-west of Australia contain large quantities of oil and gas in the sea subsoil. Whilst there are other offshore areas, the areas to the north are the largest and are expanding. The map (see over) shows each of the offshore areas of immediate interest and activity. Because of the complexities involved with maritime boundaries with Indonesia and Timor-Leste it is the northern areas on which some further mention is required, especially the Timor Sea agreement with Timor-Leste as this is a developing and important issue.

It may be seen from the map that the offshore oil and gas areas around Australian are extensive. Special laws apply to these areas arising from the Offshore Petroleum Agreement 1967 and the Offshore Constitutional Settlement 1979, set out in Chapter 6. From the marine environment point of view they generally present a low risk as they are well offshore and they are well run. No Australian offshore oil and gas rig has yet caused any major oil spill into the sea. Most of the newly emerging areas are in the north so this area will now be mentioned.

The need for a stable and organised approach to the exploration and exploitation of the northern seabed areas required that Australia should agree on the outer limits of the seabed and water column boundaries with Indonesia. The boundaries were settled in a series of agreements between the two countries.\(^{34}\) The agreements with Indonesia establish this maritime boundary, although it should be noted that the most recent of them, made in 1997, has not yet been ratified. Nonetheless, both countries act on the basis that the boundaries are settled, at least for the time being.

However, there was a gap in the agreed Indonesian boundaries, which was that part of the maritime boundary which lay opposite East Timor, as Timor-Leste was then known. Most of Indonesia was a Dutch Colony until it gained independence shortly after World War II but what is now Timor-Leste was a Portuguese Colony. As a result it had a different administrative background and it has a different racial mix. Australia attempted to negotiate with Portugal on the maritime boundary opposite East Timor, but to no avail. Then in 1975 Portugal withdrew from the formal administration of East Timor and Indonesia militarily annexed the area. As a result, what had been known as the ‘Timor Gap’ in the line of maritime boundaries with Indonesia became, of necessity, a situation where Australia had to negotiate with Indonesia. (Australia had always maintained in its votes in the United Nations that East Timor had its right to self-determination.)

The result of the Australian and Indonesian negotiations was the *Timor Gap Agreement* which established three zones of cooperation in the area, known as the Joint Petroleum Development Area (JPDA). Different regimes prevailed in each zone but there was a joint sharing agreement of the oil and gas resources for the area, and the boundary was resolved as to the seabed and to the water column. In its struggle for independence, persons from East Timor took what steps they could.

The Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of Timor and Northern Australia done over the Zone of Cooperation on 11 December 1989. It came into force for Australia on 9 February 1991.

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35 The Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of Timor and Northern Australia done over the Zone of Cooperation on 11 December 1989. It came into force for Australia on 9 February 1991.
This included a challenge to the treaty in the Australian High Court on grounds that included that the treaty was unlawful. The appeal failed and the agreement and its implementing legislation were held to be valid.\textsuperscript{36} Portugal then commenced proceedings in the International Court of Justice against Australia seeking to show that the treaty was invalid. However, this failed on the ground that Indonesia was a necessary party to the case but it had not consented to the International Court of Justice (ICJ) jurisdiction and refused to become a party.\textsuperscript{37}

In August 1999 the East Timorese voted to separate from Indonesia. After rampant violence and destruction the Indonesian forces withdrew and the United Nations force entered East Timor. This took the form of a multinational force headed by Australia, called INTERFET, which was authorised and charged by the Security Council to restore peace and security in East Timor and facilitate humanitarian assistance operations.\textsuperscript{38}

After the re-establishment of security by INTERFET, UN Security Resolution 1272 of October 1999 established the United Nations Transitional Administration in East Timor (UNTAET)\textsuperscript{39} to administer East Timor until its transition to self-governing independence.\textsuperscript{40} The Resolution allowed the UN to ‘conclude such international agreements with States and international organizations as may be necessary for the carrying out of the functions of UNTAET in East Timor’. This was wide enough to cover, amongst other things, the renegotiation of the \textit{Timor Gap Treaty}.\textsuperscript{41} Although the revenue that Australia and Indonesia had received from the Timor Gap had been minimal in the past, after further investment and development, sales of oil and gas from the area could well be a major source of income for the new country of Timor-Leste. It was consequently an important issue.\textsuperscript{42}

On 10 February 2000 Australia and UNTAET signed the \textit{Exchange of Notes constituting an Agreement between Australia and UNTAET concerning the continued Operation of the Treaty between Australia and the Republic of

\textsuperscript{36} \textit{Horta v Commonwealth} (1994) 181 CLR 183.
\textsuperscript{37} For the ICJ decision, see \textit{Portugal v Australia} (1995) ICJ 90.
\textsuperscript{39} United Nations Administration in East Timor.
\textsuperscript{42} Downer A, Foreign Minister of Australia, Press Conference at the United Nations, United Nations Headquarters, New York, 2 November 1999. Hopes for substantial revenues for the two countries and the companies that are making the investment lies with the Phillips Bayu-Udan gas liquids scheme, the Woodside/Shell Sunrise natural gas project, the BHP Petroleum Jahal area and the Bonaparte Gulf area.
Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia. The Commonwealth Parliament subsequently passed amending legislation. This provided for the continued operation of the terms of the original Indonesian Timor Gap Treaty and was due to expire on the date East Timor became independent.

Further negotiations between Australian, UNTAET and East Timorese representatives gave rise to an agreement dated 5 July 2001 (Timor Sea Treaty 2002). Under the agreement a joint petroleum development area (JPDA) was established which was similar to the Indonesian agreed JPDA, and it was agreed that the parties would control all petroleum development and, of this, 90% of the production taxed revenue would belong to Timor-Leste. Timor-Leste, however, correctly maintained that the maritime boundary between Australia and Indonesia did not bind it. It then argued for the boundary to be moved to the south, thus giving it most of the oil, gas and fisheries in a very important commercial area. Australia negotiated and at the same time withdrew its agreement under UNCLOS to any compulsory jurisdiction on maritime boundaries. The real difference was that there was a huge amount of oil and gas in the Greater Sunrise field, which lay partly in and partly out of the JPDA but to the south of the agreed Australian-Indonesian maritime boundary. A 2003 International Unitisation Agreement for Greater Sunrise (IUA) agreed that 20.1% of the Greater Sunrise fell in the JPDA and 20.1% outside it.

On 12 January 2006 a new agreement was signed between the two governments; the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS Treaty). Under the new treaty Timor-Leste would keep the revenue taxing rights to 90% of the product from the JPDA and there would be 50/50 sharing of those rights from the Greater Sunrise field; there will be a moratorium on assertion of maritime boundary claims for 50 years; Australia will continue to regulate petroleum activities to the south, and Timor-Leste to the north, outside the JPDA along the 1972 Australia-Indonesia seabed boundary and Timor-Leste will have

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43 *Timor Gap Treaty (Transitional Arrangements) Act 2000* (Cth) gives effect to this Exchange of Notes and amends the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990* (Cth).


46 Article 4.

47 The IUA was signed by both countries on 6 March 2003.

48 DFAT Media Release FA005 of 12 January 2006; see <www.foreignminister.gov.au/releases/2006/FA005_06.html> and the DFAT ‘Australia-East Timor Maritime Arrangements’; <www.dfat.gov.au/geo/east_timor/fs_maritime_arrangements>. At the time of writing, the CMATS Treaty still has to pass through the parliamentary processes of both countries.
the fisheries rights in the JPDA. The map opposite illustrates the main geographical features of the three agreements. Now that the two governments are agreed, the oil companies have a stable background against which to begin their negotiations with each other and seriously to consider how and when they might commit the enormous investment into exploration and development in and out of the JPDA in the Timor Sea.

