

# A GLOBAL OIL STAIN – CLEANING UP INTERNATIONAL CONVENTIONS FOR LIABILITY AND COMPENSATION FOR OIL EXPLORATION/PRODUCTION

Jacqueline Allen\*

In April 2010, the world watched helplessly as oil spilled into the cool blue waters off the Gulf of Mexico causing the largest oil spill in United States history. But unlike past catastrophic oil pollution incidents caused by oil tankers, this incident was caused by a well blowout and subsequent explosion on an oil rig.<sup>1</sup> This incident was more ruinous than past tanker incidents due to the very characteristics of a well spill which are much longer in duration and magnitude. On the *Deepwater Horizon* 11 crew lost their lives and when fire caused the *Deepwater Horizon* to sink it left a well gushing at the sea floor which took 84 days to cap.

Prior to this and closer to home, in August 2009, the Montara Wellhead Platform, located 650 kilometres west of Darwin, had an ‘uncontrolled release of hydrocarbons’ that subsequently led to a fire in November 2009.<sup>2</sup> Luckily there were no injuries at Montara, however oil pollution contaminated 70 000 square kilometres of ocean and it took over 10 weeks to cap the gushing oil on the sea floor.<sup>3</sup>

Given the large amount of oil projects off the Australian coast it is both hard to fathom and necessary to consider what the consequences might be for an oil rig blowout<sup>4</sup> for Australian marine life, tourism, and fishing industries that rely on clean, unpolluted waters.

Existing international conventions for oil spills are from an earlier era when oil rigs were not considered a significant risk for oil spills and environmental damage. Now that technology has increased the capability of oil rigs to drill to new depths and venture further out from coastlines, this paper contends that a compulsory international convention is required to cover insurance, liability for clean-up and compensation for parties affected by consequential environmental damage. Whilst oil spills from oil rigs may be a rare occurrence they have the potential to be of such a vast duration and magnitude that is imperative the Australian and international community learn the lessons from Montara and *Deepwater Horizon* – because these devastating spills could happen anywhere.

Firstly, this paper will examine the international conventions pertaining to oil pollution with particular emphasis on the conventions which cover liability and compensation for oil pollution. Secondly this paper will examine and compare the responses of both Australia and the United States after their recent oil spills arising from oil rigs; particularly how these two countries coordinate clean-up and liability/compensation. This paper will conclude with arguments for an international convention and recommendations for both Australia and the international community to address the omission of oil rigs from conventions pertaining to oil pollution liability and compensation.

## 1 International Conventions for Oil Spills

The *United Nations Convention on Law of the Sea* (‘UNCLOS’) is the overarching convention stating the basic rights and obligations of coastal states to authorise and regulate oil exploration and production in their respective Exclusive Economic Zones (‘EEZ’) and on their continental shelf.<sup>5</sup> UNCLOS gives coastal states the right to impose

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\* Jacqueline Allen is currently completing her LLB at Queensland University of Technology. The author wishes to express thanks to Kate Lewins and Michael White for their assistance with this paper.

<sup>1</sup> Technical term for the *Deepwater Horizon* was a ‘mobile offshore drilling unit’; for the purposes of this paper and ease of the reader the term ‘oil rig’ will be used to cover: all offshore platforms, units, and structures, fixed or mobile, which are concerned with oil and gas exploration, exploitation and production at sea.

<sup>2</sup> Department of Resources, Energy and Tourism, *Government Response to the Offshore Petroleum Safety Regulations Inquiry* (June 2009) and *Review of the National Offshore Petroleum Safety Authority Operational Activities* (March 2009), September 2010 <<http://www.ret.gov.au/resources/Documents/Offshore%20Petroleum%20Safety/GovtResponse-NOPSAReviewSept2010.pdf>> at 10 October 2010, 30; Coogee Resources, *PTTEP Australasia Timor Sea Operations Background Information* <[http://www.coogeeresources.com.au/uploads/PTTEP\\_Fact%20Sheet\\_operations\\_and\\_company\\_Dec\\_2009.pdf](http://www.coogeeresources.com.au/uploads/PTTEP_Fact%20Sheet_operations_and_company_Dec_2009.pdf)>.

<sup>3</sup> Montara Well Head Platform Uncontrolled Hydrocarbon Release Terms of Reference; Montara Commission of Inquiry, ‘*Report of the Montara Commission of Inquiry*’, June 2010, 38.

<sup>4</sup> In the context of this paper, blowout refers to unintentional and/or uncontrolled release of hydrocarbons – likely due to mechanical failure.

<sup>5</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (UNCLOS) arts 56, 60, 81 193.

measures to protect the marine environment and to reduce, prevent or control pollution from devices including oil rigs.<sup>6</sup> Australia ratified *UNCLOS* in 1994.

The international community has come close to having a Convention relating to oil rigs and pollution liability and a draft Convention was discussed as recently as 2004. The process began in 1977 when Comité Maritime International was requested by the International Maritime Organisation ('IMO') to prepare a draft convention relating to oil rigs and pollution.<sup>7</sup> The first draft was titled the *Draft Convention on Offshore Mobile Craft 1977* and was known as the '*Rio Draft*'.<sup>8</sup> The Convention was revised further in 1994 and titled the *Draft Convention on Offshore Mobile Craft 1994* ('*Sydney Draft*'),<sup>9</sup> however, the Convention had deficiencies and a working group was established to develop a more comprehensive Convention.<sup>10</sup> Unfortunately there was dominant opposition from the International Association of Drilling Contractors and the United States Maritime Law Association who challenged the need for a comprehensive international treaty for oil rigs.<sup>11</sup> In October 1999, the IMO Legal Committee confirmed that its future work would include a draft convention on offshore mobile craft however the topic would be given a low priority due to the lack of expressed government interest and more urgent matters.<sup>12</sup> After much debate, the IMO took it off its long-term working plan in 2001. CMI followed suit, also removing it from their agenda.<sup>13</sup>

Despite opposition and work officially ceasing by CMI and IMO, a CMI working group and the Canadian Maritime Law Association developed the *Draft Convention on Offshore Units, Artificial Islands and Related Structures Used in the Exploration for and Exploitation of Petroleum and Seabed Mineral Resources 2001* ('*Canadian Draft*').<sup>14</sup> The *Canadian Draft* was published and discussed at the CMI Conference in Vancouver in 2004 and had overall support despite continued strong opposition from the United States and it was agreed to continue to work towards improving this document. The *Canadian Draft* is a comprehensive document covering many aspects of oil rigs including liability for pollution damage arising from offshore activities and is a possible starting point for any future international Conventions that may be developed to include oil rigs.

In the wake of both the *Deepwater Horizon* and Montara incidents, the IMO Legal Committee have expressed in principle support for inclusion of a new item on the Committee's agenda to consider 'liability and compensation issues connected with transboundary pollution damage resulting from offshore oil exploration and exploitation'.<sup>15</sup> It is debatable whether the IMO is the right organisation to carry this issue forward or whether the International Seabed Authority (ISA), United Nations Environment Programme (UNEP) or other UN bodies pertaining to the Law of the Sea might be more appropriate.<sup>16</sup>

Governments worldwide have so far been reluctant to have a global regulatory regime to cover oil rigs; however the *Deepwater Horizon* disaster may alter this view.

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<sup>6</sup> *UNCLOS* pt XII, s 1, art 194, s 5208, arts 60, 80.

<sup>7</sup> Mikhail Kashubsky, 'Marine Pollution from the Offshore Oil and Gas Industry: Review of Major Conventions and Russian Law (Part 1)' (2006) 151 *Maritime Studies* 1, 5.

<sup>8</sup> CMI Documentation 1977 vol I, 28; vol III, 124.

<sup>9</sup> *Draft Convention on Offshore Mobile Craft 1977*, (not in force) ('*Rio Draft*'); *Draft Convention on Offshore Mobile Craft 1994*, (not in force) ('*Sydney Draft*').

<sup>10</sup> Michael White 'Offshore Craft and Structures: A Proposed International Convention' (1999) 18 *Australian Mining and Petroleum Law Journal* 21, 22.

<sup>11</sup> Nigel H Frawley, William M Sharpe and John L Joy, 'The Origins of the CMLA Draft Convention on Offshore Units, Artificial Islands and Related Structures Used in the Exploration for and Exploitation of Petroleum and Seabed Mineral Resources', *CMI Newsletter*, no 1, 2004, 2; Michael White, 'Offshore Oil & Gas Catastrophes: Montara Spill and Australian Offshore Oil and Gas Regulatory Laws' (Paper presented at International Law, Litigation and Arbitration Conference, Federal Court Sydney, 6 May 2011) 16.

<sup>12</sup> John Joy and William Sharpe, 'Report of the Offshore Subcommittee' (paper presented at the Canadian Maritime Law Association 2000 Annual General Meeting, Halifax).

<sup>13</sup> Kashubsky, above n 7.

