Oil Pollution in the Australian and New Zealand Region

BY

Michael White QC

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In their major work on oil pollution M'Gonigle and Zacher stated:

> " The protection of the global environment has only recently become an issue of international concern. Indeed, despite the massive, world-wide industrialization of the last century the health of the environment was assumed or ignored. With the mounting pollution and ecological disruption brought on by such industrialization, attitudes have begun to change but slowly. Even today, the seriousness of the problem and the size of the changes needed to deal with it are still uncertain."[1]

The words are as true for today as when they were written in 1979.

This paper concentrates on the legal aspects of marine pollution from oil spilled off the coasts of Australia and New Zealand (NZ) but it also mentions other aspects of marine pollution . There are three main areas of law which touch on the situation, namely, public international law (which is comprised mainly of the relevant international conventions), implementation of those conventions by legislation, and the legal rights and obligations arising from the cost of cleaning up oil spills and claims for loss or damage. There are also some voluntary agreements among certain oil and shipping companies. Most of the legislation is based on the relevant international conventions, of which there are many, and it is convenient to deal with those conventions first.[2]

International Conventions

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[1]M'Gonigle, M R and Zacher, M W, *Pollution, Politics, and International Law.Tankers at Sea* (University of California Press, 1979) p3.

[2]This article touches on each of these areas but, in the very limited space available, it is not possible to discuss any of these areas in depth. The conventions, legislation and the agreements have provisions other than those mentioned in this paper.

Following an inquiry in the UK in 1952-1953 into oil pollution around its coasts the UK government called an international conference on the topic of oil pollution which was held in London in 1954. The conference agreed on terms for a convention to control oil pollution, known as OILPOL 54,[3] which was the first of the international conventions to deal with oil pollution by ships. It was well received and attracted much support from most of the relevant countries. It came into force internationally on 26 July 1958 and for Australia on 29 November 1962.[4] OILPOL 54 was amended from time to time to make the regulation over the discharge of oil more and more stringent[5] and it was eventually repealed by the convention that replaced it - MARPOL 73/78. Since OILPOL 54 the responsibility for convening such conferences and administering relevant conventions has been taken on by the United Nations body then called the International Maritime Consultative Organization (IMCO), now known as the International Maritime Organization (IMO).

The limited power of coastal states under international law to deal with ships beyond their territorial seas had been a restriction upon their ability to control marine oil pollution offshore.When the *Torrey Canyon* went aground some miles off Lands End, England in 1967 the oil spill was estimated at over 100,000 tons of crude oil, much of which caused damage to the English coast.[6] But the wreck lay outside the United Kingdom territorial sea and so beyond its jurisdiction. This and other major oil spills stimulated the international community do something about such disasters occurring near their shores. The resulting convention was the 1969 *Intervention Convention*[7] the terms of which permitted a country to intervene beyond its territorial seas if its shores were threatened by pollution from a

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[3]*International Convention for the prevention of the Pollution of the Sea by Oil* done at London on 12 May 1954.
[4]Singh, *International Maritime Conventions* (Stevens & Sons, 1983) p. 2235.
[5]Amendments were made in 1967 and 1969 - Singh, supra, pp.2234-2235.
[6]For a good mariner's account of the *Torrey Canyon* disaster see Potter, J, *Disaster by Oil*, The Macmillan Company, New York, 1973; Chap.1.
[7]*International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* done at Brussells on 29 November 1969.

marine casualty.[8] At the same time the 1969 *Civil Liability Convention* [9] established strict liability but limited the amount for oil pollution damage from tankers. An insurance structure was created and the ship owners of ships carrying over 2,000 tons of oil as cargo were required to maintain insurance (or other financial security) to cover their liability for pollution damage under the convention.

In 1971 the *Fund Convention*[10] was concluded, again under the auspices of IMCO, which was a supplementary convention to the *Civil Liability Convention*. This convention considerably extended the limits of liability for oil pollution (from about US$20 million to about US$80 million). The concept behind the *Fund Convention*, the income for the fund being raised from a levy on the oil owners who import or export oil in bulk, as opposed to the shipowners, was that the burden of pollution costs be shared between the shipping and oil industries.[11] The *Fund Convention* provides that where the shipowner is not liable at all under the *Civil Liability Convention*, or is liable but is unable to meet that liability, or if the pollution costs and damage exceeds the limits of that liability, compensation will be paid to the claimant from the International Oil Pollution Compensation Fund, which the Convention established. The limit of payment for any one incident was raised in a 1979 Protocol to about US$76 million. The *Fund Convention* relieves the shipowner (or more usually its insurer) of some of the liability under the *Civil Liability Convention*, but not if there is wilful misconduct by the shipowner or where there is failure by the shipowner to observe aspects of the convention which leads to damage. Similar procedural provisions are

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8 Initially the *Intervention Convention* only related to oil threats but a Protocol done at London on 2 November 1973 amended it to include threats from other pollutants, including most oils carried in bulk, gasolines, naphtha, noxious substances, liquified gases carried in bulk and radioactive substances.

9 *International Convention on Civil Liability for Oil Pollution Damage* done at Brussels on 29 November 1969. It is also commonly referred to as the "CLC".

10 The *International Convention on the Establishment of an International Fund for Oil Pollution Damage* done in London in 1971.

11 Churchill and Lowe *The Law of the Sea* (Manchester University Press. 1989) p.266.

contained as those set out in the *Civil Liability Convention.*[12] Protocols were agreed to both of these Conventions in 1984, which raised the maximum limits of payouts, but they have not attracted sufficient ratifications for them to be adopted, mainly because the USA has, because of the *Exxon Valdez* spill in Alaska in 1989, adopted the attitude that the international conventions give too little protection against oil pollution, has refused to support them and has enacted its own legislation.[13] The terms of these Protocols may be agreed to in a conference planned in late 1992, but with a lower level of ratifications for them to come into force.

