

**Amendments to the Protection of  
the Sea (Powers of Intervention) Act**

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## INTRODUCTION

This paper outlines recent amendments to the *Protection of the Sea (Powers of Intervention) Act 1981* (Powers of Intervention Act) passed by Parliament in 2006. The amendments took effect the day after the *Protection of the Sea (Powers of Intervention) Amendment Act 2006 (the Amendment Act)* (No. 44 of 2006) received Royal assent (that is, they took effect on 23 May 2006). These amendments were made to clarify the powers of intervention in conjunction with the creation within the Australian Maritime Safety Authority (AMSA) of my position, the Maritime Emergency Response Commander (MERCOCM). MERCOCM has national responsibility for management of interventions in maritime casualties that threaten significant pollution.

I was appointed to the MERCOCM position on 7 November 2005.

## Background

The General Manager Emergency Response had the opportunity to address this Association's conference in Adelaide in 2004 in relation to AMSA's role in reducing the risks associated with maritime casualties in Australian waters in relation to prevention, response and resources. His presentation outlined action taken by AMSA, as Australia's national marine safety agency, in executing its functions to promote maritime safety, the protection of the marine environment and to undertake aviation and marine search and rescue and I do not propose to repeat parts of that presentation.

Since that time, AMSA has undertaken an aggressive program of measures to seek to secure Australia's coastal interests in the case of a maritime casualty.

Maritime transport activity around the Australian coast produces an ongoing risk of ship sourced pollution of the marine environment by the various forms of liquid hydrocarbons, chemicals, bulk and packaged noxious substances and waste products either carried by or generated on board ships. This can cover fuel oils, cargo (liquid or solid) and operational waste. Relatively shallow refinery ports in Australia provide a level of protection by limiting the size of tankers entering these ports however this may increase other types of the risks. Off shore facilities and pipelines also pose risks as cargoes are transferred.

International experience has demonstrated that even a single major pollution event may result in enormous losses, not only to the maritime environment, but also to coastal communities, and recreational and commercial activities.

While the likelihood of a maritime casualty imposing a major risk to Australia's coastal interests is small, the potential consequences of such a casualty warrant a high level of on-going cooperation between the Australian Federal and State/Territory governments to ensure that any such incident is addressed rapidly and effectively. Experiences of recent incidents in Europe and elsewhere have shown that from a national perspective, a single national decision-making framework is the most effective model for managing and coordinating a response to an actual or potential pollution incident.

At the same time, the improving safety record of the maritime industry has reduced the commercial viability of traditional salvage-capable vessels, such that Governments need to take a greater role in ensuring that a minimum level of ocean-going emergency towage capability continues to be available within Australia to assist with shipping casualties or pollution prevention. This was identified as an issue in the 2004 House of Representatives Standing Committee on Transport and Regional Services Inquiry, "Ship Salvage Inquiry into Maritime Salvage in Australian Waters".

After a process of consultation between the Australian, State and Northern Territory Governments, the relevant Transport Ministers agreed to the creation of the new MERCOM role as part of the National Maritime Emergency Response Arrangements. On 18 November 2005, Australian, State and Northern Territory Transport Ministers, meeting at the Australian Transport Council, approved the Arrangements, which included:

- 1) provision of a minimum level of emergency towage capability at strategic locations around the Australian coast;
- 2) appointment of a single national coordinator to manage emergency interventions in shipping casualties that threaten significant pollution; and
- 3) enhancement of powers of intervention for shipping casualties that pose a threat of significant pollution.

Each of these measures has now been put in place. The first measure mentioned in the Arrangements was to ensure that there was adequate towage capability to provide sufficient emergency response capacity to respond to maritime emergencies in Australia's coastal waters. The emergency towage program has three levels of response. Firstly, this capacity includes the location on a permanent basis of a dedicated vessel to service the Torres Strait and the northern sector of the Great Barrier Reef. The Minister for Transport and Regional Services commissioned the emergency response vessel, *Pacific Responder*, in Cairns last month. It is one of my functions to manage this capability.

Secondly, arrangements have also been put in place to ensure that there will be tugs available around Australia at strategic locations through contracts between AMSA and towage providers. Figure 1 below shows the regions identified for the second level of response.

Thirdly, AMSA will have a third level of capability identified for circumstances where ETV *Pacific Responder* or a towage capability vessel identified under contract with AMSA is not immediately available. This capacity builds on appropriate 'vessels of opportunity' which might be in the vicinity of a casualty and directed to assist under powers of intervention legislation.

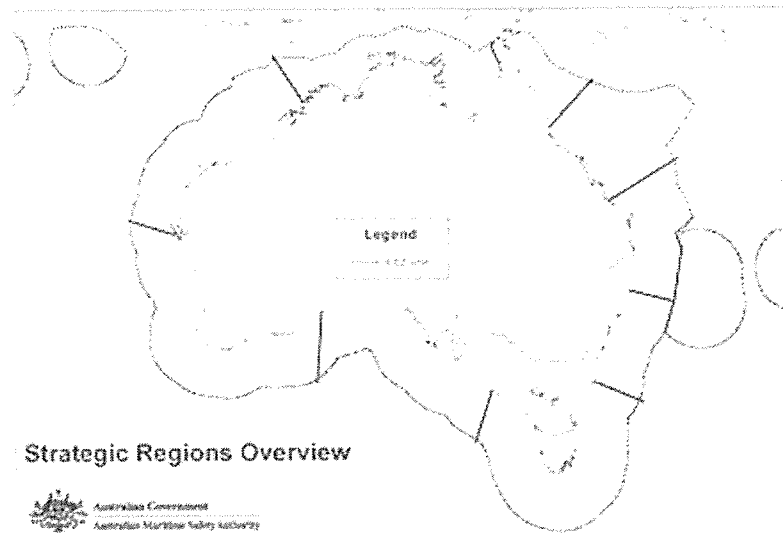


Figure 1: ETV strategic regions (boundaries of the regions are not obvious from this diagram)

My group within AMSA has responsibility for the response to an incident, accessing all of these and existing oil and chemical spill response resources to better manage a maritime incident which is, or has the potential to impact on the Australian marine environment.