<sup>14</sup> The CMI working group, the CMI International Working Group on Offshore Craft and Related Structures was established after the CMI Conference in Sydney, Australia in October 1994. The Canadian Maritime Law Association working group is titled the: Offshore Subcommittee.

<sup>15</sup> Report of the Legal Committee on its Ninety-Seventh Session (LEG 97/15 1 December 2010) [1410]; Report of the Legal Committee on its Ninety-Eighth Session (LEG 98/13/1 18 February 2011); Michael White, 'Offshore Oil & Gas Catastrophes: Montara Spill and Australian Offshore Oil and Gas Regulatory Laws' (Paper presented at International Law, Litigation and Arbitration Conference, Federal Court Sydney, 6 May 2011) 16.

<sup>16</sup> Nicholas Gaskell, 'Offshore Oil and Gas Catastrophes: Compensation for Offshore Pollution from Ships: Problems and Solutions' (Paper presented at International Law, Litigation and Arbitration Conference, Federal Court Sydney, 6 May 2011) 17; IMO traditionally has dealt with ships.

Whilst a Convention pertaining to oil pollution liability for oil rigs has not yet come to fruition, through the IMO the international community has implemented a number of conventions designed to address oil pollution and liability following a number of marine casualties involving oil tankers.<sup>17</sup>

International conventions that address oil pollution from oil tankers and bunkers include:

- The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972;<sup>18</sup>
- The International Convention for the Prevention of Pollution by Ships 1973, amended 1978;<sup>19</sup>
- The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, amended by Protocol of 1973;<sup>20</sup> and
- The International Maritime Organisation Oil Pollution Preparedness Response and Cooperation Convention.<sup>21</sup>

The IMO has two international conventions pertaining to civil liability for marine pollution; the *International Convention on Civil Liability for Oil Pollution Damage 1992 as amended in 2002 with effect from 2003* ('CLC 92') and the *International Convention on the Establishment of an International Fund for Oil Pollution Damage 1992* ('Fund Convention'). These Conventions have worked well in practice, with virtually all bills paid.<sup>22</sup> Whilst neither of these conventions applies to oil rigs it is useful to examine them in the context of the content required in a convention pertaining to oil rigs:<sup>23</sup>

### 1.1 International Convention on Civil Liability for Oil Pollution Damage 1992 as amended in 2002 with effect from 2003 ('CLC 92')<sup>24</sup>

The CLC 92 was established to provide liability and compensation for clean-up costs and damages from an oil tanker spill. This convention works with the *Fund Convention* (see below). Under the CLC 92, tanker operators obtain compulsory insurance, usually with a P&I club, depending on the size of the tanker to a maximum of approximately AUD\$170 million.<sup>25</sup> The benefit for the operator is that there is an upper limit for liability based on the tonnage of the ship,<sup>26</sup> although there are limitations to this upper limit.<sup>27</sup> Once claims have exceeded this upper limit the *Fund Convention* applies (see below).<sup>28</sup> The CLC 92 operates on a principle of strict liability which

<sup>17</sup> Tanker casualties include: (*Torrey Canyon*, 1967) (*Exxon Valdez*, 1989) (*Erika*, 1999) (*Prestige*, 2002).

<sup>18</sup> *Protocol of 1996 to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972* 36 ILM 1 (entered into force 24 March 2006); implemented by the Commonwealth by enactment of the *Environment Protection (Sea Dumping) Act 1981* (Cth); although there is some State legislation purporting to give effect to the original Dumping Convention, in State Coastal Waters that legislation is superseded by Commonwealth Act s 9(1).

<sup>19</sup> *Protocol of 1978 relating to the International Convention for the Prevention of Pollution by Ships 1973* 1340 UNTS 61 (entered into force 2 October 1983); Main Commonwealth legislation giving effect to MARPOL is *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) (this applies only to ships and has nothing pertaining to rigs/platforms/installations); *Marine Pollution Act 1987* (NSW); *Transport Operations (Marine Pollution) Act 1995* (Qld); *Pollution of Waters by Oil and Noxious Substances Act 1987* (SA); *Pollution of Waters by Oil and Noxious Substances Act 1987* (Tas); *Pollution of Waters by Oil and Noxious Substances Act 1986* (Vic); *Pollution of Waters by Oil and Noxious Substances Act 1986* (WA); *Marine Pollution Act 1999* (NT).

<sup>20</sup> *Protocol relating to the Intervention on the High Seas in Cases of Pollution by Substances Other than Oil 1973* 1313 UNTS 3 (entered into force 30 March 1983); this Convention was implemented in Australia by: *Protection of the Sea (Powers of Intervention) Act 1981* (Cth).

<sup>21</sup> *International Maritime Organisation Oil Pollution Preparedness Response and Cooperation Convention* 30 ILM 735 (entered into force 13 May 1995).

<sup>22</sup> Nicholas Gaskell, 'Offshore Oil and Gas Catastrophes: Compensation for Offshore Pollution from Ships: Problems and Solutions' (Paper presented at International Law, Litigation and Arbitration Conference, Federal Court Sydney, 6 May 2011) 6.

<sup>23</sup> There is also a even higher convention under the *Fund Convention 1992* - it is optional as to whether state parties want to be part of it or not in Michael W D White, *Australasian Marine Pollution Laws* (Federation Press, 2<sup>nd</sup> ed, 2007) 58.

<sup>24</sup> Was first enacted by the Commonwealth in the *Protection of the Sea (Civil Liability) Act 1981* (Cth). This Act now gives force of law to selected provisions of CLC 92. Although the Act goes beyond the provisions in the CLC; White, above n 23, 122.

<sup>25</sup> *International Convention on Civil Liability for Oil Pollution Damage 1992 as amended in 2002 with effect from 2003* 973 UNTS 3 (entered into force 19 June 1975) art VII ('CLC 92'); Australian Maritime Safety Authority, *Oil Spills From Ships – Who Pays?* (Fact Sheet, Australian Maritime Safety Authority) <[http://www.amsa.gov.au/Publications/Fact\\_sheets/Oil\\_Spills\\_From\\_Ships\\_Fact\\_Sheet.pdf](http://www.amsa.gov.au/Publications/Fact_sheets/Oil_Spills_From_Ships_Fact_Sheet.pdf)>.

<sup>26</sup> Tonnage is measured by the *Tonnage Convention* Art V(2) and multiplying it by the 'units of account' to arrive at the amount, but this is subject to a minimum and maximum limit in White, above n 23, 62; 'unit of account' is the SDR; *International Convention on Civil Liability for Oil Pollution Damage 1992 as amended in 2002 with effect from 2003* 973 UNTS 3 (entered into force 19 June 1975) art v(9)(a).

<sup>27</sup> Does not apply if shipowner acted with intent to cause damage, or recklessly and with knowledge that such damage would probably result *International Convention on Civil Liability for Oil Pollution Damage 1992 as amended in 2002 with effect from 2003* 973 UNTS 3 (entered into force 19 June 1975) art V(2).

<sup>28</sup> White, above n 23, 163.

benefits claimants as they are only required to prove oil damage from a particular tanker and not required to prove negligence.<sup>29</sup> This hastens the payout for claimants and avoids lengthy and costly litigation.<sup>30</sup> There are some limits as to what is recoverable and what qualifies as ‘pollution damage’. Clean-up costs within the ordinary meaning of loss or damage and costs associated with preventative measures and replacing lost amenities can be claimed.<sup>31</sup>

## **1.2 International Convention on the Establishment of an International Fund for Oil Pollution Damage 1992 (‘Fund Convention’)**

The *Fund Convention* applies when valid claims for compensation due to ‘pollution damage’ from an oil tanker exceed the amount available under the *CLC 92* or there is some impediment to a valid recovery under the *CLC 92* such as insolvency or difficulty identifying the tanker owner.<sup>32</sup> This scheme was created after tanker owners complained that oil companies should share the costs incurred from oil spills due to the nature of their ownership over the oil. Therefore tanker owners contribute to the *CLC 92* and oil companies contribute to the *Fund Convention* and these two regimes share the costs incurred from oil spills.<sup>33</sup>

In Australia, the *Fund Convention* was enacted in the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth).<sup>34</sup> As of January 2010, the amount of compensation available in Australia under the *Fund Convention* was approximately AUD\$1.2 billion.<sup>35</sup> To date, no tanker spill in Australian waters has ever exceeded the upper limits of the *CLC 92*.<sup>36</sup>

## **1.3 Regional Agreements**

A variety of regional agreements exist which address oil pollution in the oil and gas industry in regions such as the Mediterranean Sea, Baltic Sea and the Persian Gulf.<sup>37</sup>

Key agreements/conventions include:<sup>38</sup>

### **1.3.1 Convention for the Protection of the Marine Environment of the North Atlantic 1992 (‘OSPAR Convention 1992’)<sup>39</sup>**

The *OSPAR Convention* applies in the North East Atlantic and obliges parties to ‘take all possible steps to prevent and eliminate marine pollution’. Pollution from oil rigs is expressly dealt with, including pollution from fixed and floating offshore platforms.<sup>40</sup> *OSPAR* applies both the precautionary and polluter pays principles.<sup>41</sup> The *OSPAR Convention* has 15 member governments.<sup>42</sup> It should be noted that *OSPAR* does not provide for clean-up or liability for oil spills from oil rigs.