The result of the three agreements in the Timor Sea is that the jurisdiction in the JPDA will be exercised in the terms of the 2002 Timor Sea Treaty, the sharing of the unitisation problems arising from the Greater Sunrise field straddling the eastern boundary will be dealt with under the 2003 IUA and the rest of the area, under the CMATS Treaty, will be under the Australian jurisdiction to the south of the Australia-Indonesia boundary and under the Timor-Leste jurisdiction to its north.

In conclusion of this section, it may be said that the maritime area to the north of Australia is an area of complex jurisdictions which are underpinned by its great potential wealth. The marine activities in that area will increase in scale and complexity and it may be expected that the need to protect and preserve the marine environment will grow. The main marine pollution risks are from the many oil and gas rigs operating in the area, the tanker traffic to and from them and the risk of passing shipping, hurricanes or criminal activity causing an oil spill.

9.5 Conclusion

This completes the descriptions of the three special areas that have been chosen for this chapter and it only remains to draw some short conclusions. The first is that from the legal point of view, the protection of the marine environment from ships in the waters in these special areas is full of complexities. If one needed convincing for any other reason that the offshore jurisdiction of Australian laws needs to be addressed, starting with the Offshore Constitutional Settlement 1979, just looking at these three special areas should manage it.

Of the three areas, the GBR may be a simpler jurisdiction as it falls entirely within the Australian maritime jurisdiction and its complexities arise from the federal nature of the Australian constitution. The Torres Strait area, on the other hand, has the complexities of a treaty with Papua New Guinea and the needs of the Torres Strait islanders who inhabit the region and the need to protect its sensitive marine environment. The offshore oil and gas areas, particularly the areas to the north and, within these the Timor Sea, have numerous and increasing offshore petroleum activities and the complexities of international maritime boundaries.

49 Other features of the CMATS Treaty include that there be a Maritime Commission established to focus maritime discussions, including on maritime security, protection of the marine environment and management of natural resources.
All three areas have significant shipping volumes passing through them. One clear conclusion that may be drawn is that Australia will need to devote greater resources and develop much greater expertise if it is to administer and exploit these areas in a manner that is sensitive to protecting and preserving the marine environment.
Chapter 10

New Zealand Conventions and Laws

10.1 Introduction

New Zealand is a unitary country so its legal system does not have to deal with the federal structure that exists in Australia. However, as will be seen, the structure employed in New Zealand to implement the international conventions on marine pollution is one that devolves considerable responsibilities to the regional centres, so it thereby takes on some of the same complexities.¹

New Zealand has a major reliance on the oceans in that some 90% of its trade by volume of international trade is carried by sea,² fisheries is an important part of its economy³ and its offshore oil and gas industry is a major part of its energy structure.⁴ It has a coastline of about 15,000 kilometres and no part of the country is more than 130 kilometres from the coast.⁵ Important to all of this is the protection and preservation of the marine environment.

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¹ The author is indebted to Associate Professor Paul Myburgh, Law School, University of Auckland and to Mr Tim Workman, senior legal officer with Maritime New Zealand for assistance with material for this chapter.

² Almost 85% of NZ exports by value and over 99% by volume are carried by sea. In the case of imports, around 75% by value is carried by sea and the volume is also over 99%; see Statistics New Zealand (2000), website <www.stats.govt.nz/quick-facts/industries/shipping.htm>. The vast majority of this trade is carried by about 30 global and regional companies; see New Zealand Economic and Financial Overview 2006, publication produced by the New Zealand Debt Management Office in the Treasury; website <www.treasury.govt.nz/nzefo/2006>.

³ Fishing is a major NZ industry and is now its fourth largest merchandise export earner. Fish and other seafood accounted for $1119 million in export revenues in the year ended September 2005, about 3.6% of total merchandise exports; see New Zealand Economic and Financial Overview 2006, above.

⁴ New Zealand is able to supply a significant proportion of its energy requirements. Natural gas is currently produced in the Taranaki region of the North Island, from the large offshore Maui field, and also smaller onshore fields. The three main groups of gas users are electricity generation, petrochemical production and reticulation. In the year ended 31 March 2005, 40% of gas was used for electricity generation; 40% for petrochemicals and the remaining 20% reticulation in the North Island as a premium fuel. New Zealand’s crude oil and condensate production was 777,000 tonnes in the year ended 30 September 2005, of which 91% was exported and some 3.9 million tonnes were imported; see New Zealand Economic and Financial Overview 2006, above.

Fortunately, New Zealand waters have been spared any major maritime pollution spill. There have been groundings and other casualties from time to time but in most cases no oil was spilt. Probably the Jody F Millennium was the worst one for some time and even in that case the vessel’s (bunkers) oil spill was not large by world standards and it was close to a beach where equipment and personnel could manage the situation.\(^6\)

This chapter will address the New Zealand laws that give effect to the relevant international conventions, which were mentioned in Chapters 2, 3 and 4, discuss some of the New Zealand organisation and certain maritime initiatives associated with it, and then conclude with some observations.

### 10.2 New Zealand Conventions

The New Zealand governments have been a little slow in awakening to the importance of the international conventions relating to the marine environment and there is some catching up still required. It may be seen from Appendix 2 to this book (Status of IMO Conventions) that New Zealand is now a party to most of the IMO conventions which are open for ratification. In relation to non-IMO conventions, it is a party to UNCLOS, has agreed to UNCED and Agenda 21, has ratified the Basel Convention, the Convention on Biological Diversity, London Convention, CITES, SPREP and the Waigani Convention. In short it has ratified most of the relevant international conventions and is a party to most of the relevant international organisations. The conventions to which it should become a party but has not, as yet, done so are mentioned in the Conclusion.

### 10.3 New Zealand Legislation

As has been noted for Australia, common law countries such as New Zealand need to pass legislation before international conventions are given domestic effect and the two main relevant New Zealand Acts will be mentioned first followed by the other less relevant ones.\(^7\)

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\(^6\) Generally see Maritime New Zealand website, <www.maritimenz.govt.nz/Pollution/past_spill.asp>.

10.3.1 Maritime Transport Act 1994

The Maritime Transport Act 1994 (the MTA) includes as its objects to protect the marine environment, implement New Zealand’s international obligations and to continue the Maritime Safety Authority of New Zealand. It is a lengthy Act, deriving, in part, from the British Merchant Shipping Acts so this part has some overlap with some topics in the Australian Navigation Act 1912. However, the MTA also deals with the law relating to carriage of goods and by far the larger part is directed to implementing provisions relating to the marine environment and implementation of a number of the IMO conventions. Great care should be taken in dealing with the MTA to ensure that a current copy is used as it has been much amended since enacted.

With 485 sections and 7 schedules, the MTA is too lengthy to attempt a detailed summary of its many provisions. What is proposed, therefore, is for this section to describe its main aspects, including aspects of those provisions relating to the protection of the marine environment from ships, offshore installations and pipelines.

Part 1 of the MTA has the usual preliminary provisions, including definitions of ‘New Zealand internal waters’, ‘New Zealand ship’, ‘New Zealand waters’, ‘territorial sea’ and ‘owner’ of a ship. None of these definitions are unusual although they all need to be carefully read for an accurate analysis of the meaning and effect of the Act. Many parts of the MTA paraphrase and alter the international conventions to which it gives effect, which is always unfortunate as altering the wording lessens the international comity which is so important for international activities such as shipping and protection of the marine environment. The Act binds the Crown and the Governor-General may, by Order in Council, declare which international conventions are in force. Part 2 is now repealed.