A significant part of the response was the last of the Arrangements mentioned above, that is, the amendment of the legislation to clarify the powers available to me under the *Protection of the Sea (Powers of Intervention) Act 1981* (the Powers of Intervention Act).

### **Summary of the amendments to the Powers of Intervention Act**

In the event of a marine casualty occurring offshore, the Commonwealth has substantial powers to protect the Australian coastline and marine resources and wildlife from the threat of damage from pollution.

The Commonwealth *Protection of the Sea (Powers of Intervention) Act 1981* (Intervention Act) gives effect to the International Convention relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, as amended by the 1973 Protocol relating to substances other than oil.

The Convention allows coastal States to take measures necessary to prevent, mitigate or eliminate grave or imminent danger to the coastline or related interests from pollution or threat of pollution of the sea following the upon a maritime casualty.

The reference to "related interests" includes fishing, tourism, and protection of marine resources and wildlife. It applies to any seagoing vessel and makes intervention possible in relation to any hazardous substance, including oil.

The Convention requires that there must be a "maritime casualty" that represents "a grave and imminent danger" of pollution to the coastal before the coastal State can intervene.

The Act also allows Australia to protect its coastal interests inside the territorial sea in circumstances where oil or a noxious substance is escaping or has escaped from or where AMSA is satisfied that oil or a noxious substance is likely to escape from a ship. In these cases, AMSA may take such measures as it considers necessary to "prevent, or reduce the extent of, the pollution or likely pollution, by the oil or noxious substance, of any Australian waters, any part of the Australian coast or any Australian reef" and to "prevent damage, or reduce the extent, or likely extent, of damage, to any of the related interests of Australia by reason of the pollution, or likely pollution, of the sea by the oil or noxious substance" (amongst other measures). It is this provision that has been substantially clarified by the Amendment Act.

The Intervention Act has allowed for directions to be made when considered necessary to prevent, mitigate or eliminate the danger of pollution. Significantly the Amendment Act has clarified the extent of the direction-making power to include third parties, in addition to directions given relevant only to the ship the subject of the incident.

In general terms, the Amendment Act has clarified the powers available to MERCOM under the Powers of Intervention Act and provides protection for persons complying with directions of the MERCOM. The amendments:

- clarify the application of powers of intervention in the Exclusive Economic Zone (EEZ) and align the powers available in the EEZ with those in the territorial sea;
- align intervention powers for casualties involving hazardous and noxious substances in the EEZ and coastal sea;
- extend Australian Government powers of intervention to encompass all ships in all waters (subject only to constitutional law limitations);
- provide protection from prosecution for the MERCOM when issuing directions under the Intervention Act and persons complying with a direction of the MERCOM;
- clarify powers to direct persons ashore and masters of ships in Australian waters to assist with an emergency;
- clarify the power of the MERCOM to determine a place of refuge;
- provide that the directions of the MERCOM prevail over those of any other person where an inconsistency exists;
- clarify powers to requisition assets to assist in resolving an emergency and to provide for payment of just compensation when assets are requisitioned;
- clarify the right of third parties to recover their costs of responding to an emergency from a shipowner; and
- update penalties for non-compliance with the Act.

I have included a more detailed account of most of the amendments introduced in the Amendment Act in an attachment to this paper so will not explain each amendment in detail. However, I propose to comment on the significant amendments and how these are seen as affecting the functions of the MERCOM.

### **Place of Refuge**

One of the significant changes in the Amendment Act is the provision which expressly provides the MERCOM with the power to direct that a specified place be treated as a place of refuge (section 11 (1)(s)). The Intervention Act now expressly provides the authority to direct a ship falling within the scope of the legislation on the high seas, and in coastal and internal waters, to enter a particular port or sheltered area irrespective of the consent of the relevant port authority and/or State or Northern Territory Government.

This authority relies on the external affairs power under section 51(xxix) and the power to make laws with respect to "trade and commerce with other countries and among the States" in section 51(i) of the Australian Constitution to enact this legislation.

In determining whether to direct that a ship enter a particular port, the MERCOM has a significant responsibility. While it is a long-standing principle of customary international law that a ship in distress where life is at risk be provided all necessary assistance, including being allowed to enter a place of refuge, that principle has never extended to the protection of commercial interests. In the reality of modern search and rescue techniques, it is extremely unlikely that a ship will need to seek a place of refuge for safety of life. Australia, as a coastal State, has to take all necessary steps to protect its coastal interests. In some circumstances, that will require granting a place of refuge to limit pollution risk or major navigational safety risk. In other circumstances, the MERCOM may exercise his/her judgement to determine that it is not appropriate to direct entry to a place of refuge. This is consistent with the approach adopted by the U.K. SOSREP. There are two sets of relevant Guidelines that will be available to aid the MERCOM in reaching this decision, the IMO Guidelines and the Guidelines agreed between the Commonwealth and the States.

#### *National Place of Refuge Risk Assessment Guidelines*

In Australia, there are no pre-determined places of refuge. The selection of a suitable place of refuge for a maritime casualty is assisted through the Guidelines developed through the National Plan and endorsed by Commonwealth and State and Territory Ministers in the Australian Transport Council in May 2003, referred to as the National Place of Refuge Guidelines.