<sup>29</sup> Unless there is joint liability where liability is apportioned between owner and claimant as in White, above n 23, (art III), 59, 63.

<sup>30</sup> Australian Maritime Safety Authority, *Oil Spills From Ships – Who Pays?* (Fact Sheet, Australian Maritime Safety Authority) <[http://www.amsa.gov.au/Publications/Fact\\_sheets/Oil\\_Spills\\_From\\_Ships\\_Fact\\_Sheet.pdf](http://www.amsa.gov.au/Publications/Fact_sheets/Oil_Spills_From_Ships_Fact_Sheet.pdf)>.

<sup>31</sup> White, above n 23, 60; *International Convention on Civil Liability for Oil Pollution Damage 1992* as amended in 2002 with effect from 2003 973 UNTS 3 (entered into force 19 June 1975) arts I(6) and I(7) *CLC*; ‘costs of reinstatement’ was inserted to clarify that mere loss of amenities is not sufficient – only replacement costs.

<sup>32</sup> *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth), s 46A(2); *International Convention on the Establishment of an International Fund for Oil Pollution Damage 1992* Art 4 (‘*Fund Convention*’); AMSA, above n 30.

<sup>33</sup> White, above n 23, 65.

<sup>34</sup> *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth), ch 3.

<sup>35</sup> Australian Maritime Safety Authority, above n 30; this is also due to a third tier: Supplementary Fund Protocol 2003 which has been in force in Australia since January 2009: *Protection of the Sea Legislation Amendment Act 2008* (Cth).

<sup>36</sup> White, above n 23, 124.

<sup>37</sup> Curry L Hagerty and Jonathan L Ramseur, *Deepwater Horizon Oil Spill: Selected Issues for Congress* (Diane Publishing, 2010) 39.

<sup>38</sup> For a great run down of Regional agreements see website: United Nations Environment Programme ‘Regional Seas Programme’ <<http://www.unep.ch/regionalseas/legal/conlist.htm>>.

<sup>39</sup> *Convention for the Protection of the Marine Environment of the North Atlantic 1992*, adopted 22 September 1992, 2354 UNTS 67 1993 (entered into force 25 March 1998) (‘*OSPAR Convention*’).

<sup>40</sup> *Convention for the Protection of the Marine Environment of the North Atlantic 1992*, adopted 22 September 1992, 2354 UNTS 67 1993 (entered into force 25 March 1998) (‘*OSPAR Convention*’) art 5 and annex III; Kashubsky, above n 7, 6; this is binding in EU law as EU is a party to the Barcelona Convention.

<sup>41</sup> *Convention for the Protection of the Marine Environment of the North Atlantic 1992*, adopted 22 September 1992, 2354 UNTS 67 1993 (entered into force 25 March 1998) (‘*OSPAR Convention*’) annex I, art 2(1) - art 2(2).

<sup>42</sup> The fifteen Governments are: Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and United Kingdom.

### 1.3.2 Offshore Pollution Liability Agreement ('OPOL')<sup>43</sup>

Originally *OPOL* applied in the UK, intended as an interim measure until the ratification of the *Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources* ('*CLEE 1977*').<sup>44</sup> However, *CLEE 1977* was never ratified and *OPOL* has extended to apply to all European Union coastal states and Norway.<sup>45</sup> *OPOL* makes available remedial measures up to \$125 million per incident and pollution damage up to \$125 million per incident.<sup>46</sup> This agreement is not between states; instead it applies to 16 major offshore operators currently active in exploration and production. It is a voluntary agreement that ensures operating companies agree to accept strict liability for pollution damage and the cost of remedial measures. Currently all operators in the region are parties to this agreement.

### 1.3.3 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean ('Barcelona Convention')<sup>47</sup>

The *Barcelona Convention* mirrors *OSPAR* but applies to the prevention of marine pollution in the Mediterranean region.<sup>48</sup> The *Barcelona Convention* was one of the earliest regional attempts aimed at protecting the marine environment from pollution.<sup>49</sup> Like *OSPAR*, the *Barcelona Convention* applies both the precautionary and polluter pays principles and the Convention deals expressly with pollution resulting from exploration and exploitation of the seabed.<sup>50</sup> The *Barcelona Convention* does not deal with oil rigs in the same detail as *OSPAR*. A Protocol to the *Barcelona Convention* was developed in 1994 which deals more specifically with pollution from oil rigs however this has not yet entered into force and currently only one EU country has ratified the Protocol.<sup>51</sup> The *Barcelona Convention* does provide contracting parties to determine liability and compensation from pollution damage caused by activities in the Convention and the Protocol (not yet ratified) goes further to ensure that appropriate insurance cover or other financial security is provided by operators – including oil rig operators.<sup>52</sup>

### 1.3.4 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 ('Helsinki Convention')<sup>53</sup>

The *Helsinki Convention* applies to the Baltic Sea and contains provisions dealing with the prevention of pollution from offshore activities, including oil rigs.<sup>54</sup>

### 1.3.5 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution ('Kuwait Convention')<sup>55</sup>

This Convention applies to the Persian Gulf area and contains well developed standards for environmental protection, including protection from pollution from seabed activities, offshore exploration and production.<sup>56</sup>

<sup>43</sup> *Offshore Pollution Liability Agreement* ('*OPOL*') (entered into force 1 May 1975), latest version 1 January 2010.

<sup>44</sup> Gaskell, above n 22, 16.

<sup>45</sup> For more information see: The Offshore Pollution Liability Association Ltd <<http://www.opol.org.uk/>>.

<sup>46</sup> *Offshore Pollution Liability Agreement* ('*OPOL*') (entered into force 1 May 1975) cl IV.

<sup>47</sup> *Convention for the Protection of the Mediterranean Sea against Pollution 1976*, adopted 16 February 1976, 1102 UNTS 27 (entered into force 12 February 1978), ('*1976 Barcelona Convention*'). The *1976 Barcelona Convention* was revised on 10 June 1995. When the amended *Convention* enters into force, it will be called the '*Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean*'.

<sup>48</sup> Kashubsky, above n 7, 6-7.

<sup>49</sup> *Ibid.*

<sup>50</sup> *1976 Barcelona Convention*, above n 47, art 4(3) polluter pays and precaution; art 7.

<sup>51</sup> *1994 Protocol for the Protection of the Mediterranean Sea Against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and Subsoil* adopted 14 October 1994 (not yet in force).

<sup>52</sup> *1976 Barcelona Convention*, above n 47, art 16, 27.

<sup>53</sup> *Convention for the Protection of the Marine Environment of the Baltic Sea Area 1992*, adopted 9 April 1992, 1507 UNTS 167 (entered into force 17 January 2000), ('*1992 Helsinki Convention*'); Ratified by Russia on 15 October 1998. In force in Russia since 6 October 1996.

Discharges of oil and garbage from fixed and floating offshore platforms are regulated by the *1992 Helsinki Convention* similarly to *MARPOL 73/78* provisions (latest amendments entered into force on 15 November 2008).

<sup>54</sup> *Convention for the Protection of the Marine Environment of the Baltic Sea Area 1992*, adopted 9 April 1992, 1507 UNTS 167 (entered into force 17 January 2000), ('*1992 Helsinki Convention*') annex VI.

<sup>55</sup> *Protocol concerning Marine Pollution Resulting from Exploration and Exploitation of the Continental Shelf*, adopted 29 March 1989, 19 EPL 1989 (entered into force 17 February 1990) ('*1989 Kuwait Protocol*').

### 1.3.6 Russian Offshore Oil and Gas Environment and Safety Regulatory Regime

This is an agreement between Russia, United States of America and Norway to assist with evaluating and reforming the Russian offshore oil and gas regulatory system.<sup>57</sup>

Both Australia and the United States have recent experience dealing with oil spills arising from an oil rig; namely at Montara located 650 kilometres west of Darwin and the *Deepwater Horizon* in the Gulf of Mexico. This paper will now compare the way that Australia and the United States coordinated clean-up responses and the liability/compensation regimes in both countries.