In 1968, prior to the two 1969 conventions, the oil industry showed great initiative and responsibility in erecting a voluntary agreement to indemnify and pay for the costs of cleaning up oil spills from tankers and to recompense those who suffer damage from them. The agreement is known by its acronym, TOVALOP.[14] Under this agreement the tanker owner parties to it pay such levies as are needed to meet claims and the TOVALOP administration becomes liable to indemnify tanker owners for costs incurred and payments made for compensation arising from oil spills. The initial limit was US$16.8 million and this was later raised in a Supplement agreement in 1987 to US$70 million. The owners and demise charterers of the relevant tankers are the parties who meet the liability.[15]

With further commendable initiative the oil industry, realising that some years would pass before the new upper limits of liability would come into force under the two conventions, introduced a voluntary scheme known as CRISTAL,[16] which commenced in 1971. CRISTAL extended considerably the ceiling of the cover for oil pollution.[17] The

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12 Articles 6-8.
13 See the *Oil Pollution Act 1990.*
14 The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution.
15 Booklet entitled "Tovalop", produced by The International Tanker Owners Pollution Federation Limited (London).
16 Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution.
17 Booklet entitled "CRISTAL. Memorandum of Explanation. Cristal Contract. Cristal Limited." (Published by Cristal Ltd,London. Revised 20 February 1992).

scheme is administered by Cristal Limited (a Bermudan company) with the day to day administrative services being handled by its subsidiary, Cristal Services Limited, from London. Its purpose is to supplement the amount of the indemnity payable under TOVALOP to the tanker owner. The distinguishing feature of CRISTAL is that it is the owner of the oil which provides the compensation rather than, as in TOVALOP, the owner or demise charterer of the tanker. In the first instance the claimant must seek compensation from the owner of the tanker involved in the incident up to the limit of the Supplement to TOVALOP, and then pursue its claim under the *Fund Convention* and, further, against any other party which may be liable.(For such pursuit CRISTAL may advance funds for prosecution of the claim). It is only after these avenues have been exhausted that the claim may be pursued against CRISTAL.[18] It is for this reason that the CRISTAL fund is often described as a "top-up" fund. The limit of payment is US$36 million for tankers up to 5,000 gross tons and for tankers above that tonnage an additional $733 for each ton up to a limit of US$135 million. Notice of a claim must be given to Cristal Limited within 2 years of the alleged incident giving rise to the claim.[19] These agreements are limited, however, like the two conventions, to cover for spills of persistent (heavy) oils from laden tankers. Spills of persistent oil other than from laden tankers, spills of other oils and spills of other pollutants do not attract strict liability, limitation of liability or the insurance and indemnification regime to cover the costs and damage they occasion.

MARPOL 73/78[20] is presently the major international convention concerning maritime pollution. When it entered into force in 1983[21] it superseded OILPOL 54.

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18 Booklet entitled "CRISTAL", supra, pp.7,8.

19 Ibid, p.9.

20 *The International Convention for the Prevention of Pollution by Ships* done at London on 2 November 1973.The text is reproduced in (1973) 12 *Int. Legal Mat.* 1319 and by Singh, supra, p. 2272 et seq. The 1978 Protocol is reproduced in (1978) 17 *Int. Legal Mat.* 546. The convention and all of its subsequent changes are also reproduced as schedules to the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth).

21 Gold, *Handbook on Marine Pollution,* (Canada. 1985) p.58; see also Department of Foreign Affairs and Trade, Canberra. AGPS. *Treaty Series 1988.*

MARPOL was opened for signature in 1973[22] but the 1973 convention did not gain sufficient acceptances to come into force. At a further conference, in 1978, a Protocol amended the convention and brought the whole of the amended convention forward for acceptance, of which there were subsequently a sufficient number, hence the original 1973 convention and the 1978 protocol are reflected in the name of MARPOL 73/78.

MARPOL 73/78 contains twenty articles, two protocols and five annexes, namely, Annex I - oil, Annex II - noxious liquid substances, Annex III - harmful packaged substances, Annex IV - sewage, and Annex V - garbage. The Convention and Annex 1 entered into force on 2 October 1983, Annex II on 6 April 1987, and Annexes III and V on 31 December 1988 , but Annex IV has not yet attracted sufficient ratifications to enable it to enter into force.[23] Annex I to MARPOL 73/78 controls the shipping and oil industries in regulating, for example, how and when ships may discharge their oil and how they should be built.[24]

There are other international conventions which are concerned with marine pollution. Many of them have regional effect only, some of them cover offshore exploration and exploitation of the sea bed and sub-soil, others cover radioactive substances, some of them regulate dumping of wastes in the oceans and one of them restricts international dealing in wastes for dumping. It is not possible to cover these, of course, in this short paper.

The conventions and agreements which have been mentioned above establish, then, the international framework under which the Australian and NZ legislation was enacted,

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22 The first conference was held in London from 8 October to 2 November 1973 at which 78 States, including Australia, were represented.

23 Gold, supra, p.58; *Gard News*, Issue 123 dated October 1991.

24 These are two quite separate approaches and demonstrate how wide-ranging Annex 1 is to the problem of oil pollution. For an authoritative recitation of Australia's position on the implementation of the marine environment conventions see Ryan KW (ed) *International Law of Australia* (2nd ed. Law Book Co, 1984), Chap 18 by Burmester H "Australia and the Law of the Sea in the Protection and Preservation of the Marine Environment".

except that it should be noted that Australia and NZ have not yet become parties to the *Fund Convention*[25] and NZ has not yet become a party to MARPOL.