These guidelines are intended to help Australian maritime administrations, ship masters and the maritime industry in identifying places of refuge in circumstances where an emergency cannot be dealt with at sea and the appropriate procedure is to access a place of refuge.

Following the amendments to the Intervention Act I will be working with my relevant State counterparts to amend these Guidelines.

In 2003, the IMO Assembly adopted the Guidelines on Places of Refuge for Ships in Need of Assistance (A. 949(23)). Those Guidelines do not address rescue of human life at sea, but focus on the management of an incident. The role of MERCOM is empowered to make administrative arrangements consistent with the Guideline as set out in paragraph 3.5 that a coastal State take into account the factors identified by the IMO (listed in Appendix 2, paragraph 2 of the Guidelines) as relevant to assist a coastal State to “*make an objective analysis of the advantages and disadvantages of allowing a ship in need of assistance to proceed to a place of refuge*”<sup>1</sup>.

### **Salvage**

As a signatory to the Salvage Convention 1989, Australia’s National Plan recognises that in the event of an incident involving a damaged or disabled ship it is paramount that the maritime salvage industry be involved in the response as soon as possible. The MERCOM has a significant role in managing the available resources for a salvage operation in Australia’s coastal waters in circumstances where it appears that adequate measures are not being taken by the parties involved in the incident. It is, however, my expectation that the salvage arrangements will continue to be a matter of commercial negotiation between the shipping agent and the salvor and that the statutory powers that MERCOM has will not, in practical terms, be required.

### **Directions to parties other than the ship**

The additional express powers to give directions merely clarify an issue that may have been ambiguous. The Amendment Act provides that a direction by the MERCOM has precedence over any other direction made under State or Territory law or any other Commonwealth law to the extent of any conflict between those directions. While AMSA always had powers to take whatever measures were seen as appropriate to manage a risk to Australia’s marine environment, the limitation in the Intervention Act on sanctions for failing to comply with a direction to certain expressed directions may have been taken to imply a lack of power to make a direction other than to those persons specified as subject to the sanction. The power now allows for directions to be made to make available assets within a port to assist a ship in distress, as well as the provider of services within a port.

For example the ‘direction’ to ‘move cargo from a ship” under subsection 11(1) (b) may require another direction to a port to accept the ship into the port and make a berth available, or to stevedores to work on the ship or an owner of a barge to accept cargo if that is what is an appropriate measure.

The MERCOM continues to be required to make directions that are reasonable and proportionate to the underlying threat of pollution. The Act has clarified the

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<sup>1</sup> [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D9042/949.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D9042/949.pdf)



rights of persons subject to a direction to seek to recover costs if they are able to establish that the MERCOM's actions were not reasonable and proportionate.

### **Conclusions**

As the role of the MERCOM develops, new legal and practical factors will no doubt emerge to keep lawyers and practitioners occupied. The unified approach by the Commonwealth and the States to identify one clear and unambiguous authority to deliver the desired pollution prevention outcomes is an indication of the commitment to take the best available action to minimise the risk to Australia from a maritime incident. I am confident that the role, with the additional legislative basis provided by the Amendment Act, will be a significant addition to the risk management for early response of an incident in Australia's waters.

## **Attachment**

### ***PROTECTION OF THE SEA (POWERS OF INTERVENTION) AMENDMENT Act 2006 (No. 44 of 2006) (the Amendment Act)***

The amendments to the *Protection of the Sea (Powers of Intervention) Act 1981* are set out in the schedule to the Amendment Act.

#### **Section 3 Interpretation**

Section 3 of the Act is the interpretation section. A number of definitions were amended and added in the Amendment Act; including the definition of the Exclusive Economic Zone (EEZ) and the High Seas. The Powers of Intervention Act did not mention the EEZ and the meaning of 'high seas' in the Act was not compatible with contemporary understanding and international law.

The Intervention Convention 1969 came into force in Australia in 1981 with the enactment of the Act. At that time there was no concept of an Exclusive Economic Zone (EEZ), and the term high seas as used in the Intervention Convention and given effect in the Act includes the area of the sea now referred to as the EEZ. The UN Convention on the Law of the Sea (UNCLOS) 1982, as ratified by Australia, subsequently defined the various maritime zones, including the EEZ and the 'high seas'. The EEZ for Australia was defined in 1994 in the Gazette on 29 July of that year. It is now intended to separately define the EEZ and the "high seas" in the Act consistent with the UNCLOS definitions.

The definitions are self explanatory. Definitions of several new terms have been inserted in subsection 3(1), including definitions of aircraft, Australian Coastal Sea, Australian ship, constitutional corporation, exclusive economic zone, controller of a tangible asset, electronic communications, goods, high seas, internal waters, services and territorial sea.

#### **Subsection 5**

Section 5(1) provided that this Commonwealth 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. This amendment repeals this subsection and inserts a new subsection 5(1) which clarifies that the provisions of the Commonwealth Act will run concurrently with State and Territory law when there is no conflict. The inserted subsection 5(1A) clarifies that a direction made under the Act will have precedence over any other direction made under State/Territory Law to the extent of any conflict. Subsection 5(1B) refers to the constitutional provisions in support of supremacy of Commonwealth law over State or Territory law. Subsection 5(1C) also confirms that a direction given under the Act will also prevail over inconsistent directions given under other extant Commonwealth law, unless that other law expressly states otherwise.

These provisions remove all doubts about the Australian Government's powers under this Act when these need to be invoked. The amendments are aimed at providing clarity which is essential for effective and co-ordinated decision-making

in times of emergency and to ensure that decisions can be taken from a national perspective, rather than from a local or regional perspective, to ensure maximum benefit from a pollution prevention action.