Part 3 sets out regulatory aspects for participants in relevant maritime activities, which includes the duties of masters and others to have stated documents, to make reports and to comply with the various provisions of the MTA. Part 4 sets out the powers relating to ‘maritime rules’, which Rules are subordinate legislation that play an important role in the New Zealand regulatory structure. Much of the detail concerning the

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8 Preamble to the Act. The Authority is continued under s 82 and is now named Maritime New Zealand.
9 At time of writing the last amendment was 2005 No 108. The NZ website with the legislation is at <www.legislation.govt.nz>.
10 Section 2.
11 Part 2 used to deal with health and personal safety on ships but the whole of Pt 2 was repealed by the Health and Safety in Employment Amendment Act 2002 and it is now dealt with under the Health and Safety in Employment Act (HSE Act). Maritime New Zealand administers the HSE Act on ships under a designation by the Prime minister pursuant to s 286 of the HSE Act.
12 The NZ legislation, Rules and Regulations may be found under <www.legislation.govt.nz>.
maritime industry is set out in these Rules although some of them are of such importance that they could well be in the MTA itself.\(^{13}\) Part 5 sets out the powers and duties of Maritime New Zealand, which are extensive.\(^{14}\) Its Director plays an important role in the administration of ships and shipping and has wide power to deal with documents (including about qualifications and licences, permits, revocation, suspension, etc), examinations, investigation of accidents and, in particular, detention of ships in certain circumstances.\(^{15}\) The Director’s powers include suspension from employment in a New Zealand ship if the requisite document is not held and there is a sound administrative law structure for the person concerned to be given notice, to be heard, etc. Appeals from decisions of the Director are to the Maritime Appeal Authority in the case of non-qualified seafarers and to the District Court in the case of maritime document holders.\(^{17}\)

Part 6 of the MTA addresses offences in relation to maritime activities. These include offences for actions that are likely to cause serious harm to the marine environment, or are against maritime safety requirements, or relate to false or misleading documents. Part 6 also continues the ‘Maritime Appeal Authority’ from the repealed *Shipping and Seamen Act 1952*.\(^{18}\) In dealing with offences a court may disqualify the holder of a maritime document or impose conditions on its use.\(^{19}\) After six months an application may be brought to the District Court for removal of the disqualification and an appeal then lies to the High Court and, from there, with leave, to the Court of Appeal.\(^{20}\)

\(^{13}\) By including substantive provisions in the Rules it makes it easier for the administrators to keep them up to date as they do not have to await the delays and the scrutiny of parliament. Statutory Regulations are subject to direct parliamentary scrutiny but the Rules are only subject to approval by the minister.

\(^{14}\) Maritime New Zealand has a chair and four Authority members who report to the Minister of Transport. Under this is a Director and then under that office are three Deputy Directors with all of the staff. Maritime Safety New Zealand replaced the former Maritime Safety Authority. Maritime New Zealand’s website gives this structure and much other information; see <www.maritimenz.govt.nz> and follow prompts.

\(^{15}\) Section 55. A very good safeguard in the Act, but one that will cause problems from time to time because the NZ legislation differs from conventions, in that the Director is not empowered to detain a ship ‘where that detention would constitute a breach of a convention’; s 55, especially s 55(4). Compensation for the Director ‘unduly detaining’ a ship is possible; s 56.

\(^{16}\) Sections 43-47, 49-52.

\(^{17}\) Sections 52(5) and Sch 2. The Maritime Appeal Authority is headed by a barrister or solicitor appointed for a term of three years. It is obliged to follow the rules of natural justice, but its provisions about receipt of evidence are somewhat creative. It may receive any evidence whether admissible in a court or not, but otherwise is bound by the *Evidence Act 1908*; Sch 2, paras 8, 9. Its decision is final; para 14.

\(^{18}\) The details relating to this Authority are set out in the Second Schedule to the MTA.

\(^{19}\) Section 73.

\(^{20}\) Sections 77, 79.
Part 7 concentrates more on shipping matters, especially the liability of ship owners and others entitled to limit liability against claims made against them and on release of ships where security is given. Part 8 addresses on whom liability falls where two or more ships are involved in a collision (basically, ‘in proportion to the degree to which each ship was at fault’). Part 9, which formerly dealt with wreck and salvage, including the powers of a Receiver of Wreck, has been much amended and the Receiver done away with and salvage is now addressed in Pt 17, see below. Parts 10-12, which formerly dealt with construction and survey of ships and equipment, load lines and aspects of safety at sea, are repealed and these aspects are now dealt with under the Maritime Rules. Parts 13-15 cover related shipping matters and Pt 16 addresses carriage of goods by sea, including implementing the amended Hague Rules (set out in Sch 5). Part 17 provides that the Salvage Convention 1989 has the force of law in New Zealand. The English text of the Salvage Convention is set out in Sch 6 to the MTA.

For its remaining parts the MTA addresses the regulatory structure relating to the protection of the marine environment from maritime related activities, in whole or in part, amounting to some 223 sections. Parts 19-29 are particularly important and the overall structure of these marine environmental protection provisions is that none of the relevant international conventions have been directly addressed as discrete parts. In some cases the provisions about ships, offshore structures and pipelines have been put into the same part. Within these provisions Pt 19 addresses laws directed to the protection of the marine environment from harmful substances, so is a major part in dealing with pollution from ships. Also important is Pt 20, which addresses the protection of the marine environment from hazardous ships, structure and offshore operations. The powers under this part are relevant to the powers to give directions and take other regulatory steps in the event of shipping (and other maritime) casualties.

When reading through the Act one observes that the attempt to put provisions from many sources into the one Act is a brave attempt to collect it into the one piece of legislation but it has had some unfortunate results. For instance, one recognises the defences to a discharge from a

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22 For discussion of this in Australia, see White M, ‘Salvage, Towage, Wreck and Pilotage’, Chapter 9 in White M (ed), Australian Maritime Law 2000, above.

ship that are to be found in MARPOL annexes but the offences are not directly identified. It means, therefore, that the familiar structure for the regulatory regime that is underpinned by the international conventions is not present, making the MTA a clumsy regulatory tool for an international industry. As already mentioned, a further aspect is that one has to look to the Rules and the Orders in Council to actually cover the important parts of the field in relation to the regulatory structure.

Woven through the MTA are some familiar legal precepts and some of them deserve express mention. New Zealand and foreign warships and defence aircraft are, in the main, exempted from compliance but Pts 19-27 (marine pollution provisions) do apply to them. New Zealand ships, citizens and residents are bound wherever in the world they may be for offences under the MTA Pts 19-28. However, where the alleged criminal offence occurs beyond the New Zealand territorial sea foreign natural persons may be arrested and remanded with or without bail, and may be prosecuted if the Attorney-General gives consent to it, but it seems foreign companies may be prosecuted without the Attorney-General’s consent being necessary.

The key regulatory provision about polluting the marine environment is s 226. It provides that ‘harmful substances’ shall not be discharged, or escape, otherwise than in accordance with the Marine Protection Rules:

(a) from any ship, offshore installation or pipeline into the EEZ of its seabed; or
(b) from any ship or offshore installation ‘involved with the exploration or exploitation’ of the seabed, or from any pipeline, into or over the continental shelf beyond the EEZ; or
(c) from any New Zealand ship into the sea or seabed elsewhere (in effect anywhere); or
(d) as a result of ‘marine operations’ into the EEZ, or into or above the continental shelf beyond it.

Two major points can be made from these provisions:

(a) the Marine Protection Rules set out the substances that may not be discharged or allowed to escape so they need to be carefully studied; and

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24 Section 4.
25 Section 223.
26 Section 224.
27 ‘Harmful substances’ means any substance so specified under the Marine Protection Rules; s 225.
28 ‘Marine operations’ means exploration for, or exploitation or processing of, mineral in the sea or the seabed; s 222.
29 Section 226.
(b) the jurisdiction claimed for the MTA marine protection provisions apply for all New Zealand merchant ships, persons and companies anywhere, for all other ships, companies and persons in the EEZ or over the continental shelf if involved in exploring or exploiting minerals in the continental shelf.\(^{30}\) However within the 12 mile territorial sea, the discharge law comes under the Resource Management Act 1991 (but not the reporting regime), as to which see below. Overall, however, this jurisdiction claimed by New Zealand appears to conform to the international norms including the requirements of UNCLOS.\(^ {31}\)

In applying s 226, one notes that it is s 237 that sets out who may be liable for its breach. If the discharge (or escape) is from a ship it is the master and owner, if it is from an installation or pipeline it is the owner, if it occurs during marine operations it is the ‘person in charge’ and the person ‘carrying out’ the operations, and if the discharge or escape ‘results from intentional damage’ then it is the person who caused it.