Australian Legislation

A. Commonwealth

Before dealing with the Commonwealth legislation mention needs to be made of the distribution of offshore jurisdiction between the governments of the Australian States and the Commonwealth.There had been a constitutional dispute as to whether the Commonwealth or the States had jurisdiction over the territorial sea but this was decided in favour of the Commonwealth in 1975 in *The Seas and Submerged Lands Act Case*[26] although the subsequent Offshore Constitutional Settlement[27] returned the jurisdiction to the States.[28] Thus, for control over oil pollution from ships, the States and the Northern Territory (NT) have jurisdiction out to three miles from the coast and thereafter the Commonwealth legislation prevails.[29]

Over the past two decades there have been a series of Commonwealth acts concerning marine pollution but the main relevant provisions are now contained in four acts. It is convenient to deal with each of these four acts separately. The first of them is the *Protection of the Sea (Powers of Intervention) Act 1981*[30] which gave the Commonwealth

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25 They have observer status but they are only now taking steps to become parties.

26 *New South Wales v Commonwealth* (1975) 135 CLR 337.

27 The Standing Committee of the Attorneys - General met in Hobart on 5 March 1976 which meeting put in train steps for the eventual Agreement. Acts were subsequently passed by the Commonwealth and each of the States and the Northern Territory to give effect to it - see generally Cullen R *Federalism in Action. The Canadian and Australian Offshore Disputes* (Federation Press. 1990) Section 4.3.

28 The three mile limit was fixed as it was then the outer limit of the territorial sea, but this is no longer the case as in 1991 the Commonwealth extended the Australian territorial sea out to twelve miles. The jurisdiction of the States under the agreement remains, however, only out to three miles.

29 The State has legislative power to make laws which touch and concern the peace, order and good government of WA which are operative beyond the margins of WA territory - *Pearce v Florenca* (1976) 135 CLR 507.

30 Act No 33 of 1981, assented to 14 April 1981.

powers to intervene outside its territorial sea to take measures against a marine casualty where there "was a grave and imminent danger to the coastline of Australia," and otherwise gave effect to the provisions of the *Intervention Convention.* It was pursuant to these powers, in s.8 of the Act, that orders were given to the salvors of the *Kirki* to tow the vessel back out to sea and away from the coast. (The 1991 *Kirki* incident off the coast of Western Australia produced the largest oil spill in the Australasian region to date - about 18,000 tonnes).

The *Protection of the Sea (Civil Liability) Act 1981*[31] established the regime of strict liability with limitation of the amount thereof and the requirement for insurance for that liability, as provided under the *Civil Liability Convention.* The Act applies, basically, to all Australian ships, and all foreign ships which enter or leave an Australian port carrying more than 2,000 tons of persistent oil in bulk as cargo. The owner is liable for any pollution damage caused by oil which has escaped or been discharged [32]and this includes "the cost of preventive measures".[33] Thus the Commonwealth, State and the NT governments and any local government, person or company which has suffered loss or been put to expense in cleaning up the oil may calculate their respective loss or damage suffered and/or costs incurred in cleaning up and claim them from the owner (insurer). The owner is entitled to limit its liability,[34] the amount of which depends on the tonnage of the ship but with an upper limit of about A$21.5 million[35] The limitation provision is lost if the escape or discharge occurred through the "actual fault or privity" of the owner.[36] In the case of the *Kirki* the Department of Transport and Communications departmental investigation[37] found that the vessel was very poorly maintained, heavily rusted and there was a "deliberate

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31 Act No 31 of 1981, also assented to 14 April 1981.
32 Civil Liability Convention Art. III.
33 Ibid, Art.I.
34 Ibid, Arts V, VII.
35 The *Kirki* was about 82,660 tonnes so its upper limit of liability is about A$20 million.
36 Art V; s.20(3).
37 Report No.33.

attempt to mislead" the marine surveyors by some patching of metal with canvas which was then painted over.[38] It is arguable that this could amount to "actual fault or privity" by the owner. Taking this point would only be worth while if the total of the costs and damages were so high that they exceeded the upper limit of liability under the act.

The third of the major Commonwealth acts is the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth)[39] which is the act for implementing the provisions of MARPOL 73/78. This Act was administered by the Commonwealth Department of Arts, Sport, the Environment, Tourism and the Territories[40] until the beginning of 1992 when Australian Maritime Safety Association (AMSA)[41] took over that task. Part II of the Act gives effect to Annex I of MARPOL 73/78, by making it an offence by the master and the owner for the discharge of oil or an oily mixture from an Australian ship into the sea. Exceptions include if the discharge is a consequence of accidental damage to the ship where reasonable precautions were taken after the damage or the discovery of it, and if the discharge is of an approved mixture to combat oil already in the sea and has the approval of the relevant authority.[42] Other exceptions include the discharge of oil or an oily mixture by a tanker proceeding *en route* more than 50 nautical miles from land and not in a special area, with other limits and controls including the rate of the discharge.[43] Australian ships are required to keep an Oil Record Book which have an accurate record of the discharge of oil or oily mixtures.[44] An "Australian ship" is defined as one registered in

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38 Ibid, p.86.

39 Act No. 41 of 1983, assented to 20 June, 1983. The 1983 Act repealed the earlier *Protection of the Sea (Discharge of Oil from Ships)* Act 1981 - in s35.

40 Booklet entitled "Protection of the Sea: Conventions and Legislation in Australia" (AGPS, Canberra.)

41 A semi-government organisation which took over many of the responsibilities of the Department in the maritime area, established by the *Australian Maritime Safety Authority Act 1990*. It is based in Canberra but has offices in the major maritime centres.