## Section 8

Section 8 of the Amendment Act deals with issues related with taking of measures in accordance with the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (Intervention Convention). This Convention deals explicitly with measures on the 'high seas' when there is 'grave and imminent' danger of pollution or threat of pollution to the coastline of a State. However, the Convention is not clear if the casualty that is causing the pollution or posing the risks of pollution from oil needs to be on the high sea for a State to intervene.

The amendment to section 8 clarifies the situation by specifying that the measures in this section are applicable where the *casualty* occurs on the high seas. It also clarifies that the *measures* can be taken on the high seas or elsewhere. Practical considerations for effective measures to mitigate or minimise the risks or impacts of pollution from a maritime casualty on the high seas may require that actions be taken elsewhere, for example within Australia. damaged ship, or stevedores ashore may be directed to unload a vessel.

Accordingly 'high seas' has been deleted from subsection 8(2) consistent with the above to allow for measures to be taken on the high seas and elsewhere.

The specific reference to the Intervention Convention in the note has been removed since the measures are somewhat broader than those explicitly provided by the Intervention Convention, but which are consistent with the intent of the Convention and Australia's pollution prevention objectives.

Subsection 8(2) of the Act acknowledges the general powers that have been provided to AMSA under subsection 8(1). Subsection 8(2)(a) formerly provided a list of specific, but non-exhaustive, actions that the Authority can take to prevent, mitigate or minimise risks of pollution from oil.

Subsection 8(2)(b) provided that AMSA could take the measure of 'directing' certain persons in accordance with section 11 of the Act. This subsection also contained a list of persons to whom AMSA could give directions. These specifically related to the casualty. Notwithstanding the general power granted by virtue of subsection 8(1), it was desirable to make it clear that AMSA has the power to issue directions to persons beyond those expressly specified in subsections 8(2)(b). The Amendment Act allows for directions to a wider range of persons. The desired outcome of a quick, effective and coordinated action to prevent, mitigate or eliminate pollution incidents requires directions to be given to persons in addition to those specifically associated with a casualty. This item amends subsections 8(2) by adding a provision to allow the Authority to issue directions to any other persons. All 'directions' and 'actions' will continue to be subject to the tests of reasonableness and proportionality as required under section 8(4).

Subsection 8(2A) has been amended to provide greater clarity as to the range of persons who are most likely to be directed and when AMSA has the power to direct.

The new subsection 8(2B) provides a wider list of persons that can be given a direction, without affecting the general meaning of the new subsection 8(2)(b)(iv). This list is not exhaustive, but includes:

- (a) the owner of any other ship;
- (b) the master of any other ship;
- (c) the owner of a tangible asset;
- (d) the controller of a tangible asset;
- (e) the supplier of goods;
- (f) a person to whom goods are being, or are proposed to be, supplied;
- (g) the supplier of a service; and
- (h) a person to whom a service is being, or is proposed to be, supplied.

Subsection 8(2C) clarifies the jurisdiction of AMSA to issue a direction to an owner or master of another ship, i.e. a ship that itself is not the casualty presenting a pollution risk, in relation to the geographical location of the ship and/or its nationality. It provides, consistent with UN Convention on the Law of the Sea (UNCLOS) and the Intervention Convention, that freedom of navigation of foreign ships may not be hampered on the high seas but directions can be given in the EEZ and landward zones to prevent, mitigate or eliminate a risk of significant pollution. For Australian ships, however, AMSA will retain the right to issue directions anywhere.

Subsection 8(4) explicitly refers to the Intervention Convention, making it obligatory, when taking measures in relation to exercise of powers in accordance with section 8, to act in accordance with Articles III and V of the Convention.

Subsection 8(6) was amended to clarify that the term "high seas" as used in the section is not to be interpreted in accordance with the Intervention Convention, since the term "high sea" has subsequently been defined in the UN Convention on the Law of the Sea, that is, that the 'high seas' extend outward from a State's exclusive economic zone limits.

Subsection 8(6) has been clarified so that, while terms used in section 8 are generally to be interpreted in accordance with Intervention Convention when they occur in both this section and in the Convention, there are exceptions with regard to the terms used in subsections 8(2b) (c),(d),(e),(f), (g) or (h) and 8(2C)(a),(b),(c) or (d) which are to be interpreted in accordance with Section 3 of the amended Act.

A new section 8(7) has been inserted to establish a legal relationship between a ship that is involved in a maritime casualty and 'any other person' who can be directed in order to prevent, mitigate or eliminate risks of pollution. This will allow

that person to benefit from immunity and compensation provisions as provided under the Bill.

### **Section 9**

The amendments to section 9 are similar to the amendments to section 8, but apply to measures in accordance with the Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973 (the Protocol).

Subsection 9(4), which defines the way powers granted by section 9 in relation to a pollution threat on the high seas from substances other than oil needs to be exercised, was amended. This subsection explicitly provides that the requirements of Article III and V of the Intervention Convention will need to be adhered to by virtue of Article II of the Protocol even if the Protocol has not entered into force.

Article III of the Convention sets the requirements in relation to consultation by the Coastal state, including consultation with all stakeholders and expert groups, and general obligations towards safety of life of seafarers of the distressed vessel. Article V sets the principle that all actions needs to reasonable and proportionate to the actual or potential threat of pollution.

The amendment aligns the legislation with the text by explicitly providing that these Articles III and V obligations will extend to all measures taken under this section even when they are taken in waters other than high waters, ie in the EEZ, coastal waters or in internal waters.