## 2 So What If Something Goes Wrong? Australia's Response

### 2.1 Jurisdictional Issues

Australia's federal structure creates particular jurisdictional issues with regards to offshore oil exploration and production. Whilst it is beyond the scope of this paper to explore these issues thoroughly,<sup>58</sup> it is important to note that the main Commonwealth Act that applies to the offshore energy industry is the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* ('OPGGSA'). This Act applies from the 3nm limit from the baselines out to the limits of the Exclusive Economic Zone ('EEZ') and the declared outer continental shelf areas, subject to exceptions.<sup>59</sup> State and Northern Territory laws apply in coastal waters (the first three nautical miles from the baselines).<sup>60</sup> Ideally, there should be one national body to oversee the offshore oil industry in Australia rather than a fusion of State, Territory and Commonwealth regimes. This is particularly relevant when incorporating international law as international law does not recognise Commonwealth's grant of jurisdiction to the States.<sup>61</sup>

The Montara wellhead platform is located in Commonwealth waters in the offshore area of the Territory of Ashmore and Cartier Islands.<sup>62</sup> On 5 November the Minister for Resources, Energy, and Tourism announced a Commission of inquiry into the uncontrolled hydrocarbon release at Montara, pursuant to Part 9.10 of the *OPGGSA*.

### 2.2 Clean-up

Montara was the first well blowout in Australia in over 25 years.<sup>63</sup> The resulting oil spill from Montara was the first major incident of its kind in Australia and was the worst oil spill in Australia's offshore petroleum industry history;<sup>64</sup> despite the fact that approximately 3000 wells have been safely drilled in offshore waters in over 40 years.<sup>65</sup>

In Australia, the principal organisation for conducting clean-up operations is the Australian Maritime Safety Authority ('AMSA').<sup>66</sup>

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<sup>56</sup> Kashubsky, above n 7, 7; *1989 Kuwait Protocol*, above n 55, art II.

<sup>57</sup> Bureau of Ocean Energy Management, *Regulation & Enforcement – Offshore Energy and Minerals Management US Department of the Interior 'Russia'* <<http://www.boemre.gov/international/Russia.htm>>.

<sup>58</sup> A great resource that covers jurisdictional issues in depth is: White, above n 28. See also Tina Hunter, 'Australian Offshore Petroleum Regulation After the Varanus Island Explosion and the Montara Blowout – Drowning in a Sea of Federalism' (2011) (25) *Australian and New Zealand Maritime Law Journal* (in this issue).

<sup>59</sup> Explanatory Memorandum, *Offshore Petroleum Bill 2005* (Cth), part 1.4; *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), part 1.4, s 8; exceptions being when the *Crimes at Sea Act 2000* (Cth) applies or there is inconsistency between Commonwealth and State laws; Michael White, 'Offshore Oil & Gas Catastrophes: Montara Spill and Australian Offshore Oil and Gas Regulatory Laws' (Paper presented at International Law, Litigation and Arbitration Conference, Federal Court Sydney, 6 May 2011) 4.

<sup>60</sup> Michael White, *Australian Offshore Laws* (Federation Press, 2009) 17.

<sup>61</sup> White, above n 28, 106.

<sup>62</sup> Montara Commission of Inquiry, '*Report of the Montara Commission of Inquiry*', June 2010, 36.

<sup>63</sup> Minister for Resources and Energy, the Hon Martin Ferguson, '*The Report of the Montara Commission Inquiry and the Australian Government Draft Response*', 24 November 2010 [9].

<sup>64</sup> Montara Commission of Inquiry, above n 61, 38.

<sup>65</sup> Minister for Resources and Energy, the Hon Martin Ferguson, above n 62.

<sup>66</sup> *Australian Maritime Safety Authority Act 1990* (Cth), s 6(1)(a).

Australia has a 'National Plan' which is a 'national integrated Government and industry organisational framework' to enable an effective response to an oil spill.<sup>67</sup> The National Plan is managed by AMSA along with relevant State and Northern Territory government departments, emergency services and representatives from the shipping, oil, exploration and chemical industries.<sup>68</sup> Under this Plan, authorities work together on marine pollution incidents by having detailed national, state and local contingency plans, appropriate oil spill response equipment available, and regular training for personnel likely to be involved in an oil spill response. The National Plan has a notional capacity to respond to an oil spill of up to 21 000 tonnes with equipment stockpiled in Australia.<sup>69</sup> Above this, the National Plan provides for overseas assistance in accordance with the *International Convention on Oil Pollution Preparedness, Response and Cooperation* ('OPRC').<sup>70</sup>

The Australian Marine Oil Spill Centre ('AMOSC'), a subsidiary of the Australian Institute of Petroleum, is an integral industry based part of the National Plan.<sup>71</sup> AMOSC is financed by nine participating oil companies and other subscriber companies as a 'major commitment by the Australian oil industry to safeguard the Australian coastline in the event of a major oil spill'.<sup>72</sup> AMOSC maintains Australia's major oil spill response equipment stockpile on 24 hour stand-by and offers highly trained personnel to enhance a successful, prompt response to an oil spill. AMOSC also offers oil spill response training for industry and government.

If marine pollution occurs within three nautical miles of the baseline then the relevant State or Territory would be responsible along with AMSA, as required. If marine pollution occurs beyond three nautical miles the Commonwealth along with AMSA would be responsible for response, although State and Territory governments act as Designated Authorities under the *OPGGSA*.<sup>73</sup>

In the event of an oil spill from an oil rig or any other source (exploration rig, platforms and pipelines) the agency responsible would be the relevant oil company, as 'combat agency' with assistance from government agencies, as required.<sup>74</sup> The relevant personnel would proceed to the site and arrange for equipment to be mobilised.<sup>75</sup> If a spill is small then it would be dealt with locally.<sup>76</sup> In spills of a larger scale more equipment and personnel would be required and the oil company may request to transfer the role of 'combat agency', particularly if the oil company is unable to respond effectively.<sup>77</sup> This happened on the first day of the uncontrolled release from the Montara Wellhead when the operator, PTTEP Australasia ('PTTEPAA'), transferred the role to AMSA; demonstrating that PTTEPAA were out of their depth from day one.

The requirements for clean-up action and response will be different depending on the individual circumstances of the spill. The response often depends on what is both physically and scientifically available but can involve letting the oil break down naturally (this would depend on the location of the spill), use of dispersants, containing and recovering the oil (using booms and skimmers).<sup>78</sup>

To ascertain how oil spill response and clean up is managed it is helpful to use Montara as an example.

On 22 August 2009, AMSA announced that it was coordinating response arrangements pursuant to the 'National Plan'. Although PTTEPAA had handed the oil leak response over to AMSA via the relevant Territory agency, PTTEPAA retained responsibility for the incident and a liaison officer from PTTEPAA worked with AMSA in

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<sup>67</sup> 'Australian Maritime Safety Authority, *Australia's National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances* (Fact Sheet, Australian Maritime Safety Authority) <[http://www.amsa.gov.au/Publications/Fact\\_sheets/National\\_Plan\\_Fact\\_Sheet.pdf](http://www.amsa.gov.au/Publications/Fact_sheets/National_Plan_Fact_Sheet.pdf)> at 18 May 2011; White, above n 28, 203.

<sup>68</sup> Australian Maritime Safety Authority, above n 66.

<sup>69</sup> Australian Maritime Safety Authority, Submission No 24 to *Montara Commission of Inquiry*, Parliament of Australia, 8.

<sup>70</sup> *Ibid* 9.

<sup>71</sup> *Ibid* 5.

<sup>72</sup> Australian Marine Oil Spills Centre, 'About AMOSC' <<http://www.aip.com.au/amosc/about/index.htm>>.

<sup>73</sup> Department of Environment, Water, Heritage and the Arts, Submission No 18 to *Montara Commission of Inquiry*, Parliament of Australia, 1.29.

<sup>74</sup> Australian Maritime Safety Authority, above n 57; Australian Maritime Safety Authority, above n 69, 27.

<sup>75</sup> White, above n 28, 203.

<sup>76</sup> *Ibid*; Australian Maritime Safety Authority, above n 69, 27.

<sup>77</sup> Australian Maritime Safety Authority, above n 69, 27.

<sup>78</sup> 'Australian Maritime Safety Authority, *How Australia Responds to Oil and Chemical Spills in the Marine Environment* (Fact Sheet, Australian Maritime Safety Authority) <[http://www.amsa.gov.au/Marine\\_Environment\\_Protection/National\\_plan/Reports-Fact\\_Sheets-Brochures/How\\_Australia\\_responds\\_to\\_oil\\_and\\_chemical\\_spills\\_fact\\_sheet.asp](http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/Reports-Fact_Sheets-Brochures/How_Australia_responds_to_oil_and_chemical_spills_fact_sheet.asp)>.