42 S 9(1) and (2).

43 S 9(4).

44 Ss 12 to 14.

Australia or an unregistered ship having an Australian nationality.[45]

Part III of the Act deals with prevention of pollution by noxious substances, essentially toxic chemicals, implementing Annex II of the Convention. Provision is made for Regulations to declare what noxious substances are covered by the Act, both those set out in the appendices to Annex II to MARPOL 73/78 and otherwise.[46] Inspectors are given wide powers to board and inspect the record books and otherwise and the books are *prima facie* evidence in any prosecution.[47] The regime in relation to Annexes I and II were amended from time to time.[48]

By major amendments in 1986[49], not all of which has been proclaimed for operation, this 1983 act was the vehicle for the implementation of Annexes III, IV and V of MARPOL. Thus Part IIIA of the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 sets out the requirements to notify of the carriage or loss of harmful packaged substances, as the convention requires. Part IIIB sets out the requirements in relation to the discharge of sewage and Part IIIC those in relation to discharge of garbage.

The fourth of these major Australian acts is the *Navigation Act* 1912 which has been amended to give effect to the requirements of MARPOL 73/78 in relation to construction and alteration of ships.[50] The *Navigation Act* 1912 was derivative of the UK

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45 S 3(1).
46 Ss 17,18.
47 Part IV.
48 In 1984 further amendments to Annex 1 of the Convention were adopted by the IMO's Marine Environment Protection Committee (MEPC) which came into force internationally on 7 January 1986. Some of these provisions were given force in Commonwealth legislation by the *Statute Law (Miscellaneous Provisions) Act (No.1) 1985*. Amendments relating to Annex II of Protocol 1 of MARPOL 73/78 were also adopted by MEPEC in 1985, which entered into force on 6 April 1987. Those that relate to technical details of implementation are given force in Commonwealth legislation by the *Protection of the Sea (Prevention of Pollution from Ships) Amendment Act 1986*.
49 *Protection of the Sea Amendment Act* 1986.
50 Annexes I and II of MARPOL were given effect by *Navigation (Protection of the Sea) Amendment Act 1983*.

Merchant Shipping Acts, which had regulated the details of the ships, crews and shipping generally in the UK[51] so these new detailed requirements for new ship construction and the alteration of older tankers fit comfortably into the framework of this Australian act. Ships which comply with its requirements are entitled to a Ship Construction Certificate or an International Oil Prevention Certificate as appropriate, without which they were not entitled to sail at all for Australian ships and are not to enter Australian ports for foreign ships.The tank construction requirements include separate ballast tanks for oil tankers and this allows the tankers to operate safely on ballast voyages,when their oil cargo tanks are empty, without the need to fill the empty oil tanks with seawater for their stability.[52]

Not all ships must be built to this requirement, which depends on size and the date of construction, but those not so required are to discharge the mixed oil and water into shore reception facilities,[53] or to retain the mixture onboard in slop tanks and to have "an oil discharge monitoring and control system" fitted.[54] Ships of 400 tons gross tonnage and over are required to have oily-water separating equipment (those over 10,000 tons are also to have an oil filtering system)[55] and tanks for oil residue.[56] The balance of Division 12 of the Act is concerned with alteration to ships, their survey and the administration of these provisions in relation to Australian ships and foreign ships in Australian waters. Foreign ships should carry these certificates from their own country and if they fail to do so the Minister has power to direct them not to use any Australian port or facility.[57]

Division 12A of Part IV of the *Navigation Act 1912* implements Annex II to

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51 For a detailed history of the *Merchant Shipping Act* and their relevance in Australia see Carter GB "The Imperial Merchant Shipping Act Story", (1992) 66 ALJ 359.
52 Under Division 12 of the Act Regulations 13 to 19 of the Annex I of MARPOL are given legislative force, which deal with details of construction and the like.
53 Reg. 14
54 Reg. 15.
55 Reg. 16.
56 Reg. 17.
57 S 267K.

MARPOL 73/78 (pollution by noxious liquid substances in bulk).[58] In Annex II the term "noxious liquid substances in bulk" is defined to mean "any substance designated in Appendix II to this Annex or provisionally assessed under the provisions of Regulation 3(4) as falling into Category A, B, C or D". The categories into which the type of chemicals are put depend on their toxicity.[59] The regulations set out in great detail the measures of control over the various substances.

As has been mentioned, there were major amendments in 1986 of the *Navigation Act* 1912 to give legislative effect to Annex III of the Convention[60], (relating to ships carrying packaged harmful substances), Annex IV (sewage from ships) and Annex V (garbage from ships). The ship construction and survey requirements of the annexes were inserted into the *Navigation Act* so that, in Part IV, a new Division 12B dealt with the harmful substances requirements and a new Division 12C dealt with the sewage requirements. (Apparently the garbage requirements did not require construction alterations). Thus, provided the ships are built with the suitable tanks and other equipment, they will be granted certificates to this effect and will be able to operate. These provisions have not yet been proclaimed. These are all major amendments to the act and considerably extend its effectiveness, and give effect to Australia's international obligations to the MARPOL Convention. The provisions of the Act also include a right of appeal to the Administrative Appeals Tribunal over adverse decisions concerning the refusal to issue a certificate and the like, by insertion of Part IXA in the *Navigation Act 1912.*[61] The whole legislative regime has been further amended from time to time.[62]

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58 Inserted by the *Navigation (Protection of the Sea) Amendment Act 1983.*

59 Annex II Reg. 1(6).

60 By the *Protection of the Sea Legislation Amendment Act 1986.*

61 The 1986 Act also amended the *Protection of the Sea (Civil Liability) Act 1981* and the *Protection of the Sea (Shipping Levy Collection) Act 1981.* Not all of the provisions of the 1986 Act have been proclaimed.