### **Subsection 10**

Section 10 of the Act deals with the extent of AMSA's general powers to act in relation to casualties in waters other than on the 'high seas' when 'oil or a noxious substance is escaping or has escaped from a ship', or when AMSA is 'satisfied that oil or noxious substance is likely to escape from such a ship'. The casualty or possible casualty in this case falls within the coastal State's jurisdiction and powers to intervene, as defined by national laws rather than international Convention.

Subsection 10 sets out the jurisdiction of the Authority over ships which are in waters other than the 'high seas'. New subparagraphs 10(3B) and 10(3C) deal with the issue of 'direction' to 'any other ship' or 'another ship', that is a ship which is not the vessel causing or likely to cause pollution. The effect is that section 10 will apply to vessels in the various maritime zones in or around Australia other than on the 'high seas', which are causing or likely to cause pollution, except that a direction to render assistance in accordance with subsection 10(3B) and 10(3C) may also be given to another person in addition to the casualty.

The Intervention Act stated that this section applied to all ships in internal waters except those engaged in intra-state trade, or are fishing or pleasure vessels (by

virtue of subsection 10(6)). The Australian and State and Northern Territory Governments have agreed that the Australian Government's powers of intervention should be extended to include all ships in all waters, including internal waters of a State.

The amendment enables a casualty of any type of ship on any type of voyage to be managed all the way through an incident until an appropriate place of refuge is achieved where the incident is under brought control. This may involve bringing a casualty into State internal waters, which may include a port or other suitable coastal area. The application of AMSA's powers within State internal waters allows for one competent authority to manage the incident to conclusion without the unnecessary delays or disputes over change of jurisdiction when a ship is moved to a place of refuge within internal waters.

Subsection 10(1) was amended to define the constitutional heads of power available to the Australian Government to regulate ships within the internal waters of a State.

A new subsection 10(1)(ba) was included to apply section 10 to casualties within the EEZ. Inclusion of the EEZ within section 10 enables AMSA to take action in response to a casualty within the EEZ at an earlier stage than was previously available under the Intervention Act. The test for intervention under section 10, being the escape or likely escape of oil or a noxious substance, is more favourable for the coastal State than under sections 8 and 9, which require that there be a 'grave and imminent danger' of pollution.

There are similar amendments to section 10 to those made to sections 8 and 9 to allow the additional power to give directions. Subsection 10(3)(b) now lists a number of persons who can be directed, in order to put beyond doubt that, notwithstanding the general power granted by virtue of subsection 10(2), that AMSA has the power to issue directions to persons beyond those expressly specified in subsections 10(3)(b).

Section 10(6) has become redundant and has therefore been repealed. A new subsection 10(6), which establishes a legal relationship between a ship that is involved in a maritime casualty in accordance with section 10 and 'any other person' who can be directed in order to mitigate or minimise risks of pollution from oil or other substances in waters other than the 'high seas' has been inserted.

There are some amendments to the definitions in section 10(8). The definition of 'Australian Coastal Sea' in this subsection has become redundant and has been deleted. A definition of continental shelf has been included to clarify the use of this term in the definition of 'Australian reef' in this section. The definitions of 'internal waters' and 'ship' have become redundant as a consequence of Item 11.

The previous current definition of a 'noxious substance' has been replaced with a simple definition, which is linked the Protocol meaning of this term by defining the meaning of the term 'substance other than oil'. This amendment removes the need for separate prescription of 'noxious substances' through regulations or Marine Orders for the purposes of intervention in coastal waters and aligns

intervention actions in respect of noxious substances in coastal waters with the range of noxious substances for which intervention actions can be taken on the high seas under the Intervention Convention and its Protocol.

### **Subsection 11**

Section 11 deals with 'directions' under the Act. Under sections 8, 9 and 10, AMSA can give directions to owners, masters or salvors of vessels which present a pollution threat. Directions can be also given to other persons necessary to prevent, mitigate or eliminate the risks of pollution. Section 11 sets out the measures that can be taken under the heading of 'direction'.

Subsection 11(1) provides the general framework of this 'direction' power in relation to a ship. It defines the actions that can be done with respect to the ship or its cargo or prohibiting doing of something to the ship or its cargo. Though the powers of direction are generally broad and not restrictive, subparagraphs (a), (b), (c), (d), (e) and (f) provide specific examples what a direction may require or prohibit to be done.

Section 11 has been amended to introduce the concept of the 'first ship' in relation to a direction, meaning the ship that is the casualty subject to an intervention. This clarity is essential given that under the Act a number of other ships may be directed to assist a casualty, such as salvage tugs or other ships in the vicinity. There are other flow-on amendments to section 11.

Subsection 11(1) now lists specific examples of types of directions that may be given. This amendment is complementary to amendments in relation to section 8, 9 and 10 of this Act. The power of direction not only relates to the 'first' ship, i.e., the casualty, but also to other persons, such as another ship or other persons who may have control over necessary resources or infrastructure, such as a port authority or a shipyard, to achieve the pollution prevention outcomes. This broad power has been always available to AMSA, under the general powers to take such measures as the Authority considers necessary, but has been clarified.

New subsections 11(1)(g) to 11(1)(l) were inserted to provide guidance on what may be 'required' from a ship other than a casualty when a 'direction' is used. Subsections 11(1)(m) to (r) refer to 'tangible assets (other than ships)' and describe what may be required or prohibited in relation to these tangible assets when a direction is issued to a owner or controller of a tangible asset under this Act. The term 'a tangible asset' has been defined in section 3.

Subsection 11(1)(s) refers to a 'place of refuge' for the first ship and provides AMSA with clear power to direct a 'controller' of a tangible asset, most likely the person in charge a port or a harbour, to treat the place as a place of refuge.