The defences set out under s 243 are the usual defences to be found in MARPOL but the drafter has, once again, inserted local provisions. The defences relate to the safety of the ship, saving life at sea and the discharge was ‘reasonable’ in those circumstances. Further, if there was ‘damage’ to the ship or its equipment, it is a defence if it occurred without the ‘negligence or deliberate act’ of the defendant and reasonable steps were taken.\(^ {32}\)

There are more obligations under Pt 19 and failure to observe them is an offence. They include that there is a duty to report any such discharges or any discharge that occurs in breach of s 15B of the Resource Management Act 1991,\(^ {33}\) as to which latter Act see under. Under the structure the report can be to the Director or the relevant Regional Council and, in either case, the obligation lies on those entities to inform the other and then take action to deal with it as appropriate.

An important aspect of Pt 20 is that s 248 gives power to the Director, in the event of a shipping casualty,\(^ {34}\) to issue any instructions to the

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\(^{30}\) This is for merchant, cruise and pleasure vessels. Warships have been mentioned above.

\(^{31}\) For discussion of the relevant UNCLOS provisions, see Chapter 2.

\(^{32}\) For comparison, the MARPOL provisions are discussed in Chapter 2, the Commonwealth provisions in Chapter 7 and those of the Australian States in Chapter 8.

\(^{33}\) Section 227.

\(^{34}\) The MTA gives this power where there is a ‘hazardous ship’ and this is defined as a ship, as a result of a shipping casualty, that is discharging or is likely to discharge a harmful substance; s 248. These same or similar powers may be used in the event of a hazardous marine operation, a hazardous offshore installation or a ‘hazardous pipeline’; s 247 and following. These powers are often relied on by the Director after a maritime casualty occurs, such as in the casualty and oil spill by the Jodie F. Millenium, as to which see details on the Maritime New Zealand website, above.
master, owner, agent, salvor or other relevant person with respect to the ship or its cargo or both. These include directions to move or otherwise deal with the ship (where possible), or remove or deal with the cargo, or take over the whole control of dealing with the casualty, including its sinking or destruction. Of course in practice if there is a competent salvor, master or owner dealing with the situation, then Maritime New Zealand will usually monitor the scene and give general directions and leave the detail to the persons who have charge of it. However, if this is not the case then the powers include, if it be necessary, to give instructions to the master of any New Zealand ship to render assistance and generally assist in the operations. Compensation may be sought from the Crown by those who are directed to take steps or to give this assistance if the direction was not ‘reasonably necessary’ or the expense or loss and damage was disproportionate.\(^{35}\)

There are some unusual aspects of the MTA. One is that ships need to give prior notice of arrival at a port if they are carrying oil or a noxious liquid substance in bulk as cargo, or are planning to transfer such things whilst in the territorial sea or internal waters, such notice going to the Director or relevant Regional Council.\(^{36}\) Failure to do this is an offence and the penalties vary with its seriousness. The Director is given wide powers to deal with discharges and, as mentioned, there is a right to compensation if the exercise of the powers was ‘not reasonably necessary’ and a person suffers loss as a result.\(^{37}\) The minister has power to give directions to the Director, but a copy of the direction is to be laid before the House of Representatives as soon as practicable thereafter.\(^{38}\)

Part 21 gives force to the London Convention but the MTA adds its own gloss. Toxic, hazardous and radioactive wastes are covered and the usual provisions include making it an offence to deal with them except with an appropriate permit. It is heartening to see the usual defences set out in the Act, such as that of being necessary to save or prevent danger to life or the ship, offshore installation etc. There are several local innovations, such as the defence that the action was ‘a reasonable step in all the circumstances, or that it was likely to result in less danger than otherwise would have been the case.’ Part 22 addresses the requirements about ‘marine protection documents’ and the need to obtain the relevant ones from the Director; not to have false documents and to produce them for inspection when required.

In relation to oil spills, Pt 23 provides for some of the usual laws but adds quite a few not found in equivalent conventions or Acts. It erects an

\(^{35}\) Sections 248(4), 250, 251.  
\(^{36}\) Sections 229, 230.  
\(^{37}\) Section 251.  
\(^{38}\) Section 255.  
\(^{39}\) Section 265.
Oil Pollution Advisory Committee, requires the Director to produce an Oil Spill Response Strategy, and makes provision for Oil Spill Contingency Plans nationally and by ships, sites and in regions. The Director is also to buy and maintain stockpiles of clean-up equipment. This Part also makes provision for the ‘On-Scene Commander’ to deal with oil spills, which designation is a normal aspect of any National Plan. This is an excellent provision and similar to that of Australian and the United Kingdom provision for such a person to have overall command. The powers of the On-Scene Commander are set out. They are extensive and include directing ships and offshore installations, removing obstructive persons, vacating areas, restricting public access and power to commandeer ‘any land, building, vehicle, New Zealand ship’ or other property.\(^{40}\) The On-Scene Commander’s powers must not, however, be exercised to conflict with those for civil defence or the police emergency powers. Again the minister may give a direction but it must be laid before the House.\(^{41}\)

An innovation in the MTA not found in the Australian legislation, but found in the USA and Canada, is its provision for an Oil Pollution Fund in Pt 24. Under these provisions a levy is to be paid by ships and the fund may only be used for clean-up, preventive and related purposes. From this point of view it is not so unlike the levy in Australia that is paid to AMSA with that body being responsible nationally for oil and similar spill clean ups included amongst its other responsibilities.

Part 25 of the MTA is directed to civil liability for marine pollution from ships and offshore facilities. In relation to ships, it gives effect to the CLC and in relation to offshore marine structures and operations it sets up similar liability (but of course there is no CLC equivalent for them unless they are in navigational mode and so are categorised as ‘ships’). Part 25 also makes provision for the usual certificates of insurance etc from ships (and offshore installations) to prove they have the financial backing from a P&I Club in case of an oil spill. It should be kept in mind about liability for pollution that Pts 7 and 8 also address these issues. Quite logically, Pt 26 gives effect to the Fund Convention and makes the usual provisions for the fund to be a legal personality, for contributing oil to be levied and paid by relevant oil companies and for the usual requirements to give effect to that convention.

The MTA then moves away from the financial aspects back more into the regulatory aspects. Part 27 has numerous provisions about marine protection Rules and Regulations. Part 28 sets out quite a number of offences for various things, including penalties and provisions for appeals. In relation to appeals, offences, except for ‘infringement notice’ offences, are punishable on summary conviction.\(^{42}\) Appeals from them are dealt with under ss 422(2), 423 and 424.

\(^{40}\) Articles 305, 311. Compensation is payable; Arts 307, 308.
\(^{41}\) Article 310.
\(^{42}\) Section 408. Infringement Notices are dealt with in ss 422(2), 423 and 424.
the right to appeal comes from the other detailed provisions. Basically appeals from summary conviction go to the District Court (within 28 days of the decision), from there on points of law to the High Court and from there by leave or special leave to the Supreme Court. Part 29 sets out extensive provisions about Maritime New Zealand. Part 30 has miscellaneous provisions and the final Part, Pt 31, has transitional and other miscellaneous provisions. As mentioned, there are seven schedules.43

This is only a short description of what is contained in this very large and complicated Act and it does not attempt to deal with the many issues raised by it. That would take a whole, large, book in itself. By way of general comment, one can suggest that this attempt to bring all of the marine environmental issues relating to ships and offshore structures under the one Act has resulted in a regulatory and legal structure that is not really manageable. It is preferable to have individual Acts that deal with the individual conventions, at least to a large extent.