62 The *Navigation Act 1912* and the *Protection of the Sea (Prevention of Pollution from ships) Act 1983* were amended by the *Transport and Communications Legislation Amendment Act (No. 2) 1990* by certain provisions concerning disposal of garbage. The *Transport Legislation Amendment Act 1989* made some amendments to the *Protection of*

In the result there are four major Commonwealth Acts[63] which establish a regime for the control of oil pollution from ships and their effect is to give power over Australian ships, and foreign ships which wish to enter Australian ports. The regime includes regulating ship construction so that ships are built, or altered, to have the proper tanks and other equipment to enable the ships to operate to prevent or reduce pollution. The regime also regulates the circumstances in which oil or oily mixtures and other pollutants may be discharged into the sea, and has a reporting system of pollution incidents. The Commonwealth can control any ship under its flag,[64] or any ship operating in or out of its ports or, under the *Intervention Convention* , intervene in any shipping casualty the pollution from which threatens its shores even if it is beyond the territorial sea. If there is a spill of persistent oil from a laden tanker there is strict liability, to a certain limit, which forms a fund for expenses incurred in cleanup and for damages. I should mention that there are other Commonwealth acts which deal with marine pollution which enable the Commonwealth to levy ships,[65] control sea dumping of material likely to pollute the sea[66] and regulate the import and export of pollutant material that is likely to be dumped by others.[67] All of this is a great step forward from the position as it was 25 years ago, although there is still much to be done.

I now turn from the Commonwealth legislation to deal briefly with the that of

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the Sea (Prevention of Pollution from Ships)Act 1983, and a number of minor amendments were also made in the *Statute Law (Miscellaneous Provisions) Act (No.1) 1987, Transport Legislation Amendment Act 1988, Statutory Instruments (Tabling and Disallowance) Legislation Amendment Act 1988* and the *Transport and Communications Legislation Amendment Act (No 2) 1989*. Not all of the provisions of these Acts have yet been proclaimed.

63 *Navigation Act 1912, Protection of the Sea (Powers of Intervention) Act 1981, Protection of the Sea (Civil Liability) Act 1981, Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. There are other acts, of course, including those that levy relevant ships carrying oil but there is no opportunity to explore them here.

64 The *Kirki* was not, however, under the Australian flag.

65 *Protection of the Sea (Shipping Levy) Act* 1981 and the *Protection of the Sea (Shipping Levy Collection) Act* 1981.

66 *Environment Protection (Sea Dumping) Act* 1981.

67 *Hazardous Waste (Regulation of Exports and Imports) Act* 1989.

the States and the NT.

QLD & NT not up to date
QLD about to introduce all 6
annexes of MARPOL.

B. State and NT Legislation

The OILPOL 54 Convention was given force in each of the States and the NT by their various acts.[68] These acts were all similar and it is convenient to use the WA legislation, the *Prevention of Pollution of Waters by Oil Act* 1960, by way of example. That Act, in Part II, made it an offence to discharge oil, or any mixture containing oil, into waters within the jurisdiction from a ship, or a place on land, or from any apparatus used for transferring oil from or to any ship. If a proscribed discharge or escape occurred the owner and master, or the occupier or the person in charge were, respectively, liable.[69] The Act contained the usual defences, derived from OILPOL 54, of safety of the ship, preventing damage to the ship or cargo, or saving life at sea, provided that it was a "reasonable step to take in the circumstances"; or where the escape was a consequence of damage or of leakage "which could not have been avoided, foreseen or anticipated" and provided "all reasonable precautions were taken".[70]

Under the Act the relevant authority was empowered to take such action as it deemed appropriate to remove the oil which had been discharged and, irrespective of whether the offending owner or master, or occupier or person in charge has a good defence to any charge which may be brought against him to "recover all cost incurred by it in and about the removal".[71] The balance of the Act includes the standard provisions referred to above requiring ships to carry certain equipment to prevent or monitor discharges of oil, to keep oil records and report incidents.

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68 *Pollution of Waters by Oil Act 1969/Pollution of Waters by Oil Act 1973 (Qld); Prevention of Oil Pollution of Navigable Waters Act 1960 (NSW); Navigable Waters (Oil Pollution) Act 1960 (Vict); Oil Pollution Act 1961 (Tas); Prevention of Pollution of Waters by Oil Act 1961 (SA); Prevention of Pollution of Waters by Oil Act 1960 (WA); Pollution of Waters by Oil Act 1962 (NT).*

69 S 5.

70 S 6(1).

71 S 7(1).

These early Acts based on OILPOL have been repealed and replaced in most States by Acts which give statutory effect to MARPOL 73/78 Annexes I and II.[72] The provisions of the Acts in those States which have passed this legislation has similarity to the terms of the convention and to the provisions of the relevant Commonwealth Act, but they all include their own variations. They are all limited to State waters.[73] Again using the WA Act as an example, by its *Pollution of Waters by Oil and Noxious Substances Act* 1987, a discharge into State waters from a ship, a place on land, or an apparatus used for transferring oil or an oily mixture is an offence punishable by fine.[74] They also provide for the usual defences under the MARPOL Convention, namely, safety of the ship or saving life at sea, or if the escape from the ship was in consequence of damage, other than intentional damage, and all reasonable precautions were taken to prevent or minimize the escape; or if the discharge was approved for the purpose of combating pollution.[75] Another defence is that if the discharge occurs in accordance with the extensive provisions made in the act to allow discharge of oil from various types of ships under various conditions and various distances from the coast (or into a reception facility onshore).[76]

It is to be noted that, subject to the statutory defences, a discharge from a ship or a place on land attracts strict liability. In relation to a "transfer operation" (transfer to or from a ship or place on land) the concept of common law negligence is retained in WA as liability

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72 *Navigable Waters (Oil Pollution) Act 1980 /Marine Pollution Act 1987(NSW); Pollution of Waters by Oil and Noxious Substances Act 1986 (Vict); Pollution of Waters by Oil and Noxious Substances Act 1987 (Tas); Pollution of Waters by Oil and Noxious Substances Act 1987/Marine Environment Protection Act 1990 (SA); Pollution of Waters by Oil and Noxious Substances Act 1987 (WA).* Neither Queensland nor the NT have yet passed legislation giving effect to MARPOL 73/78.