Subsection 11(1)(t) refers to 'supply of services' and describes what can be required from a supplier of services when a direction is issued. Subsection (u) relates to a direction to a person to whom goods are being, or are proposed to be, supplied. It addresses the concern that existing commercial and

contractual arrangements may act as a deterrent against compliance with a direction due to an existing legal obligation. For example a tug that is needed to assist a casualty off shore may be constrained by existing contractual arrangements with ports and shipping companies. This insertion provides the legal basis to direct a port to release a tug to provide assistance as required.

#### **Section 14**

Section 14, which deals with the issue of addressing a direction under the Act to a ship where there is more than one owner or salvor in possession of the ship, was amended to cover the issue of a direction in relation to owners or controllers of tangible assets when there is more than one owner or controller.

#### **Section 17**

Section 17, which provides for how directions under the Act are to be served, was amended as a consequence of adding owners or controllers of tangible assets to the list of persons who can be directed.

Section 17A has been added to provide legal immunity from criminal and civil liabilities to the Minister, a delegate of the Minister, AMSA, a member of AMSA, a delegate of AMSA and other persons specified in a direction in the Act or persons directed under the Act. The immunity provisions are intended to encourage persons to respond to a shipping casualty that poses a risk of pollution by ensuring that persons acting in good faith and with reasonable care do not suffer from legal actions arising from taking any measures to prevent or minimise pollution, either by taking action, issuing a direction or complying with a direction.

The international community has increasingly recognised the need to protect persons who are acting in the public interest, such as preventing a major pollution incident, from prosecutions or civil liabilities as a result of their actions taken in good faith. Such protections are now a feature of recently developed international conventions.

Claims for compensation for third party losses will continue to be brought against the owner of the casualty in accordance with international conventions. The Civil Liability for Oil Pollution Damage Convention 1969 and the subsequent 1992 Fund protocol allow proceedings to be brought against the owners of a tanker for all pollution damages arising from oil carried as cargo. The Australian Government may recover its costs of intervention in a maritime casualty and for pollution response and clean up under Parts IV and IVA of the *Protection of the Sea (Civil Liability) Act 1981*. Subsection 17A(1)(5) explicitly preserves AMSA's right to recover intervention and pollution clean up costs under the *Protection of the Sea (Civil Liability) Act 1981*, even if that owner or the master is subsequently directed in accordance with the Act. The amendments makes it clear that, to the extent that AMSA or others are entitled to recover their costs under existing laws, those rights are not affected by the proposed responder immunity provision giving a person complying with a direction immunity for civil or criminal proceedings.



Subsection 17A(6) makes it explicit that in case the granting of immunity to a shipowner or other person conflicts with international obligations when a direction is issued to a person to do an act or to omit doing something, the immunity provision will not prevail. It preserves the shipowner's general liabilities under international conventions. Subsection 17A(7) provides that in relation to proceedings for compensation, the immunity granted by this section will be inoperative, allowing proceedings to be brought against AMSA if compensation is not provided in accordance with section 22.

Subsection 17A(9) provides the coming into force of the immunity provisions, stating explicitly that these provisions will not apply to an act done or omitted before the commencement of this section, ie these provisions can not be applied retrospectively.

Section 17B provides for recovery of expenses for compliance with certain directions. It sets out the general principle that the first ship, ie the ship that is the casualty, is primarily responsible for all expenses incurred to prevent, minimise or mitigate risks of pollution, arising out of acts or omissions pursuant to an action or direction under the Act. It also provides that all expenses or costs incurred are to be treated as debts owed by the shipowner or shipowners, allowing direct civil action to be brought by the concerned parties in the Federal Court of Australia or in any other competent jurisdiction.

### **Section 18**

Section 18 of the Act addresses the practical issue of change in ownership of a ship or change of its master after a direction has been served. Section 18 was only concerned with the implications of change in the casualty's ownership or its command and set the onus on the incumbent owner or master to transmit the direction to the new owner or master and to advise the Authority of the change in ownership. It has been amended to include provisions for servicing of a 'direction' on persons other than the owner of a ship, the master or the salvor in possession of a ship.

The penalty provision has also been amended. A new and increased penalty provision of 50 penalty units was added. Section 4B of the Crimes Act 1914 will result in the penalty for an individual being 50 penalty units and for a body corporate being a maximum fine of 250 penalty units.

### **Section 19**

Section 19 of the Act is the offence provision in relation to contravention or non-compliance with a direction made under this Act.

Consistent with the provisions of the *Crimes Act 1914* and modern drafting practice, the simple replacement subparagraph 19(1) sets the penalty in penalty units and refers to a person in relation to a breach, to include both bodies corporate as well as natural persons in accordance with section 4B of the *Crimes Act 1914*.

Section 19 of the Intervention Act sets the penalties for not acting in accordance with directions made under the Act. The penalty for contravention or non compliance was set at a maximum of \$20,000 for an individual or \$50,000 for a body corporate. Where a court of summary jurisdiction is involved, the penalties are then \$2,000 and \$5,000 respectively. These penalties for breaches of directions served in accordance with section 17 at a maximum fine of 2,000 penalty units or a maximum term of imprisonment for 5 years, or both, for an individual. Section 4B of the Crimes Act 1914 will result in the penalty for a body corporate being a maximum fine of 10,000 penalty units.

### **Section 21**

Section 21 was amended to address the practical issue of service of a direction on the owner of a ship by serving it on the 'agent' of the ship owner, whether the agent is a natural person or a body corporate.