Some mention has been made of the Resource Management Act 1991 so it is appropriate now to turn to this Act.

10.3.2 Resource Management Act 1991

The Resource Management Act 1991 (the RMA) is directed to consolidating the New Zealand laws relating to the sustainable management of natural and physical resources concerning land, air and water, concentrating on the environmental aspects.44 It is voluminous, comprising 433 sections and 12 schedules. It deals with many aspects of planning for land use and heritage protection and it establishes an Environment Court (derived from the previously existing Planning Tribunal), which court is comprised of commissioners as well as a judge. The administrative structure of the RMA is not simple, with the Minister for the Environment, the Minister for Conservation, regional councils and territorial authorities all having separate and defined functions.45 Much of the RMA does not directly relate to marine environment and pollution from ships so only those aspects that do so relate will be mentioned.46

Before dipping into the substantive matters in the RMA, it is convenient to mention some of the definitions in Pt 1, especially in relation to the jurisdiction over which the RMA purports to extend. ‘Water’ is

43 The Schedules are: 1 – Maritime New Zealand (mainly repealed); 2 – the Maritime Appeal Authority; 3 – Enactments Repealed and Regulations Revoked; 4 – Enactments Amended; 5 – the Amended Hague Rules; 6 – the International Convention on Salvage 1989; and 7 – (further) Enactments Repealed.

44 See the website <www.mfe.govt.nz/laws/rma>; and see s 5 of the Act.

45 Sections 24-31.

defined as water in all of its physical forms and includes coastal water. ‘Coastal marine area’ means the foreshore, seabed and coastal water and related airspace, and covers from the outer limit of the territorial sea to the mean high water springs mark. For its part, ‘coastal water’ means water within the outer limits of the territorial sea and includes mixed sea and fresh water in the estuaries and harbours and, finally, ‘outer coastal water’ is defined as coastal water that is remote from estuaries, fiords, inlets and harbours.\textsuperscript{47} The net effect of this is that each prescriptive section of the Act needs to be read carefully to see exactly what jurisdiction it covers. The RMA binds the New Zealand ‘crown’ but does not apply to foreign government warships and aircraft.\textsuperscript{48} In short, nearly all activities that involve the coastal marine area are regulated. On the foreshores, permits are required for such activities as reclamation or draining, erection of structures, damaging the foreshore or seabed (except for lawful harvesting of resources), removing sand or other material or conducting aquaculture.\textsuperscript{49} Offshore from the foreshores, the activities are regulated, depending on the exact section of the Act, out to the limits of the territorial sea (12 nautical miles).

Turning to the substantive aspects of the Act in relation to shipping, one notes that no person may, in the coastal marine area (author’s italics), discharge into the water a harmful substance (or a mixture of such) from a ship or offshore installation, unless it is permitted or authorised.\textsuperscript{50} Similarly, no person may dump or incinerate any waste from a ship, aircraft or offshore installation into the coastal marine area.\textsuperscript{51} Generally one can say that, in the coastal marine areas, there is a general duty to avoid dumping or discharging contaminants from ships or offshore installations and, if it occurs, the party should attempt to mitigate and remedy any damage.\textsuperscript{52} The exceptions include some customary activity, and whilst liability is strict (that is, intention is not an element) there are defences to charges, which include such things a emergencies and reasonable conduct to save or protect life or property.\textsuperscript{53}

Mention has been made of the specific marine provisions, but the RMA casts its provisions much wider in its more general regulatory section. This provides that no person may discharge contaminant into

\textsuperscript{47} These definitions are in s 2. The definitions provide that across rivers it is a line one kilometre upriver from the mouth or the point upriver that is a width of the river mouth multiplied by five and ‘mouth’ is also defined. For those not familiar with navigational and marine surveying terms, the ‘mean high water springs’ mark is established by recording over some time of the mean of the tidal high water marks at the monthly spring tides.

\textsuperscript{48} Sections 4, 4A.

\textsuperscript{49} Sections 12, 12A.

\textsuperscript{50} Section 15B.

\textsuperscript{51} Section 15A. Radioactive waste comes in for similar regulation; s 15C.

\textsuperscript{52} Sections 15B-17.

\textsuperscript{53} Sections 18, 341-341B.
It can be seen that this offence includes any person on a ship or offshore installation and that there is no restriction to the territorial sea. While, no doubt, neither responsible and proper regulatory practice nor the law would allow double jeopardy from the one Act to justify conviction on two or more offences, there is a significant overlap from the particular provisions relating to shipping and offshore installations and the general provisions.

The penalties provided in the RMA for offences do not include imprisonment for persons from a foreign ship unless the person intended to commit the offence or it was a reckless act or omission with knowledge that it would affect the coastal marine area. The penalties are increased if the act or omission was done for commercial gain.

In relation to the appeal provisions, decisions from the various administrative authorities or boards of inquiry may be taken to the Environment Court and, on a point of law, to the High Court and from there to the Court of Appeal.

10.3.3 Other New Zealand Legislation

Of course there are a number of other acts that have some bearing on the New Zealand regulatory structure on the marine environment. Because establishment of offshore zones are important in order that the coastal State may regulate offshore in accordance with international law and practice, the zones under UNCLOS are given effect in the United Nations Convention on the Law of the Sea Act 1996, the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1997 and the Continental Shelf Act 1964. The use and ownership of the foreshores (beaches) became an important political issue in New Zealand with Maori claims to customary rights to them, so the New Zealand Government vested all rights to them in the Crown under the Foreshore and Seabed Act 2004.

The Hazardous Substances and New Organisms Act 1996 (HASNO Act) is more concerned with genetically modified organisms but it has some relevance to the protection of the marine environment. It established an Environment Risk Management Authority and it does overlap with the RMA. The HASNO Act has an overarching framework for dealing with all hazardous substances and is the source of additional regulatory powers, which lie with the Director of Maritime New Zealand. The Act

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54 Section 15.
55 Sections 339A, 339B.
56 Sections 120, 121 and also ss 290, 299 and 308.
57 See ‘Module 3: Overview of controls for managing hazardous substances in New Zealand’; which report is devoted to how to manage this overlap.
58 Under s 97(f) the Director is to ensure that its provisions are enforced in or on any ship. Other officers and agencies have this obligation in other areas of activity under that section. ‘Ship’ is defined as having the same meaning as in the MTA; s 2.
is lengthy, 259 sections and seven schedules, and has the familiar ring about regulating all activities that may harm the environment unless they are approved in some form. Suffice to say that the general duty provides that every person who imports, possesses, or uses a hazardous substance or new organism is to ensure that they do not contravene any requirement or control regarding it and any adverse effect is avoided, remedied or mitigated.59 Appeals from decisions made by the Authority lie to the District Court or, on a question of law, to the High Court.60 It may be seen that these wide provisions cover many activities on or from ships or offshore installations and, unlike the MTA and RMA, it does not seem to have an expressed geographical limitation.