73 "State Waters" are defined, in effect, as the sea out to the three mile limit and the waters to the landward side thereof - s 3(1). This area is also referred to as "coastal waters". The 1991 proclamation by the Commonwealth that the Australian territorial sea is extended to twelve miles from the low water mark has not affected the three mile limit of State Waters.

74 S 8(1), (2) and (3).

75 S 8(4), (5), (9).

76 S 8(6), (7).

is only attracted if the discharge occurs "by reason of a wrongful act or omission".[77] In relation to oil there is a duty to report all "prescribed incidents" and also to keep an Oil Record Book.

Part III of the WA Act is concerned with the discharge or an escape of noxious substances, giving effect to Annex II of MARPOL73/78. The Annex sets out a list of substances (chemicals etc.) which are then treated in a manner consistent, in effect, with their toxicity. The Act gives effect to the prohibitions on these substances in making it an offence to discharge some of them at all and allowing discharge on certain conditions for others. The Regulations may add to, take from, or vary the category into which the convention placed the various chemicals. The defences are the same as those set out for oil spills. There is a duty to report "proscribed incidents" and to keep a Cargo Record Book.[78]

Part IV of the WA *Pollution of Waters by Oil and Noxious Substances Act 1987* provides for supporting provisions from the MARPOL Convention, including that the appropriate authority may take steps to prevent or limit prohibited oil discharges and to dispose of the same, and may recover the costs and expenses of doing so. These "may be awarded in the course of proceedings for an offence ...whether or not the ...person is convicted..",[79] so there is a very wide discretion in the court to order the polluter to pay for all of the costs and expenses of the cleanup and the damage, without any limit of liability, whether or not any of the defences are made out. To take an example, if the discharge occurs while saving life at sea the polluter may still be liable for all of the costs and expenses incurred by the authorities, whether or not they were reasonably incurred, and the polluter is only excused from a fine as there is a defence to the charge. As well there remains the common law liability for damages for a discharge (but not an escape) as the Act expressly

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77 S 9.
78 Ss 22, 23.
79 S 27(3).

provides that its provisions do not affect that aspect of the law.[80] Similar, but not identical, provisions as those relating to oil concern a discharge of noxious liquid substances.[81] There is no time limit during which a prosecution may be brought[82] and inspectors are given wide powers.[83]

This survey of the legislation of just one of the States illustrates how that State approached its legislation on marine pollution. Each of the States and the NT has had a different and, in some cases, a desultory approach to the implementation of MARPOL 73/78, but they are slowly bringing this convention into legislative effect. In the meantime the Commonwealth acts also cover the sea out to the three mile limit from the low water mark.

New Zealand Legislation

The New Zealand Parliament has dealt with the developing situation in marine pollution by a sequence of amendments to its *Marine Pollution Act 1974*. ("the Act").[84] Rather than enact new legislation for each development the NZ Parliament amended the original Act.[85] The Act is comprised of six parts, namely:

Part I: which covers prevention of oil pollution at sea and gives effect to OILPOL 54;

Part II: which covers dumping and incineration of wastes and gives effect to the *London Dumping Convention* 1972;

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80 S 27(4).
81 S 28.
82 S 30.
83 S 29.
84 Act No.14 of 1974, assented to on 6 April 1974.
85 *Marine Pollution Amendment Act 1974; Marine Pollution Amendment Act 1975; Marine Pollution Amendment Act 1977; Territorial Sea and Exclusive Economic Zone Act 1977; Marine Pollution Amendment Act (No.2) 1977;Judicature Amendment Act 1979; District Courts Amendment Act 1979; Marine Pollution Amendment Act 1980; New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987;Shipping and Seamen Amendment Act 1987; Marine Pollution Amendment Act 1988 and Public Finance Act 1989;* Act No. 34 of 1990.

Part III: which covers intervention of shipping casualties which are pollutant risks beyond the territorial sea and gives effect to the *Intervention Convention* 1969;

Part IIIA: which imposes oil pollution levies on NZ flag ships and relevant ships using NZ ports;

Part IV: which covers strict liability, limitation of liability and some compulsory insurance and gives effect to the *Civil Liability Convention* 1969;

Part V: which imposes additional levies and gives additional upper limits for costs and damages and gives effect to the *Fund Convention* 1971. (It will be proclaimed when NZ finally becomes a party to it);

Part VI: which has miscellaneous provisions, mainly concerning administrative matters and enforcement.

There is a curious mixture in this act as it presently stands of which the most glaring is that Part I only gives effect to OILPOL, a convention which has been repealed by MARPOL for almost a decade. For a reason which must be closely related to indolence, or some such similar quality, NZ has never ratified the MARPOL convention over the near decade since it has been in force. Nor has NZ ratified the *Fund Convention* 1971 in the two decades of its existence. It seems likely that these deficiencies will be remedied in the near future.