### **Subsection 22**

Section 22 was amended to insert a provision for a new fair mechanism for compensation for acquisition of property arising from operation of this Act. This amendment is consistent with section 51(xxxi) of the Constitution, which requires that any compensation for acquisition of property by the Commonwealth is on just terms. Subsection 22(1) provides that a reasonable amount of compensation will be provided to a person by the Commonwealth if a requisition of property has taken place on any terms but just terms in accordance with constitutional provisions. Subsection (2) provides the forum for proceedings if there is any dispute with regard to the compensation. The Federal Court has been specified as the appropriate court, given its competence in matters related with Admiralty proceedings. Subsection (3) defines the terms 'acquisition of property' and 'just terms'.



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# Amendments to the *Protection of the Sea (Powers of Intervention) Act 1981*

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Maritime Emergency Response Commander  
AMSA

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- **Background**
- **NMERA overview**
- **Role of MERCOM**
- **Amendments to the Act**
- **Place of Refuge**



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## Background

- Declining incidents and risks have reduced commercial viability of salvage and emergency towage services.
- Major salvage tug provider started reducing its fleet.
- Port towage is moving to less capable vessels to meet only port needs.



## NMERA overview

- Establishment of a minimum level of emergency towage around the Australian coastline.
- Where there is a significant risk of pollution, the Commonwealth will be responsible for **ALL** ships in **ALL** waters.
- Appointment of AMSA as the single national decision maker for major events.



## NMERA overview (cont)

Importantly

- Amend POI Act to clarify existing powers.

However

- States & Northern Territory
  - Retain current POI powers for ports and coastal waters.
  - Under the NMERA IGA, committed to reviewing their legislation to ensure consistence with NMERA.



## MERCOM

The single national decision maker responsible for management of responses to maritime casualties, with intervention powers to take such measures as may be necessary to prevent, mitigate or eliminate a risk of significant pollution.



## MERCOM

- **AMSA's delegate**
  - under the National Maritime Emergency Response Arrangements
- **Intervention when deemed necessary**
  - Authority granted under the *Protection of the Sea (Powers of Intervention) Act 1981*, as amended (POI Act)



## MERCOM

- **Relationship within AMSA**
  - Position similar to UK's SOSREP
  - Works within AMSA's liability regime
  - Manages the ETV network
- **Interaction with States and NT**
  - Govt / Ports / other areas
  - Ongoing
  - Close liaison and monitoring of significant pollution risk within State & NT waters



## But when?

To the maximum extent possible, consistent with the public interest in protection of the marine environment, resolution of shipping incidents and maritime casualties will be left to the ship owner and salvors/towage providers to address on a commercial basis.



Casualties requiring the exercise of MERCOM's powers in response to actual or potentially **serious emergencies**, and giving rise to any potential liabilities, will occur randomly and infrequently.

Therefore

intervention will only be for incidents where there is a **threat of significant pollution** posed by a ship.



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State & Territory Governments retain powers to deal with lesser threats of pollution or other environmental damage within their respective jurisdictions and may still exercise powers Independently **HOWEVER**

**MERCOM will be able to step in if, in his/her opinion, not enough is being done or if assistance is needed.**

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## POI Act amendment 2006

**To enhance the effectiveness of intervention to protect Australia's coastal interests affected or threatened by an actual or potential maritime incident posing a threat of ship-sourced pollution.**

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## Powers of Intervention

- Recognising effective management requires clear, unambiguous decision making.
- AMSA always has had general power to ‘take such measures as it considers necessary’ to mitigate, eliminate or prevent a threat of pollution’
  - Based on Intervention Convention 1969



## POI changes

- Enhanced POI laws to provide greater clarity and facilitate decision making during an emergency
  - Jurisdiction (including EEZ)
  - Directions to persons
  - Liability and responder immunity
  - Increased penalties



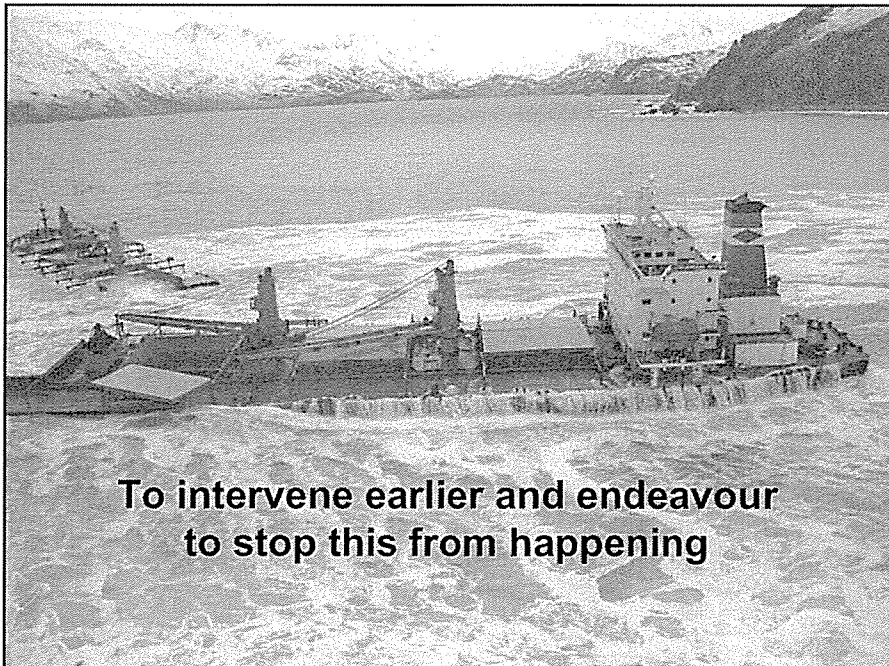
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## Jurisdiction

- **Separately define EEZ** and align with coastal waters powers (S10)
- **Lower threshold** – changed from “Grave and Imminent danger to the coastline” to ‘has escaped or .... is likely to escape’.
- Why?

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## Jurisdiction cont.