The Marine Reserves Act 1986 established the framework for marine reserves (and the Environment Act 1986 and the Biosecurity Act 1993 have passing relevance to fish and mammals in the EEZ). There are, of course, quite a few Acts that deal with fisheries but they need not be mentioned as, whilst they are of paramount importance in relation to the protection of fish stocks, there is only a slight direct relevance to the protection of the marine environment itself. Fishing vessels themselves are, of course, regulated by fisheries and ship safety legislation. Mention has already been made of the importance of the many and various Orders under the relevant Acts in giving effect to the New Zealand marine regulatory structure but suffice for present purposes to note that, under the Maritime Transport Act (Marine Protection Conventions) Order 1999, declarations are made concerning the Intervention Convention, the CLC, the Fund Convention, MARPOL 73 (but not MARPOL 78) and UNCLOS.61

In relation to safety and so, incidentally, to the protection of the marine environment the minister has power to declare safety (and exclusion) zones around offshore installations62 in accordance with UNCLOS (up to 500 metres from the installation).63 Submarine cables and pipelines are protected under the Submarine Cables and Pipelines Protection Act 1996 and there is power to declare protected areas in which fishing and other activities are not permitted. Dumping of wastes at sea are regulated, giving effect to the London Convention, through the MTA and the RMA.64

59 Section 13.
60 Part 8.
61 Other relevant Orders are the Maritime Transport (Certificates of Insurance) Regulations 2005; Maritime Transport (Fund Convention) Levies Order 1996; Maritime Transport (Infringement Fees for Offences Relating to Major Maritime Events Regulations) Order 1993; and the Maritime Transport (Maximum Amounts of Liability for Pollution Damage) Order 2003.
62 The Continental Shelf Act 1964 Regulations; MTA ss 36(1), 338.
63 UNCLOS Art 60, IMO Resolution Art 671(6) (Safety Zones and Safety of Navigation Around Offshore Installations and Structures).
64 Also through the Marine Protection Rule Part 180 – Dumping of Waste or Other Matter; see further in the Guidelines for Sea Disposal of Waste, in the relevant Standards and also in the National Policy on Sea Disposal of Waste. The regulatory structure is managed by the Director of Maritime New Zealand.
One should note that there are numerous Rules established under the legislation mentioned above, all of which are available from the websites.

On the criminal law side, the SUA Convention is given effect in the Maritime Crimes Act 1999 and the recent drive to make ports and ships more secure against terrorism is given effect in the Maritime Security Act 2004.

### 10.4 Some New Zealand Initiatives

Before closing this chapter on the New Zealand regulatory structure on the marine environment and shipping, it is appropriate to note the several administrative initiatives that the New Zealand Government has taken. From time to time there has been a Pollution Prevention Response Strategy of which the proposals in the 2005 Report are the most recent. It addresses the structure for a national response team, adding to the regional ones, and also addresses the vexed question of refuge for maritime casualties, in which a case-by-case stance is adopted.

The National Marine Oil Spill Response Service, established under the National Oil Spill Contingency Plan (the National Plan) is based in Te Atatu, Auckland, and it works with the Regional Councils for provision of oil spill equipment, on some 20 different locations in 16 different regional areas, and training. The New Zealand plan is based on the usual three tiered response in which Tier 1 is for the local site to deal with the spill, Tier 2 is for the Regional Council to deal with it and Tier 3 gives rise to a national response. In each case an On-Scene Commander is appointed by the entity responsible for dealing with the spill. Maritime New Zealand also has a New Zealand Marine Oil Spill Response Strategy and one aspect of that is the 2004 New Marine Oil Spill Risk Assessment. This assessment shows a low risk and in 2005-2006 the spills were very small and the trend over recent years was downwards.

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66 These reports and other documents are available on the Maritime New Zealand website, at <www.maritimenz.govt.nz>.

67 In Tier 3 cases NZ, like most equivalent countries, can call on neighbouring countries for assistance with equipment and personnel under the OPRC; see the 'National Plan' page on Maritime New Zealand website, above.

68 For details see the Maritime New Zealand Oil Spill Response Fact Sheet, available on its website, above, and also the annual reports.

The New Zealand Government has been active in discussing its various policy options for its offshore jurisdiction. In 2000 an Oceans Policy for New Zealand was published and debated and a recent initiative is the report entitled ‘Offshore Options: Managing Environmental Effects in New Zealand’s Exclusive Economic Zone’ 2005. This report canvasses the various options available to the New Zealand Government in the EEZ and recommends that in the short term the government forms voluntary agreements with the entities that are active in the area and in the long term it introduce legislation. Also the ‘New Zealand Marine Oil Spill Risk Assessment 2004’ report sets out many sensible scenarios and options.

10.5 Conclusion

Overall the New Zealand Government has been reasonably active and successful in keeping up with the many changes and the relevant international conventions and domestic legislation to give effect to them. It is a little slow in relation to ratifying some conventions. The IMO ones that it is desirable that it should now ratify are Annexes IV and VI to MARPOL, the Intervention Convention Protocol 1973, the Limitation of Liability of Maritime Claims Convention Protocol 1996 and the OPRC/HNS Convention 2000. The more recent IMO conventions it should be giving serious consideration to ratifying are the Bunkers Convention 2001, the Anti-Fouling Convention 2001 and the Ballast Water Convention 2004.

In relation to its legislation, the New Zealand Government officers and Maritime New Zealand are to be congratulated on taking many initiatives. The attempt to put so much into the Maritime Transport Act 1994, however, has created a legislative structure which is clumsy and unmanageable and this is compounded by placing much of the substantial material in the Rules, Regulations and Orders. Once the conventions and protocols mentioned above are ratified by New Zealand it will, of course, need to have legislation to give effect to them.

On the question of the adequacy of the legislation, it is suggested that the policy of re-drafting all of the relevant international conventions and also attempting to put nearly all of the provisions into the one Act, the MTA, is in serious need of revision. Whilst it was possible in earlier times to have just the one major Act, such as the British legislation being under the Merchant Shipping Act, regulation of maritime activities is now much more complex and more extensive. The result is that the policy of having one major piece of legislation to cover so many aspects of maritime activity is unsustainable.


71 These conventions are discussed in Chapters 2-4, above.
Another area that could benefit from review is that the responsibility and actions for the protection and preservation of the marine environment from shipping is spread across different agencies and jurisdictions. One result is that the spread of skilled personnel means that many regulatory agencies are under-resourced. Leaving so much to the regional councils and expecting that they will be competent in handling oil and other spills is optimistic. It is unlikely that most of them could ever have the skilled personnel and organisational depth needed, even with Maritime New Zealand backing it up. There is much to be said for leaving local port matters to them but for the New Zealand government agency, Maritime New Zealand in this case, to have the overall legislative power, responsibility and funding to deal with this aspect.

On the positive side is that the major agency, Maritime New Zealand, is active in coordinating regulation and training across a multitude of areas and agencies. It gives extensive training to personnel from all agencies and interests and coordinates the supplies of equipment and, in the event of a Tier 3 spill, it has the central responsibility and role. Regional harbour masters play a central role as the On-Scene Commanders and they are supported by a national structure through Maritime New Zealand, whatever the seriousness of the spill.

Overall New Zealand has in place an adequate regulatory structure. Importantly, it also has the benefit of being a low risk maritime area from the point of view of damage to the marine environment.

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72 The protection of the marine environment is closely connected to maritime safety and it seems that the NZ Port and Harbour Marine Safety Code has, like the marine environment protection regulatory structure, need of careful revision. A comment about the Code by Associate Professor Paul Myburgh, Auckland University, seems appropriate: ‘Maritime safety in New Zealand ports and harbours is a national issue of paramount importance that ought not to be addressed on a voluntary opt-in basis, or by regulation by stealth. At the very least, the New Zealand Port and Harbour Marine Safety Code should be given some form of proper legislative imprimatur, and compliance with the Code should be made mandatory for all port companies and regional councils’; see Myburgh P, ‘Shipping Law’ [2005] New Zealand Law Review 287-306 at 293.
Chapter 11

Administrative Machinery
for Combating Marine Pollution

11.1 Introduction

There is an extensive and complex array of Commonwealth, State and Territory organisations for the control of shipping and the protection and preservation of the marine environment in Australia. However, it is expedient to restrict discussion and two that are important are AMSA and the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances (the National Plan). In New Zealand there is a similar structure with Maritime New Zealand and the New Zealand National Plan. The other aspect for both countries that deserves mention is the Port State Control (PSC) regime. PSC is fairly complex and reference needs to be made to a wide array of international conventions and Australian and New Zealand laws and regulations to cover it in depth. However, this chapter will touch on it sufficiently to give the reader an overview and a guide as to where further research may be conducted. Finally, the chapter will end with a conclusion summing up the efficacy of these structures.