Canberra for the first few days of the incident.<sup>79</sup> Part of the immediate response included mobilising AMSA personnel along with a dispersant capable aircraft (from Singapore), dispersants (from both AMOSC and the AMSA equipment stockpile in Darwin) and an aerial dispersant contractor.<sup>80</sup> AMSA determined that the overall objective was to prevent oil from impacting on sensitive marine areas such as the marine parks of Cartier and Ashmore Reefs and the North West coast of Western Australia.<sup>81</sup>

The ongoing operation used equipment from oil industry stockpiles in Singapore and AMOSC as well as AMSA stockpiles in Darwin and other States. Overseas personnel were also provided by Maritime New Zealand in accordance with a Memorandum of Arrangement pursuant to *OPRC*,<sup>82</sup> and from Oil Spill Response in Singapore.<sup>83</sup> Dispersant spraying commenced on 23 August 2009 and continued until 1 November 2009. Containment and recovery operations commenced on 5 September 2009 and finished on 3 December 2009 (although no recoverable oil was located after 15 November).<sup>84</sup>

## 2.3 Insurance requirements

In Australia, an oil rig must have mandatory insurance cover pursuant to s 571 of the *OPGGSA*.<sup>85</sup> This section requires a registered holder of a petroleum exploration permit, petroleum retention licence, a petroleum production licence, an infrastructure licence, or a pipeline licence to maintain insurance against expenses, liabilities or specified things including insurance against expenses relating to the clean-up or other remediation of the effects of the escape of petroleum.

According to the Explanatory Memorandum to the *Offshore Petroleum Act 2006* (the predecessor to the *OPGGSA*) s 571 was inserted to ensure a titleholder had adequate insurance to cover eventualities such as blowouts, pollution and clean-up costs.<sup>86</sup>

Insurance requirements are directed by State and Territory governments acting as the Designated Authority ('DA') under the *OPGGSA*.<sup>87</sup> The DA may issue directions about the comprehensiveness and level of insurance cover to be held but it does not fix a set amount or particular formula for insurance under the *OPGGSA*.<sup>88</sup> The level of insurance is currently determined by the operator in conjunction with the insurer to reflect the potential liability of the activities undertaken at the time. Under the *OPGGSA* the DA does ensure the cover is adequate for all 'expected and unexpected incidents' and has the ability to challenge the insurance amounts if they believe they are too low based on 'industry best practice'.<sup>89</sup> Concerns have been raised that some DAs may not possess the necessary expertise to accurately and fully assess the risk or insurance amounts set by the operators and insurers.<sup>90</sup>

As the oil industry is a worldwide industry, companies usually have worldwide insurance cover that is sufficient for all their activities. Companies add and remove activities as required and the relevant DA insists on proof that any new activities are added to the policy.

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<sup>79</sup> Northern Territory Department of Resources, Submission No 23 to Montara Commission of Inquiry, Parliament of Australia [164]; Australian Maritime Safety Authority, above n 69, 9.

<sup>80</sup> Northern Territory Department of Resources, above n 79; Australian Maritime Safety Authority, above n 69, 9.

<sup>81</sup> Australian Maritime Safety Authority, above n 69, 9.

<sup>82</sup> *Ibid* 10, 32, appendix 6.

<sup>83</sup> *Ibid* appendix 6.

<sup>84</sup> *Ibid* 10. For a full chronology of events regarding Montara it is useful to refer to the AMSA Submission to Montara Inquiry.

<sup>85</sup> *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 571 ('*OPGGSA*'); email from Jacqui Princi, Department of Resources, Energy and Tourism to Jacqui Allen, 11 October 2010.

<sup>86</sup> Explanatory Memorandum, *Offshore Petroleum Bill 2005* (Cth), cl 302.

<sup>87</sup> *OPGGSA* s 70.

<sup>88</sup> Email from Jacqui Princi, Department of Resources, Energy and Tourism to Jacqui Allen, 11 October 2010; Explanatory Memorandum, *Offshore Petroleum Bill 2005* (Cth), cl 302.

<sup>89</sup> Email from Alan Holland, Director of Energy and Assistant Director of Titles, Northern Territory Department of Resources to Jacqui Allen, 28 October 2010; Australian Maritime Safety Authority, *AMSA Response to Recommendations in the 'Response to Montara Wellhead Platform Incident – Report of the Incident Analysis Team*

<[http://www.amsa.gov.au/Marine\\_Environment\\_Protection/National\\_plan/Incident\\_and\\_Exercise\\_Reports/documents/AMSA\\_response-Montara-IAT.pdf](http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/Incident_and_Exercise_Reports/documents/AMSA_response-Montara-IAT.pdf)>.

<sup>90</sup> Australian Maritime Safety Authority *AMSA Response to Recommendations in the 'Response to Montara Wellhead Platform Incident – Report of the Incident Analysis Team*

<[http://www.amsa.gov.au/Marine\\_Environment\\_Protection/National\\_plan/Incident\\_and\\_Exercise\\_Reports/documents/AMSA\\_response-Montara-IAT.pdf](http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/Incident_and_Exercise_Reports/documents/AMSA_response-Montara-IAT.pdf)>.



PTTEPAA had insurance coverage of US\$270 million for Montara.<sup>91</sup>

It is concerning that in Australia, oil rig operators are required to have mandatory insurance to cover clean-up costs and other remediation effects of oil spills however they are not required to compensate for environmental damage.<sup>92</sup> Section 571 of the *OPGGSA* provides that operators have insurance for liability however it does not render operators liable for any oil spill damage arising from their operations.

## 2.4 Liability for clean-up costs and compensation

The blowout at Montara is the first incident of its kind in Australia and has highlighted deficiencies within our domestic law, which arise largely from the omission of oil spill liability and compensation from oil rigs in international conventions (*CLC 92* and the *Fund Convention*). As discussed above, these conventions only require tanker owners to maintain insurance to cover pollution damage and the Bunker Convention covers non-tankers. However, these conventions, which as of January 2010 allowed for total compensation up to approximately AUD\$1.4 billion, do not apply to oil rigs.

Whilst insurance requirements for oil operators and oil rigs are somewhat clear what is unclear is exactly who is liable for clean-up costs and compensation?

## 2.5 Clean-up costs

AMSA, the agency responsible for implementing the National Plan to coordinate oil spill clean-up, is primarily funded by levies on the shipping industry. The National Plan which is integral to an oil spill clean-up is also funded by a levy on the shipping industry.<sup>93</sup>

AMSA uses this levy to: fund the implementation of the National Plan, maintain oil spill response equipment stockpiles, train personnel on oil spill response, and maintain capabilities to respond to pollution incidents. Reimbursement from the polluter is often recovered after the incident.<sup>94</sup>

The levy also allows the Commonwealth to recover its costs from ships as a collective if costs cannot be recovered from the polluting ship following an oil spill. There is nothing in the *Protection of the Sea (Shipping Levy) Act 1981* that authorises a levy or recovery of costs in relation to an oil spill from a rig/platform.<sup>95</sup> Although, some oil companies do make an indirect contribution to maintain Australia's oil pollution response through their contributions to AMOSC, which is part of the National Plan, not all oil companies make either a direct or indirect contribution to AMOSC.<sup>96</sup>

It must be asked whether it is fair that the shipping industry primarily funds the costs of maintaining Australia's national pollution response capability which amounted to AUD\$5 million in 2007/08. It also must be asked whether it is appropriate that the shipping industry may potentially end up bearing the costs of responding to a spill from an oil rig if an operator does not accept responsibility or costs cannot be recovered in full.

At this time there is nothing in legislation to ensure that AMSA is reimbursed for clean-up costs. Further, there is nothing to ensure compensation is paid out to any affected parties that have suffered consequent damage from an oil spill arising from an oil rig. Oil companies are not under any obligation to accept responsibility or agree to accept all costs relating to pollution clean-up and response. As discussed below, this is contrasted with the strict position in the United States that ensures a 'responsible party' for an offshore facility has proof of financial responsibility to cover

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<sup>91</sup> PTT Exploration and Production Public Company Limited *PTTEP News – PTTEP Managed to Put Out the Fire in Timor Sea* <<http://www.pttep.com/en/newsDetail.aspx?ContentID=299&month=2&year=2010>>.

<sup>92</sup> *OPGGSA* s 571; Bill McCormick, Science, Technology, Environment and Resources Section, 'Marine Oil Pollution' in Parliamentary Library Briefing Book: Key Issues for the 43<sup>rd</sup> Parliament (Parliamentary Library) <<http://www.aph.gov.au/library/pubs/BriefingBook43p/marine-oil-pollution.htm>>.

<sup>93</sup> Levy provided for in the *Protection of the Sea (Shipping Levy) Act 1981* (Cth) and the *Protection of the Sea (Shipping Levy Collection) Act 1981* (Cth); Australian Maritime Safety Authority, above n 90.

<sup>94</sup> Australian Maritime Safety Authority, above n 90.

<sup>95</sup> Australian Maritime Safety Authority, above n 69, 20-21.

<sup>96</sup> *Ibid* 22.

the maximum liability under the *Oil Pollution Act 1990* for any recovery costs and compensation damages.<sup>97</sup> In the United Kingdom all active offshore operators are party to the voluntary *OPOL* and agree to accept strict liability for pollution damage and the cost of remedial measures up to a maximum of USD\$250 million per incident.<sup>98</sup>

Currently, in Australia, there is an expectation that it is in the best interests for an oil rig operator to pay all costs associated with a spill response to ensure their exploration or production licence is not terminated,<sup>99</sup> which would significantly affect an operator's ability to gain further petroleum titles in Australia's offshore areas.<sup>100</sup> However an interesting issue would arise if an operator was underinsured or insolvent and just could not financially meet the costs.