Another feature of the present legislative scheme is the wide power over property and liberties that it gives the NZ government. Part III of the NZ *Marine Pollution Act 1974* deals with marine casualties and follows the *Intervention Convention* in providing that where a "shipping casualty" occurs either in or outside New Zealand waters the minister (or his delegate) may issue instructions to the master, owner or salvor to deal with the ship

or cargo[86]or, if they fail he may cause steps to be taken himself. But the powers go much further in that the act provides that the minister may, after consulting with the owner of any New Zealand or home-trade ship or other ship within New Zealand waters , "instruct the Master...to render assistance to any ship that is or is likely to be a shipping casualty" or, in relation to New Zealand or home-trade ships only, to ;

> "take on board any equipment, to sail to any place, to render assistance to any ships engaged in assisting a shipping casualty or engaged in any operations for the cleaning up, removal or dispersal of any oil or pollutant, and to obey the instructions of any person for the time being authorised by the Minister to exercise control or responsibility for a shipping casualty."[87]

Such instructions should be notified to the owner but it may be dispensed with if the urgency of the situation is such that "the measures must be taken immediately." These powers may be exercised by any person duly authorised by the minister or, presumably, any number of persons so authorised. Similar powers are also provided to give instructions or to take measures in relation to any incident concerning a pipeline or offshore installation, except those relating to the power to give instructions to and to requisition, in effect, shipping.[88]

Limited rights of compensation are granted under the Act to persons who have suffered loss or damage as a result of the minister's exercise of these powers. The person who has suffered the loss or damage may only recover the compensation from the Crown where the instructions or the measures taken by the minister:

> " (a) Were not reasonably necessary to eliminate or prevent or reduce pollution or the risk of pollution; or
> (b) Were such that the good the action or measures taken did or were likely to do was disproportionately less than the expense incurred or the loss or damage suffered as a result of that action or those measures-...."[89]

In determining the matter under paragraph (b) above, the court is to take into account the probability of damage and its extent, the likelihood of the effectiveness of the measures and

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86 S 25.
87 S 25(4)(b).
88 S 26.
89 S 27(1).

the extent of the damage caused by the measures.[90] These powers are very wide-ranging and extensive giving, as they do, the power to requisition all or any ship (without notice if it be thought necessary), for an unlimited time, to take any step whether it incurs danger to the ship, cargo or crew or not, and then to only grant compensation for delay, cost and expense if the requisition by the minister was not reasonably necessary or the good achieved was disproportionately less than the loss or expense.

It is an offence to fail to comply with any instructions issued by the Minister under ss 25 or 26 (or wilfully to obstruct them), for which the only defences provided by the Act are that of "the need to save life at sea" and using "all due diligence" to comply.[91] It is noteworthy that the need to save the ship or its cargo is not enacted as a defence so that, for instance, if an instruction should be one where the ship is placed danger it is still not a defence for the Master to refuse to comply with it. The Minister, those duly authorised by him, and those who have taken any action or refrained therefrom pursuant to instructions "shall not be under any civil liability in respect thereof."[92] In my view the act should be amended to restrict these powers to those contained in the convention and the Australian act so that there is adequate power to deal with the ship casualty that is the cause of the risk, but no power to interfere with innocent ships and persons and certainly not to do so without proper financial compensation. After all, there is a substantial fund to cover the costs of hiring ships and equipment and this is the proper path down which the legislation should travel.

There has been recent activity in New Zealand about its pollution legislation. The *Resource Management Act* 1991 is a major new piece of legislation in New Zealand which establishes control over uses of the land, air and water. It is a consolidation of a

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90 S 27(2).
91 S 28.
92 S 29.

number of acts, is wide ranging and it covers all forms of pollution, including oil. It has many strengths and a number of shortcomings, but comment on it needs to be in the light of a recent review of the marine pollution legislation. This is contained in a Discussion Paper, dated June 1992, produced by the Maritime Transport Division.[93] It concentrates on and covers the whole field of marine pollution and canvasses options and makes recommendations about future legislation. The paper acknowledges that the present legislation does not "measure up to contemporary needs"; that New Zealand is "ill-prepared for a major oil spill", that the act contains "vague and incomplete responsibilities for dealing with oil pollution" and that "provisions ... in respect of marine pollution from ships lag behind modern international practice".[94]

> Some of the proposals for future legislation set out in the Discussion Paper are:
> (a) that Annex I of MARPOL, relating to oil pollution, should be implemented in oil pollution legislation and be administered by a maritime safety authority (which is to be established);
> (b) that the four annexes of MARPOL (Annexes II to V), relating to noxious substances, harmful packaged substances, sewage and garbage, should all come under the *Resource Management Act* 1991, which act should extend its purview outside territorial waters (giving effect to the *Intervention Convention)*;
> (c) that those parts of Annexes II to V of MARPOL which relate to equipment and standards for ships be implemented through legislation administered by the maritime safety authority;
> (d) that the compulsory shore reception facilities provisions of MARPOL should lie with the regional councils under the *Resource Management Act* , as should be dumping of waste at sea (giving effect to the *London Dumping Convention*); and

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93 The paper is entitled "Review of the *Marine Pollution Act* 1974".
94 Foreword, by Kevin Ward, General Manager, Maritime Transport.

(e) that the question of a safe haven for damaged ships should be addressed.(It has not been addressed by any convention and it is an important and difficult issue.)

There are several points I would advance, when looking at these recommendations against the background of marine pollution legislation other countries. The intention to split the responsibility for related pollution matters from ships between two acts which cover the same field is not desirable. It is a fruitful source of conflict between bureaucratic departments and also of doubt and confusion when a casualty occurs, which is the very time when clarity and decisive action is needed. It is inevitable that it will lead to extended litigation. It is preferable, in my view, that all of the maritime pollution legislation concerning the operation of ships come under the proposed maritime safety authority and the new marine pollution act, that all of the ship construction and survey legislation be under the *Merchant Shipping Act* equivalent, that all of the harbour pollution control come under the port companies (under the regional councils), and that all of the land sourced pollution come under the *Resource Management Act.* This framework gathers responsibility amongst the people who should have the experience to properly administer it. After all, lives are at stake when a shipping casualty occurs. A structure of administrative appeals from bureaucratic decisions to a suitable court is necessary for the fair working of the regime. This is a novelty in maritime areas but has worked well for a long time in land regulation and control by appeals to local government courts or land courts.