11.2 Australian Maritime Safety Authority

In Australia the Australian Maritime Safety Authority (AMSA) regulates shipping and navigation in the main and it is AMSA which is the lead agency in representing the national interest at the IMO and other similar organisations. It is also AMSA which administers most aspects of the other IMO conventions and their Australian domestic legislation which implements them.\(^1\) This generous role played by AMSA is, however, a little beyond its main functions of maritime safety and protection of the environment and the Commonwealth Department of Transport and Regional Services\(^2\) is gradually acquiring the maritime skills that it has lacked in the past and is likely to be more active in future shipping policy and regulation.

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1 The State and Territory departments of transport also have a role to play of course, especially in policy, but there is not space to discuss them in this chapter.
2 Commonwealth Department of Transport and Regional Services (DOTARS).
AMSA was established by the *Australian Maritime Safety Act* 1990 (Cth). Its main functions relate to combating marine pollution, providing a search and rescue service, providing commercial services to the maritime industry, cooperating with the Transport Safety Investigation unit about maritime casualties and performing certain other functions conferred on it by the Act. It is a body corporate with the directors appointed by the responsible minister and derives some of its income from levies and charges on ships and marine bodies and the balance from government subventions. The minister may give directions to it but normally does not. It is the body that administers port state control and maintains Commonwealth navigational structures and its duties include administering MARPOL, so it can be seen as the major administrator for matters directly concerning most aspects of the marine environment in relation to shipping.

Enforcement is also part of the AMSA duties and it does bring some prosecutions itself, but mainly these are brought by the State authorities as most incidents occur in coastal or port waters or otherwise within the jurisdiction of the States and the Northern Territory. AMSA has, however, referred 41 pollution matters to various foreign flag states, resulting in 11 matters being prosecuted (no results reported). AMSA also provides assistance to State and Northern Territory agencies during investigations, for example by providing technical information and arranging shipboard inspections when a suspect vessel has sailed to another State or the Northern Territory or left Australian waters.

Some of AMSA’s income is from levies on shipping. These are exacted under various headings, including one called the ‘Protection of the Sea Levy’. This levy falls on ships of more than 24 metres that are carrying more than 10 tonnes of oil as cargo or bunkers and is payable quarterly.

One of AMSA’s related responsibilities is running the Australian mandatory ship reporting service for oceangoing ships, called AUSREP, with small craft rescue being undertaken by the coastal States and the Northern Territory. (The aspect that related to the Great Barrier Reef...
AUSREP is mainly for the purposes of rescue coordination, which is operated through the Australian Rescue Coordination Centre (RCC Australia). It also has advantages for regulation and, where appropriate, prosecution for marine pollution from ships as it can identify the likely offenders and then take steps to follow up. The reporting area covers the Australian search and rescue (SAR) area, which extends from northern latitudes near Indonesia to the Antarctic and from the Australian east coast well out into the Indian Ocean.

11.3 Maritime New Zealand

Maritime New Zealand emerged from the Maritime Safety Authority in 2005 following a 2002 New Zealand Transport Strategy report. Its origins go back, through a series of metamorphoses, to the New Zealand Marine Board, first established in 1862. The duties, powers and responsibilities of Maritime New Zealand, set out in the Maritime Transport Act 1994, are very wide and include maritime safety, seafarers’ qualifications, registration of ships, port state control, investigation of maritime accidents, maintaining and servicing lighthouses, security of ports and ships, rescue and distress service, marine oil spill response and administering the Oil Pollution Fund.

As mentioned in Chapter 10, the structure of Maritime New Zealand is that there is an Authority of five people, appointed by the minister, which Authority in turn appoints the Director. Under the Director are three deputy directors, seven general managers and some 130 fulltime staff. Most of the staff are in the Wellington office and the others are at key strategic places about the country, including the Rescue Coordination Centre of New Zealand at Lower Hutt. One of its major responsibilities is to administer the New Zealand National Plan, as to which see under.

11.4 National Plan for Combating Pollution

Most countries have an organisation for dealing with marine pollution spills and Australia and New Zealand are amongst them. Its general

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10 See generally for this information the Maritime New Zealand website; <www.maritimenz.govt.nz/about_us/history.asp>.
11 See the MTA Pt 5.
13 Maritime New Zealand website <www.maritimenz.govt.nz/about_us/structure.asp> accessed 14 October 2005. Maritime New Zealand has also produced a Strategic Plan 2005-2010, which has the aim of being the best in this best of all possible worlds, and there is also a National Policy on the Sea Disposal of Waste; see website, above.
structure is that in the event of a spill or other discharge the personnel previously nominated for the various tasks are contacted, proceed to the site or other designated place, arrange for equipment to be mobilised and then to deal with the spill. Small spills are dealt with locally and larger ones attract more personnel and more equipment as may be decided. Some description of both of the Australian and the New Zealand structures is called for so they will now be set out.

11.4.1 Australian National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances

After an oil or other pollutant spill occurs the emphasis is on cleaning up the spill as much as possible and reducing the damage it does to the marine environment, the shores and the structures that are in its path. Australia’s arrangements for dealing with spills of oil and chemicals are known as the National Plan. Under the National Plan there are separate geographical areas for command and control organisation and, because of its particular sensitivity, the part that relates to the Great Barrier Reef is known as REEFPLAN. The Mission Statement of the National Plan is:

The purpose of the National Plan is to maintain a national integrated Government/industry organisational framework capable of effective response to oil pollution incidents in the marine environment and to manage associated funding, equipment and training programs to support National Plan activities.

This mission statement is implemented by having an organisation for personnel and equipment to be rapidly marshalled at the site of a pollution emergency. The Plan also ensures that training is carried out, suitable oil spill equipment is pre-positioned commensurate with the risk and costs, and that the media and the community are able to inform themselves about relevant aspects. Specialised response equipment is located strategically in sites around the Australian coastline with a major site of equipment at the Australian Marine Oil Spill Centre (AMOSC), near Geelong, Victoria. Aircraft are available at short notice to airlift the equipment to wherever it is required. In the case of the GBR, as for much of the Australian coastline, delivery of this equipment depends on accessibility by air, land and sea. Most Australian ports have some booms, skimmers and other equipment stored and ready for rapid deployment.

The geographical area covered by the National Plan includes all Australian territorial seas and the EEZ and it also extends to the High Seas where an oil spill outside the EEZ still threatens Australian interests.

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14 The damaging effect of an oil spill is discussed in Chapter 1 (section 1.5).
15 Its full title is ‘National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances; details of which can be obtained from the AMSA website: <www.amsa.gov.au/>.
Wide powers are given to the relevant ministers; Commonwealth, State and Territory, under the suite of legislation. The powers given to the maritime emergency response commander (MERCOM) have been discussed in Chapter 7 in Section 7.8. An owner, charterer or salvor, in dealing with a shipping casualty, is often given instructions by, amongst others, the Australian government agencies on what and how the casualty is to be handled.16 In the case of oil spills, the best solution may be to leave it alone and let nature take its course but in spills close to shore this is not usually feasible as the shores, facilities, reefs and general marine environment all need to be protected.17

The Australian National Plan was created in 1973, its creation being hastened by the Oceanic Grandeur casualty in the Torres Strait in 1970.18 Under the National Plan the Commonwealth, States and the Northern Territory have entered into an Inter-Governmental Agreement covering all aspects of the National Plan’s administration, funding and operation. AMSA has an additional agreement in place with the Australian Institute of Petroleum (AIP)19 to deliver requisite personnel and equipment to the casualty site.