Fortunately, PTTEPAA provided written confirmation to AMSA that they would be responsible for all costs in relation to the oil spill response and clean-up from Montara.<sup>101</sup> The company also agreed to provide a fund to support ongoing response and monitoring operations.<sup>102</sup> AMSA has so far received over AUD\$6.344 million in costs from PTTEPAA.<sup>103</sup>

AMSA has recommended, in consultation with the offshore petroleum, exploration and production industry, a review of legislative arrangements concerning insurance to ensure cost recovery arrangement following oil spills from oil rigs are effective.<sup>104</sup>

## 2.6 Compensation

In Australia, compensation for oil spill damage arising from an oil rig is another complicated issue. One of the key features of both the *CLC 92* and the *Fund Convention* is the allowance for compensation for loss of income as a direct consequence of an oil spill arising from a ship and includes costs associated with industries such as fishing and tourism.<sup>105</sup> However, these Conventions do not apply to oil rigs.

In the aftermath of Montara, the Indonesian government has lodged a claim for compensation to PTTEPAA which has so far been rejected due to the lack of scientific evidence supporting the claim.<sup>106</sup> The West Timor Care Foundation has also announced an intention to lodge a separate claim for compensation and the East Timor President has stated East Timor's intention to lodge a claim for compensation.<sup>107</sup> The first independent scientific studies released by the Department of Sustainability, Environment, Water, Population and Communities found that no oil reached the Indonesian coastline so it will be interesting to see how Indonesia's claim plays out.<sup>108</sup>

PTTEPAA continues to liaise with the Indonesian Government regarding its compensation claim however there is a possibility that PTTEPAA will continue to reject the claims. If this occurs, it must be asked whether Indonesia and other claimants, may pursue the Australian government for compensation, particularly as the Montara Inquiry found the Northern Territory Department of Resources was not a 'diligent regulator'. The Montara Inquiry found the direct cause of the loss of well control at Montara was PTTEPAA's 'widespread and systemic'<sup>109</sup> shortcomings in their procedures and the conduct of the Northern Territory Department of Resources 'gave it little chance of discovering PTTEPAA's poor practices'.<sup>110</sup> The Inquiry also found that the Northern Territory Department of Resources made a major error in approving the Phase 1B Drilling Program and 'did not take adequate steps to ensure that PTTEPAA

<sup>97</sup> *Oil Pollution Act 1990* 33 USC §§2701-2761, 2716(c) ('OPA 1990').

<sup>98</sup> *Offshore Pollution Liability Agreement ('OPOL')* (entered into force 1 May 1975) cl IV. The breakdown of available amounts are: remedial measures up to \$125 million per incident and pollution damage up to \$125 million per incident. OPOL also applies to all European Union coastal states and Norway so covers most of the North Sea.

<sup>99</sup> Joint Authority, under the *OPGGSA*, has the ability to terminate

<sup>100</sup> Australian Maritime Safety Authority, above n 90, 15.

<sup>101</sup> Australian Maritime Safety Authority, above n 69, 22.

<sup>102</sup> *Ibid.*

<sup>103</sup> Australian Maritime Safety Authority, above n 69, 22.

<sup>104</sup> Australian Maritime Safety Authority, above n 90, recommendation 4.

<sup>105</sup> Australian Maritime Safety Authority, above n 30.

<sup>106</sup> PTTEP Australasia (Ashmore Cartier) Pty Ltd, *PTTEPAA Does Not Accept Compensation Claim*

<<http://www.coogeerresources.com.au/uploads/PTTEPAA%20Media%20release%202%20September%202010.pdf>>.

<sup>107</sup> *Ibid.*

<sup>108</sup> PTTEP Australasia (Ashmore Cartier) Pty Ltd, *Montara Environmental Monitoring Program Delivers First Findings*

<<http://www.coogeerresources.com.au/uploads/UPDATED%20PTTEPAA%20Media%20Release%201600%20-%202019.11.10.pdf>>.

<sup>109</sup> Minister for Resources and Energy, the Hon Martin Ferguson, above n 63, [17].

<sup>110</sup> *Ibid* [30].

actually complied with the requirement of good oilfield practice'.<sup>111</sup> These deficiencies by a government department leave the Australian government particularly vulnerable to any action for compensation and strengthen the argument for ensuring oil rigs are either incorporated into current regimes or a separate regime is created to allow for both clean-up costs and compensation.

Unlike Australia, the United States has more detailed legislative provisions for oil spill pollution arising from an oil rig. The next section compares the clean-up response and liability/compensation regime of the United States.

### 3 So What If Something Goes Wrong? United States Response

The United States is not a party to the *CLC 92* or the *Fund Convention*. Following the *Exxon Valdez* disaster in 1989 the US deemed these Conventions insufficient due to the amount of compensation available and the fact they did not cover damage to the environment itself.<sup>112</sup> The US decided to instead create its own more stringent legislation – the *Oil Pollution Act of 1990* ('OPA'),<sup>113</sup> which offered higher levels of liability and compensation for damage to the environment.<sup>114</sup> Like Australia, the US operates under a federal structure and the *OPA* does not prevent individual States from implementing their own more stringent oil spill laws, which theoretically allows unlimited liability for damages.<sup>115</sup> In the case of *Deepwater Horizon*, the incident is governed by federal law (Acts of Congress and general maritime law).<sup>116</sup>

#### 3.1 Clean-up

The *OPA* and the *Clean Water Act* ('CWA')<sup>117</sup> are the primary federal statutes that govern the federal response to oil spills.<sup>118</sup> The National Response System is the national response strategy for addressing oil spills and consists of expert individuals, government agencies and oil industry representatives to ensure access to expertise and resources for oil spill control and clean-up.

The framework for the National Response System is the National Oil and Hazardous Substances Pollution Contingency Plan ('NCP') which ensures federal government resources are available to support efficient clean-up response for oil spills.

The NCP operates in three tiers and the response actions for oil spills under the NCP are binding and enforceable:<sup>119</sup>

- (1) The Federal Government is required to direct all public and private response efforts; and
- (2) Area Committees (comprised of federal, state and local government officials) must develop detailed Area Contingency Plans; and
- (3) Owners or operators of vessels and certain facilities (including oil rigs) must prepare their own Facility Response Plans.

If a spill is serious enough it is considered a 'Nationally Significant Incident' and the National Response Framework is then activated that works alongside the NCP. This Framework is for extreme incidents and applies to all-hazards.

Under the NCP, an On-Scene Coordinator ('OSC') is appointed to direct and oversee response and recovery efforts and coordinate all other efforts by federal, state, local and private entities at the scene, including activities by the polluter. The Coast Guard Captain of the relevant Port usually assumes this role unless the spill occurs within inland waters where it is within the jurisdiction of the Environmental Protection Agency ('EPA').<sup>120</sup>

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<sup>111</sup> Montara Commission of Inquiry, above n 62, 13-14.

<sup>112</sup> Andree Kirchner (ed), *International Marine Environmental Law: Institutions, Implementation, and Innovations* (Kluwer Law International, 2003) 234.

<sup>113</sup> *OPA 1990*.

<sup>114</sup> Kirchner, above n 112 – termed 'natural resource damage'.

<sup>115</sup> Thomas J Schoenberg 'The Scope of Liability to Private party Claimants for Maritime Pollution Damages under US Law' (2010) 16 *Journal of International Maritime Law* 434, 434, 443.

<sup>116</sup> *Outer Continental Shelf Lands Act* 43 USC §§ 1331-1356, 1333(a)(1); Martin Davies 'Liability Issues by the Deepwater Horizon Blowout' (2011) 25 *Australian and New Zealand Maritime Law Journal* [5] (in this issue).

<sup>117</sup> *Clean Water Act* 33 USC §§1251-1387.

<sup>118</sup> Hagerty and Ramseur, above n 37, 7.

<sup>119</sup> US Environmental Protection Agency, *Oil Pollution Act Overview* <<http://www.epa.gov/emergencies/content/lawsregs/opaover.htm>>.

<sup>120</sup> Evidence to the Subcommittee on Commerce, Justice, Science and Related Agencies Committee on Appropriations, United States Senate, July 15 2010, 2 (Lisa P Jackson, Administrator, United States Environmental Protection Agency). *Clean Water Act* 33 USC §§1251-1387 ('CWA'),

Once a spill is discovered and the amount exceeds the ‘reporting trigger’<sup>121</sup> then the ‘responsible party’ notifies the National Response Center who immediately contacts the OSC. The OSC has the sole responsibility for determining the level of response and clean-up required for the oil spill.<sup>122</sup> The assistance required may be from industry, local, state or federal officials or other expert parties. If the spill is small it may be managed locally however if the spill is large it will require a much stronger federal response and engagement by a wider range of parties including National Oceanic and Atmospheric Administration, the EPA and the National Response Team.