Another point is that the Discussion Paper only recommends looking at ratification of the *Fund Convention* when one would have thought the benefits to the government and the NZ people lay in definitely ratifying it. Perhaps too much weight has been given to the oil and shipping companies wishes in this regard in the past. While the Discussion paper thoughtfully discusses widening the base of the levies to be imposed to

finance combating oil pollution[95] it quite fails to address the expenditure of those funds to need for research and development of local education and training, such as is now established in the USA and Canada. This is an important aspect which has been neglected.

In summary, it can be seen that the present NZ legislation only implements some of the relevant conventions. It aggregates to the government bureaucracy draconian powers of requisition of ships which may be quite innocent of any pollution. The saving grace is that reform of the situation is underway but I doubt that, without a major spill occurring, there will be the political will to have a sufficiently weighty inquiry into the needs of the country and give effect to them. The Discussion Paper is wide ranging and is a useful contribution, but its details are too numerous for full discussion here. The persons who conducted the inquiry and wrote the Discussion Paper did very well. It remains to be seen, however, what further inquiry into needs is carried out and what legislation emerges from it.

Conclusion

It can be seen from this brief survey that the international regime relating to oil spills is that the offending ship will be strictly liable but the amount of that liability is limited. Underlying this is the provision of insurance to meet the liability for an oil spill from a laden tanker carrying persistent oil up to the limit that the conventions and domestic legislation establish. The insurance for oil spills is mainly written by the Protection and Indemnity Clubs (P & I Clubs), which are based in Britain, Europe, USA and Japan. (In the case of the *Kirki* the P & I Club which carried the risk was Assuranceforeningen Gard of Norway.)

Australia and NZ have been spared major oil spills and the legal profession and the P & I representatives are generally unfamiliar with the details of the extent of liability

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95 Chap.13.

which may be claimed and the type of loss which gives rise to a valid claim. Another ramification of having been so spared is that there has not been the high public profile on marine pollution which otherwise would have occurred. Whilst it is to be hoped that this dearth of major spills will continue it is most unlikely. The *Kirki* oil spill is the only recent major one in the Australasian region and it was only due the spill not reaching the coast and to the courage and skills of the salvors, in saving the ship and the further 64,000 tonnes of oil cargo, that it was not more damaging. The problem of marine pollution should be squarely faced.This is being done to some extent and the IMO is currently organising a number of international conferences on marine pollution and tanker safety, at which Australia and NZ will be represented. In one of these conferences an attempt is to be made to implement the 1984 Protocols, and it is expected that the conference will agree to them in much the same terms as in 1984 but with lower limits of acceptance to bring them into force. The USA is not expected to take any active part in these international treaties, at least for some years, as the *Exxon Valdez* spill in 1989 prompted it to enact its own legislation[96] and to establish a far stricter regime than is contained in the international conventions. On the subject of international conventions, that both Australia and New Zealand have failed for these many years to become signatories to the *Fund Convention* and that NZ has not yet ratified MARPOL is a ground for criticism.

Marine pollution is a burgeoning area of maritime law. When a major oil spill occurs the resulting publicity will project the image of a major ecological disaster whether it is, in fact, one or not. Once this occurs the media, politicians and public are likely to start a clamour that will detract from the efficacy of dealing with the immediate spill but will have the long term effect of raising the profile of coping with marine pollution. In my view the departmental inquiries and discussion papers which both governments initiate from time to time are a good start but they will be found to be insufficient when the clamour begins.

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96 *Oil Pollution Act* 1990.

What would be more beneficial in Australian and New Zealand would be an adequately funded, wide ranging inquiry into the needs of both countries, and the South Pacific region in general, in relation to marine pollution generally and oil spills in particular. The experience from other countries suggests, unfortunately, that this will only occur after there has been a major casualty. Where such an inquiry has been held, as in the UK and, more recently, in the USA and Canada, it has been a starting point for useful initiatives.

Compulsory insurance to a high level is a very important factor in coping with marine pollution and the importance of the insurance structure in relation to oil spills is much underestimated. The insurance structure should be supported generally and compulsory insurance should be extended to pollutants other than persistent oil from laden tankers. This is under review in the proposed conference organized by IMO to consider a draft *HNS Convention*[97] the terms of which convention, it is proposed, will regulate the carriage by sea of hazardous and noxious substances.

In conclusion, may I say that when M'Gonigle and Zacher wrote in 1979 that "the changes needed to deal with it [the seriousness of the pollution problem] are still uncertain" they may almost have been writing, as I said in the opening of this paper, for the situation today. The control of the pollution of our seas needs a balance between their being used for the transport of goods and otherwise, which is to the benefit of us all, and their abuse, which is of detriment to us all. Neither one side of the debate nor the other should be allowed to dominate the field. In my view, there is presently a good balance due to the steady influence of those connected with the IMO and the fairly responsible manner in which the oil and shipping industries have approached the problem in recent years. The public demands on the oil and shipping industries are steadily rising, however, and

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97 The proposed *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*, the terms of which that are to be presented to the conference are under consideration buy the IMO Legal Committee and others.

independent, frequent marine pollution audits by oil and shipping companies and government departments has much to recommend them. It is likely, in my view, that the control of marine pollution will increase in importance in the maritime field.