There are two different contingency structures; one for oil spills and the other for chemicals. To understand the division of the responsibility reflected in these formal agreements, one needs to have in mind the complexities of the Offshore Constitutional Settlement 1979 under which the States are given jurisdiction of the first three miles offshore from the baseline. If they wish to exercise that jurisdiction then the Commonwealth legislation ‘rolls back’ to give place to that of the States over that area of the sea.20 Therefore pollution spills within the first three miles offshore is often handled by the State agency but with support from others under the National Plan. The jurisdiction over the GBR21 in the

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16 One example is the Kirki casualty in 1991; for details see White M, Marine Pollution Laws in the Australasian Region (Federation Press, 1994) section 10.5 and Appendix.
17 Oil will break down into its natural constituents over time, whether in the sea or on the shore. There is only a limited range of actions that can be taken if a major spill occurs in the open sea. In open sea cases less than 10% of the oil is recovered and the prospects of guiding the balance of the oil away from sensitive areas is slim. It depends on the conditions, especially the tides, winds and speed at which equipment can be gathered at the site. Generally see the ITOPF website <www.itopf.org> (and hard copy booklet on oil spills).
18 About 1000 tonnes of oil was spilt when a tanker had its bottom opened up by an uncharted large rock on the seabed in the Torres Strait. The aspect of the accident that went to the High Court was on the amount payable for salvage - Fisher v The Ship 'Oceanic Grandeur' (1972) 127 CLR 312.
19 The AIP has developed its own Marine Oil Spill Action Plan (MOSAP) and has established the major equipment stockpile at Geelong, Victoria; the Australian Marine Oil Spills Centre (AMOOC).
20 For discussion of the Offshore Constitutional Settlement 1979, see Chapter 6.
21 The GBR is dealt with in Chapter 9.
first instance lies with the Queensland government agency, Maritime Safety Queensland.\textsuperscript{22} There are frequent desk-top and mock exercises of oil spills conducted by the authorities and the relevant private sector to test and improve the National Plan.

\subsection*{11.4.2 New Zealand National Plan}

As mentioned above, Maritime New Zealand is charged with administering Tier 3 spills, the regional Councils with administering Tier 2 ones and the local site with Tier 1. However, Maritime New Zealand also has the overall administrative responsibility for the general structure and training for oil and chemical spills. Fortunately, as found in a 2004 Risk Assessment,\textsuperscript{23} over the previous six years before the assessment there had only been three major accidents in the jurisdiction involving spills of 50 tonnes or greater and another six where no oil was spilled but there was potential for one.\textsuperscript{24} In fact the good news was that the risk was calculated to have fallen slightly in recent years.\textsuperscript{25} The NZ position is discussed in Chapter 10 above.

\subsection*{11.5 Port State Control}

Port State Control is the name given to the inspection and regulation system of ships which enter the ports of a state. Under international maritime law, a state has control over ships of its own flag wherever in the world they may be, but entry into a port of a foreign country subjects the ship, cargo and crew to the laws of that state and gives the port state power to inspect the ship, its cargo and crew.\textsuperscript{26} The purposes of PSC are to ensure that the ship complies with international conventions and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{22} For details, see the ‘National Marine Oil Spill Contingency Plan (NMOSC)’ and the ‘National Marine Chemical Spill Contingency Plan (ChemPlan)’; see AMSA website <www.amsa.gov.au> and follow prompts. The position regarding the Maritime Safety Queensland responsibilities for pollution spills is discussed in Chapter 8 Section 8.2.
\item \textsuperscript{23} The 2004 New Zealand Marine Oil Spill Risk Assessment, prepared under the NZ Marine Oil Spill Response Strategy; see Maritime New Zealand website, above.
\item \textsuperscript{24} Assessment, p ES-3. Modelling showed that Auckland port was most at risk, with tankers being the most likely type of ship involved; p ES-4. The details of the major maritime incidents, including that of the \textit{Jodi F. Millenium}, the most public and biggest spills involving a grounding, salvage, oil spill and other dramas, may be found on the Maritime New Zealand website, above.
\item \textsuperscript{25} The overall estimated spill rate for 2002/2003 was about 5\% lower than in 1998; above p ES-5.
\end{itemize}
\end{footnotesize}
national laws and is constructed, crewed, maintained and operated in accordance with international standards. The primary responsibility for this rests with the flag state but many of the flag states fail to maintain any inspection system, or if they have them to maintain them to a satisfactory level. The world shipping community has improved the system of PSC to a high level to meet the need thrown up by this failure of flag states.

In Australia the primary responsibility for PSC inspections lies with AMSA, which maintains a system of ship surveyors who service the Australian ports to carry out the necessary inspections. There are over nine international conventions or agreements that give the right of inspection to ensure compliance with their requirements and the number is growing with the increased security regulation of visiting mercantile shipping. Although there are powers of prosecution of masters and owners if their ships do not comply with the requirements, the main coercive power is the detention of the ship until the proper requirements are met. Prevention of a ship from continuing its voyage is a considerable disadvantage to a ship owner as detention causes income loss, delays the delivery dates and may incur extra port charges.

Many of the powers of detention are to be found in the Navigation Act 1912 and there is a general right of appeal under this Act to the Commonwealth Administrative Appeals Tribunal. However, this right of appeal is seldom used as the time delay involved in seeking to test the legality of the detention is too much to make it a commercially viable option. Ships generally seek to meet the requirements stipulated by AMSA so they may sail as soon as possible. There is also power to detain for pollution breaches under the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 and this power is also contained in most of the State legislation.


28 Powers of detention for non-compliance are to be found in ss 164, 178, 189, 190A, 192A, 210, 214-227, 267, 267k, 267x, 267y and 399, and probably others as well. Relevant powers are also found in Marine Orders No 4 of 1994 and No 8 of 1997.

29 Part IXA.

30 Sections 27, 27A, 29.
The IMO and others have encouraged countries in various regions around the world to organise themselves into regional organisational groups to better enforce the standards required of shipping. The two regional groups involving Australia are the Asia-Pacific Regional Co-operation on Port State Control (the Tokyo MOU) and the Memorandum of Understanding on Port State Control in the Indian Ocean Region (Indian Ocean MOU).\textsuperscript{31} AMSA regularly publishes reports on the number of ships inspected, the defects which are found and the number of ships that are detained. These reports are on the AMSA website\textsuperscript{32} and also in its annual reports.

\textbf{11.6 Conclusion}

It may be seen from the above that the administrative structures in force in Australia and New Zealand for the pre-planning for and clean up after of oil, chemical and other spills into the waters within their respective jurisdictions are comprehensive. AMSA has experienced shipping and spill clean-up personnel and it has in place sensible agreements on cooperation with the States and the Northern Territory and also with the oil and shipping industries. The equipment stockpiles are in place and regular training is conducted in various sites. New Zealand also has a sound structure under Maritime New Zealand and the arrangements for training, equipment stockpiles and cooperation with the Regional Councils and sites seem appropriate. One says ‘appropriate’, as the risk for both countries is low. However, large oil spills are inevitable from time to time and when they eventually occur there are sure to be some shortcomings. The only serious shortcoming in the skills area lies in the Commonwealth Department of Transport and Regional Services, where it has lacked skilled mariners, maritime lawyers and other maritime personnel to date. However, there are signs that it is now addressing this situation.

This then concludes this chapter and, apart from the two appendices and the index, concludes the book.


\textsuperscript{32} Website at <www.amsa.gov.au>; hard copies of the AMSA reports can be obtained from it on request.
Appendix 1

SUMMARY OF CONVENTIONS
as at 31 December 2006

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* Source: Lloyd’s Register of Shipping/World Fleet Statistics as at 31 December 2005
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