### 3.2 Liability for Clean-up Costs and Compensation

Under the *OPA* a ‘responsible party’ for an offshore facility must have proof of financial responsibility to cover the maximum *OPA* liability.<sup>123</sup> This permits direct action against the ‘responsible party’ for any recovery costs and compensation damages. The current amounts required are US\$10 million for an offshore facility located landward of the seaward boundary of a State,<sup>124</sup> or US\$35 million for an offshore facility located seaward of the seaward boundary of a State.<sup>125</sup>

The *OPA* liability provisions are applicable to oil pollution from an oil rig in navigable waters, adjoining shorelines or the US EEZ. The *OPA* imposes strict liability on the ‘responsible party’.<sup>126</sup> Pursuant to the *OPA*, the United States Coast Guard has designated BP as the responsible party for oil and gas flowing from the subsea well, as BP is the lessee of the area where the facility is located.<sup>127</sup> The United States Coastguard has also designated Transocean as the responsible party for contamination from the rig itself on or above the surface of the water.<sup>128</sup>

The *OPA* makes operators strictly liable for removal costs,<sup>129</sup> and damages to: natural resources,<sup>130</sup> real or personal property,<sup>131</sup> loss of resources for subsistence use,<sup>132</sup> loss of revenues from land,<sup>133</sup> loss of profits and earning capacity (purely economic loss),<sup>134</sup> and costs for providing additional public services during and after removal activities.<sup>135</sup> The majority of claims that have arisen from *Deepwater Horizon* are purely economic loss claims.<sup>136</sup> There is some debate as to whether the *OPA* will allow recovery for pure economic loss.<sup>137</sup> Whilst international conventions for shipping allow pure economic loss for oil pollution damage,<sup>138</sup> there is a history of case law both within the US and the UK that requires a distinction between direct users of a resource who can claim and those who are indirect or relational users who cannot claim.<sup>139</sup> Very little case law has defined the scope of purely economic claims for the purposes of the *OPA* however very remote claims would need to be excluded.<sup>140</sup>

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1321(c)The CWA provides that the President has the authority to ensure an oil spill is effectively and immediately removed, however this role has now been delegated.

<sup>121</sup> *Discharge of Oil Regulation* 40 CFR 110.

<sup>122</sup> Hagerty and Ramseur, above n 37, 9.

<sup>123</sup> *OPA 1990*, 2716(c).

<sup>124</sup> *OPA 1990*, 2716(c)(1)(B)(i).

<sup>125</sup> *OPA 1990*, 2716(c)(1)(B)(ii).

<sup>126</sup> *OPA 1990*, 2702(a); responsible parties are defined in *OPA 1990*, 2701(32).

<sup>127</sup> Martin Davies ‘Liability Issues by the Deepwater Horizon Blowout’ (2011) 25 *Australian and New Zealand Maritime Law Journal* [12] (in this issue).

<sup>128</sup> Ibid; Rachel Giesber Clingman, Acting Co-General Counsel, Transocean (in re Horizon Incident), Testimony to the Committee on the Judiciary United States House of Representatives, *Liability Issues Surrounding the Gulf Coast Oil Disaster*, May 27 2010, 2 <<http://judiciary.house.gov/hearings/pdf/Clingman100527.pdf>>.

<sup>129</sup> *OPA 1990*, 2701(b)(1).

<sup>130</sup> *OPA 1990*, 2701(b)(2)(A).

<sup>131</sup> *OPA 1990*, 2701(b)(2)(B).

<sup>132</sup> *OPA 1990*, 2701(b)(2)(C).

<sup>133</sup> *OPA 1990*, 2701(b)(2)(D).

<sup>134</sup> *OPA 1990*, 2701(b)(2)(E).

<sup>135</sup> Oil rigs defined under ‘facility’ *OPA 1990*, 2701(9). Courts have interpreted s 311 of the *Clean Water Act* 33 USC §§1251-1387 as imposing strict liability on parties responsible for the discharge of oil or other hazardous substances into the waters of the United States. See *United States v. New York*, 481 F.Supp. 4 (D.N.Y. 1979). Referenced by Hagerty and Ramseur, above n 37, 10.

<sup>136</sup> Davies, above n 127; *OPA 1990*, 2701(b)(2)(E).

<sup>137</sup> Schoenberg, above n 115, 440.

<sup>138</sup> *CLC 92; Fund Convention*; Schoenberg, above n 115, 440.

<sup>139</sup> Schoenberg, above n 115, 441; *Landcatch Ltd v International Oil Pollution Compensation Fund* [1999] 2 Lloyd’s Rep 316, 328; *Alegrete Shipping Co v International Oil Pollution Compensation Fund (The ‘Sea Empress’)* [2003] 1 Lloyd’s Rep 327; *Robins Dry Dock & Repair Co v Flint* 275 US 303 (1927) (this case was an admiralty case and did not refer to the *OPA*).

<sup>140</sup> Davies, above n 127, 4.

Response costs resulting from an oil spill incurred in accordance with the NCP can also be recovered under the *Comprehensive Environmental Response, Compensation, and Liability Act* ('CERLA').<sup>141</sup>

For the purposes of calculating liability for an oil rig (or 'facility' as defined in *OPA*) the rig is first treated as a tank vessel and liability is calculated on the facility's gross tonnage.<sup>142</sup> The National Pollution Funds Center calculated liability for the *Deepwater Horizon* to be approximately US\$65 million. If the costs of removing the oil and the damage costs exceed this liability then the oil rig is deemed to be an offshore facility for the excess amount.<sup>143</sup> In the case of the *Deepwater Horizon* the liability is capped at 'all removal costs plus US\$75 million'.<sup>144</sup> These liability limits do not apply if there was 'gross negligence, wilful misconduct' or if any applicable Federal regulation is violated.<sup>145</sup> For the *Deepwater Horizon*, BP has publicly declared it will not take advantage of this limitation.<sup>146</sup> It should be noted that the National Commission on BP *Deepwater Horizon* Oil Spill and Offshore Drilling has recommended that liability limits be significantly increased and there are currently two Bills that have been introduced proposing the *OPA* be amended to remove limits on liability for offshore facilities in s 1004(a).<sup>147</sup> One Bill is retrospective to 15 April 2010.<sup>148</sup>

The Oil Spill Liability Trust Fund ('Trust Fund') was established by US Congress to pay costs related to Federal and State oil spill removal activities, natural resource damage assessments and unpaid damages claims.<sup>149</sup> The Trust Fund is administered by the National Pollution Funds Center and financed by a pre-barrel tax on crude oil received at US refineries and on petroleum products imported into the US.

A claim for removal costs of damages is first presented to the 'responsible party' or the polluter. If the 'responsible party' denies all liability or the claim is not settled in 90 days after presentation then the claimant can initiate an action in court against the 'responsible party' or present the claim directly to the Trust Fund. The Trust Fund considers claim for removal costs and damages although there are conditions and restrictions. If the Trust Fund pays a claim it will later seek to recover the costs back from the 'responsible party'. BP and Transocean have both accepted their designation as 'responsible parties' for the *Deepwater Horizon* incident therefore private party claims must be made against them first.<sup>150</sup>

Currently the per-incident cap is US\$1 billion and this limit has not been increased since the *OPA* came into force.<sup>151</sup> This cap would not have sufficed even for the Exxon Valdez spill which amounted to US\$2 billion clean-up costs and US\$1 billion in natural resource damages at the time (US\$5 billion equivalent today).<sup>152</sup>

As BP was established as a responsible party for the *Deepwater Horizon* incident, BP was required to institute a procedure for the payment of claims arising from oil spill damage.<sup>153</sup> BP announced it would establish a US\$20 billion escrow fund to meet claims by individuals, businesses, governments and for natural resource damages.<sup>154</sup>

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<sup>141</sup> *Comprehensive Environmental Response, Compensation, and Liability Act of 1980* 42 USC §§ 9601-9675; Schoenberg, above n 115, 435.

<sup>142</sup> *OPA 1990*, 2704(b)(1).

<sup>143</sup> *OPA 1990*, 2704(b)(2).

<sup>144</sup> *OPA 1990*, 2704(a)(3).

<sup>145</sup> *OPA 1990*, 2704(c).

<sup>146</sup> Davies, above n 127, [35]; National Commission of the BP Deepwater Horizon Oil Spill and Offshore Drilling, '*Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling: Recommendations*' January 2011, 46.

