

## **The wonders of oil spill clean ups**

**John Kavanagh**  
Acting Manager  
(Maritime Legislation)  
Maritime Safety Queensland

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**Some legal observations**

- **Who pays?**
- **International law**
- **Commonwealth law**
- **Queensland law**
- **Pure Economic Loss**



## Who pays?

### ➤ Polluter pays principle

*"The principle provides a basis for distributing the costs arising from pollution and to act as a deterrent for the pollution activity that has one identified. It is really an economic rather than a legal principle, but has been increasingly widely applied, originally by the OECD and the European community, but since then especially by the US."*

Edgar Gold, 2006, Gard Handbook on Protection of the Marine Environment, 3<sup>rd</sup> Edition, page 63



## UNCLOS

### ➤ UNCLOS – Article 194(2)

*2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.*



## UNCLOS

### ➤ UNCLOS – Article 194(3)

*The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent:*

...  
*(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;*

## CLC 1969

- Applies to tankers carrying persistent oil in bulk
- Covers both oil as cargo and fuel from tankers
- Liability confined to shipowner (?)
- Compulsory insurance
- Strict liability for oil pollution damage
- Shipowner may limit liability
- Limit ceiling 89.77 million SDR
- AUD 175.2 million as at 1 Sept 2006

## **Fund 1971/1992**

- **Applies when CLC limit exceeded**
- **Funded by oil industry in proportion to volume of oil received**
- **Japanese oil interests – 18%**
- **With Supplementary Fund, up to 750 million SDR**
- **AUD1,463 million as at 1 Sept 2006**



## **Bunkers 2001**

- **Modelled on CLC 1969**
- **Pollution damage from ship's bunker fuel**
- **Ships other than oil tankers > 1000GT**
- **IMO Conference in March 2001**
- **Requires 18 signatories – currently 11**
- **Shipowner strictly liable**
- **Right to limit liability – such as LLMC 1976**



## Bunkers 2001

➤ **Pollution damage defined:**

- ◆ *Loss of or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to reasonable measures of reinstatement actually undertaken or to be undertaken; and*
- ◆ *the costs of preventive measures and further loss or damage caused by such preventive measures.*

Article 1(9) – International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001



## LLMC 1976

- **Damage caused by the operation of the ship**
- **Shipowners right to limit upon creation of a fund**
- **Right to limit only lost with wilful intent or recklessness with knowledge that damage would result**
- ***Newcastle Port Authority v. Pevitt & Ors* [2003] NSWSC 888 (1 October 2003, Palmer J) – legal costs not included in fund**



## Marpol 73/78

- Annex 1 – pollution by oil
- Tankers >150 GT
- All ships >400 GT
- Prohibits discharges
- Strict liability
- Defences
  - ◆ Safety of ship or life
  - ◆ Damage - *Morrison v Peacock* (2002) 210 CLR 274
  - ◆ “a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some external or internal event”.



## Commonwealth law

- *Protection Of The Sea (Civil Liability) Act 1981*  
- CLC 1969
- *Protection Of The Sea (Oil Pollution Compensation Fund) Act 1993* - FUND 1992
- *Limitation Of Liability For Maritime Claims Act 1989* - LLMC 1976
- *Protection Of The Sea (Prevention Of Pollution From Ships) Act 1983* – MARPOL 73/78
- Bunkers 2001 ?



## Queensland law

- *Transport Operations (Marine Pollution) Act 1995 (Qld) – MARPOL 73/78*
  - ◆ S26 discharge offence
  - ◆ S28 defences
  - ◆ Damage defined
    - *Does not include any existing defect in the ship or its equipment resulting from an event, a lack of maintenance or anything else*



## Queensland law

- *Transport Operations (Marine Pollution) Act 1995 (Qld) – MARPOL 73/78*
  - ◆ s67A – compulsory insurance for ships >35m
  - ◆ To be extended to ships >15m from 18 May 2007 at latest
  - ◆ S 111 Discharge expenses include
    - Investigation costs
    - Preventing or minimising effects of a discharge
    - Treating animals and plants
    - Rehabilitating or restoring Queensland's marine and coastal environments
  - ◆ S 115 – discharge expenses recoverable as a debt from master and owner



## **3<sup>rd</sup> Party Claims for Pollution Damage**

- **Not in Queensland**
- ***NSW Marine Pollution Act 1987 section 51***
- ***Tasmania's Pollution of Waters By Oil and Noxious Substances Act 1987 section 39A***
- ***SA Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987 section 32A***
- ***WA Pollution of Waters by Oil and Noxious Substances Act 1987 section 27***



## **Pure Economic Loss**

- ***Fortuna Seafoods Pty Ltd v The Ship Eternal Wind***  
**[2005] QCA 405**
- **No 'bright line'**
- **No simple formula**



## Global Peace Litigation

- *Elbe Shipping SA v the Ship Global Peace* [2006] \*  
FCA 954 (2 August 2006)
- *Admiralty Act 1988* (Cth)
- Jurisdictional challenge

NB

## Thank you