Extend to all ships in all Australian waters

- Including internal waters of a State, and
- Large recreational, fishing and other vessels



## Directions

- Clarification of powers to direct other persons (S11)
  - Including master/owner of another ship, harbourmasters, service providers ashore.
  - May requisition tangible assets (other than ships) and services, subject to just compensation, for specified purposes.

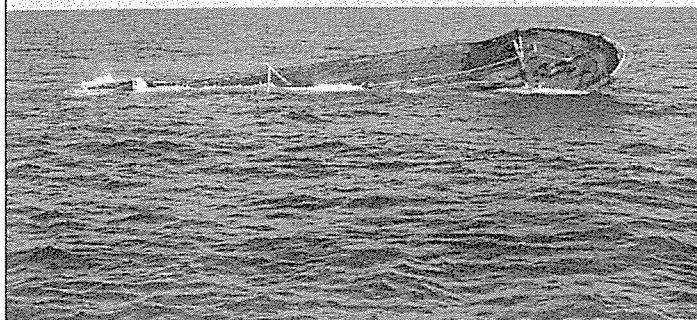


## Directions cont.

- Ability to declare a **Place of Refuge** (S11(1)(s)).
- Require temporary release of contractual obligations, where the fulfillment of those obligations is likely to impede or interfere with the carrying out of Directions (S11(1)(u)).
- AMSA directions to prevail over those of any other person, to the extent of any inconsistency (S5(1A)).



Still need Ministerial approval to do this though.....





## Liability and Immunity

- 'Responder immunity' for persons making and complying with directions (S17A)
  - Protects ports, towage providers and others from breach of existing contracts and other criminal and civil proceedings
- Shipowner remains liable for compensation claims under international conventions
  - subject to limit of liability provisions
- Service providers (pilots etc) able to recover costs direct from shipowner.



## Penalties

- Increased penalties to encourage compliance (S19)
  - 2,000 units (\$220,000) or 5 years jail (or both) for not complying with a direction (for an individual)
  - \$5500 for failure to inform of change of ownership during an incident
- Represents about a 10 fold increase in previous penalty





## Place of Refuge (POR)

- As a Contracting State to the International Convention on Salvage, 1989 (Salvage 1989), Australia is obliged under Article 11, when considering a request for a place of refuge, to take into account the need for cooperation between salvors, other interested parties and public authorities to ensure the efficient and successful performance of salvage operations.



## POR

- When dealing with ships in “distress”, the requirement is to find them an area of sheltered water where the situation can be stabilised, the cargo made safe and the salvors and authorities can evaluate what further steps are necessary without the pressure of a crisis hanging over their heads.
- The concern of port authorities that they should not be exposed to the risks of pollution, fire or explosion is well understood and is not in any way challenged.



## POR

- Subsection 11(1)(s) of the *POI Act* provides AMSA with the legislative ability to require that a specified place be treated as a POR.
- Regardless of the powers provided by the Convention, a Coastal State (i.e. Australia) has an absolute right under international law to deny a ship entry to any of its ports or offshore installations.



## POR

- There is at present no international requirement for a country to provide a POR for vessels in “distress”.
- But what is the definition of “**DISTRESS**”?
- Vessels which no longer pose a threat to their crews are not in distress, but may be in need of assistance and hence a POR.
- Thus, when considering a request for a place of refuge, Australia, is faced with the need to balance several competing factors including:



## POR

- (a) the duty of Australia to render assistance to ships in distress;
- (b) the long-established humanitarian right of a ship in distress to seek a POR for the purpose of overcoming the distress and carrying out repairs, etc;
- (c) the right of Australia to regulate, and to place conditions on, entry into its ports; and
- (d) the right of Australia to protect its coastlines and marine resources from pollution or the threat of pollution.



## Implications of Refusing a POR Request

- Australia would appear to be better placed than many maritime nations, in that passing traffic not calling at Australian ports is minimal.
- At the same time, our relative isolation means that there are few nearby maritime administrations that could provide assistance to a vessel requesting a place of refuge, unlike other areas of the world such as Europe, Asia, etc.





## Implications of Refusing a POR Request

- Consequently, in assessing a POR request, the relevant Commonwealth or State/NT agency needs to be cognisant of the fact that a vessel may have few other options available to it in the likelihood that the POR request is denied.
- So in refusing a POR request, a Commonwealth or State/NT agency should give consideration to alternative arrangements to assist a maritime casualty.



## !! Yes or No !!

- In Australian waters, places of refuge are determined on a case-by-case basis and are not pre-designated.
- This approach is premised on the fact that a place of refuge is not a fixed location but depends on the characteristics of the vessel, the facts of the incident and prevailing environmental conditions and the likely consequences.



## POR determination

- Consistent with IGA which states that ...  
*The agreed national priority is to protect the environment from widespread pollution from a maritime casualty. This may involve acceptance of some localised pollution or damage if widespread pollution is to be prevented.....*
- Will initially explore the option of continuing to respond to a maritime casualty at sea rather than automatically granting approval to access a place of refuge.



- In order to do so, AMSA will need to collect, synthesise and analyse all relevant information so as to allow a comparison between the risks involved if the ship remained at sea and the risks that it would pose to the POR and its environment.
- Look at the port/anchorage options that are available.
- Use all provisions of the *POI Act*, and working relationships with the local authorities, to properly manage the bringing in of a vessel.



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# National Maritime Place of Refuge Risk Assessment Guidelines

(Currently under review)

[http://www.amsa.gov.au/Marine\\_Environment\\_Protection/Place\\_of\\_Refuge\\_Guidelines](http://www.amsa.gov.au/Marine_Environment_Protection/Place_of_Refuge_Guidelines)

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Thank you



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