<sup>147</sup> Implementing the Recommendations of the BP Oil Spill Commission Act of 2011, HR 501, 112<sup>th</sup> Congress (2011). This Bill was originally Consolidated Land, Energy, and Aquatic Resources Act of 2010, HR 3534, 111<sup>th</sup> Congress (2010) in the 111<sup>th</sup> session of Congress. More information on this new bill can be garnered from: House Democrats, 'House Democrats Introduce Oil Spill Reform Bill' (Media Release, 26 January 2011) <[http://markey.house.gov/index.php?option=com\\_content&task=view&id=4204&Itemid=141](http://markey.house.gov/index.php?option=com_content&task=view&id=4204&Itemid=141)>; Natural Resources Committee Democrats, Summary of Democratic Legislation to Implement the Recommendations of the BP Oil Spill Commission (January 26 2011) <[http://democrats.naturalresources.house.gov/sites/democrats.resourcescommittee.house.gov/files/2011-01-26\\_SummaryOfDemocraticSpillResponseBill.pdf](http://democrats.naturalresources.house.gov/sites/democrats.resourcescommittee.house.gov/files/2011-01-26_SummaryOfDemocraticSpillResponseBill.pdf)>; HR 492 Big Oil Bailout Prevention Act of 2011, 112<sup>th</sup> Congress (2011).

<sup>148</sup> HR 492 Big Oil Bailout Prevention Act of 2011, 112<sup>th</sup> Congress (2011). This Bill was introduced originally as HR 5214 Big Oil Bailout Prevention Act of 2010, 111<sup>th</sup> Congress (2010) and originally aimed to increase the liability of a 'responsible party' of an offshore facility to removal costs plus US\$10 billion.

<sup>149</sup> *OPA 1990*, 2712.

<sup>150</sup> Davies, above n 127, [39].

<sup>151</sup> The Trust Fund Cap was to be removed in the Big Oil Bailout Prevention Act of 2010, H.R. 5214, 111<sup>th</sup> Congress (2010) however this Bill did not pass Congress.

<sup>152</sup> Hagerty and Ramseur, above n 37, 17.

<sup>153</sup> Gulf Coast Claims Facility <<http://www.gulfcoastclaimsfacility.com/faq>>.

<sup>154</sup> BP, *Gulf of Mexico Escrow Trust* <<http://www.bp.com/genericarticle.do?categoryId=9034722&contentId=7064952>>; Bob Dudley, Group Chief Executive, BP, *BP Summary Review 2010* (2 March 2011) BP

However, BP has estimated a pre-tax charge of close to US\$41 billion in its group income statement for 2010 which comprises of costs incurred up to 31 December 2010, estimated obligations for future costs and obligations related to the *Deepwater Horizon* Oil Spill Trust Fund.<sup>155</sup> So far, BP has paid over US\$5 billion in individual, business and government claims as well as the cost of Natural Resource Damages.<sup>156</sup> Claims for the escrow fund are administered through the Gulf Coast Claims Facility however claimants must sign a settlement releasing BP and other claimants from liability therefore many claimants have not accepted a payment from the Facility, hoping to recover a higher amount in court.<sup>157</sup>

It is interesting to note that Transocean, the owner of the *Deepwater Horizon*, is in current proceedings to limit their liability to just under US\$27 million which is the salvage value of the *Deepwater Horizon* using the *Limitation of Shipowners' Liability Act 1851* ('*Limitation Act*').<sup>158</sup> The *Deepwater Horizon* would have been defined as a 'vessel' for the purposes of the Act.<sup>159</sup> To establish its right to limit, Transocean must prove there was no fault at a corporate managerial level.<sup>160</sup> A trial has been set down for February 2012 in the US District Court for the Eastern District of Louisiana in New Orleans.<sup>161</sup> It has been suggested that the *Limitation Act* does not limit or circumscribe removal costs or damage claims under the *OPA* and is only relevant for non-*OPA* claims.<sup>162</sup> The United States Federal Government introduced a Bill ('*SPILL Act*')<sup>163</sup> to retrospectively repeal this Act which passed in the House of Representatives but was not voted on in the Senate. The Senate introduced a modified version of the *SPILL Act* which kept the *Limitation Act* in place however the 111<sup>th</sup> Session of Congress ended before this Bill was voted on.<sup>164</sup> An equivalent Bill to repeal the *Limitation Act* has not been introduced this year. This will make for interesting drama in the US courts.

#### 4 The Argument for an International Convention

There are no provisions in current international conventions for liability and compensation for damage and clean-up if a spill occurs from an oil rig. Addressing liability and compensation for future incidents is timely and essential.

Firstly, wells are being drilled in increasingly deeper water which creates a difficulty responding to and controlling blowouts.<sup>165</sup> The *Deepwater Horizon* was in a water depth of 1 500 metres, which is a common depth in the Gulf of Mexico.<sup>166</sup> Offshore in Western Australia there are several rigs that can operate in significantly lower depths. One rig is the *Maersk Discoverer* which can operate in a water depth of 3 000 metres - double the depth of the *Deepwater Horizon*.<sup>167</sup> There is also another rig due in October 2011 that can operate to this depth; Transocean's *Deepwater Frontier*.<sup>168</sup>

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<[http://www.bp.com/assets/bp\\_internet/globalbp/globalbp\\_uk\\_english/set\\_branch/STAGING/common\\_assets/downloads/pdf/BP\\_Summary\\_Review\\_2010.pdf](http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/set_branch/STAGING/common_assets/downloads/pdf/BP_Summary_Review_2010.pdf)>.

<sup>155</sup> BP, *BP Summary Review 2010* (2 March 2011) BP

<[http://www.bp.com/assets/bp\\_internet/globalbp/globalbp\\_uk\\_english/set\\_branch/STAGING/common\\_assets/downloads/pdf/BP\\_Summary\\_Review\\_2010.pdf](http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/set_branch/STAGING/common_assets/downloads/pdf/BP_Summary_Review_2010.pdf)>.

<sup>156</sup> Bob Dudley, Group Chief Executive, BP, 'New Era, New Responsibilities' (Speech delivered at CERA Week Conference, Houston USA, 8 March 2011) <<http://www.bp.com/genericarticle.do?categoryId=98&contentId=7067682>>.

<sup>157</sup> Davies, above n 127, [30].

<sup>158</sup> Transocean, '*Transocean Ltd. Affiliates File Limitation of Liability Petition*' <<http://www.deepwater.com/fw/main/Transocean-Ltd-Affiliates-File-Limitation-of-Liability-Petition-452C936.html?LayoutID=46>>; *Limitation of Liability of Shipowners' Liability Act 1851* 46 USC, s 181-89.

<sup>159</sup> Davies, above n 127, [76].

<sup>160</sup> *Ibid* [81].

<sup>161</sup> All federal cases will be heard in New Orleans as stated in Davies, above n 127, [1].

<sup>162</sup> *Bouchard Transp. Co. v. Updegraff*, 147 F.3d 1344, 1347 (11<sup>th</sup> Cir. 1998); Vincent J Foley, 'Post-Deepwater Horizon: The Changing Landscape of Liability for Oil Pollution in the United States' (2011) 74 *Albany Law Review* 515, 525, 529.

<sup>163</sup> Securing Protections for the Injured from Limitations on Liability Act HR5503, 111<sup>th</sup> Congress (2010). On July 1, 2010, the U.S. House of Representatives passed the Securing Protections of the Injured from Limitations on Liability (*SPILL Act*) however the Bill never went to a vote in the Senate before the end of the 111<sup>th</sup> session of Congress: <<http://www.govtrack.us/congress/bill.xpd?bill=h111-5503>>.

<sup>164</sup> Fairness in Admiralty and Maritime Law Act S3755, 111<sup>th</sup> Congress (2010).

<sup>165</sup> Bill McCormick, Science, Technology, Environment and Resources Section, 'Marine Oil Pollution' in Parliamentary Library Briefing Book: Key Issues for the 43<sup>rd</sup> Parliament (Parliamentary Library) <<http://www.aph.gov.au/library/pubs/BriefingBook43p/marine-oil-pollution.htm>>.

<sup>166</sup> Norwegian Petroleum Directorate '*Gulf of Mexico as Compared with the Barents Sea and Lofoten*' (2010)

<<http://www.npd.no/en/news/News/2010/Petroleum-related-conditions-in-the-Gulf-of-Mexico-as-compared-with-the-Barents-Sea-and-the-waters-off-Lofoten/>>.

<sup>167</sup> Maersk Drilling '*Fleet – Maersk Discoverer*' <[http://www.maersk-drilling.com/fleet/drilling\\_rigs/FleetItem.aspx?fid=22&cid=4](http://www.maersk-drilling.com/fleet/drilling_rigs/FleetItem.aspx?fid=22&cid=4)>.

<sup>168</sup> Transocean '*Fleet Specifications – Deepwater Frontier*'

<<http://www.deepwater.com/fw/main/Deepwater-Frontier-55C77.html?LayoutID=17>>. A great page to visit to look at the water depths of worldwide rigs is: <<http://www.deepwater.com/fw/main/List-by-Water-Depth-77.html>>.

Secondly, exploration is venturing into delicate areas such as the Arctic which is estimated to hold 90 billion barrels of oil and where eight countries currently hold territory.<sup>169</sup>

Thirdly, a comprehensive international convention will provide guidance to nations that are developing their offshore oil industries and ensure that operators in these countries are accountable.<sup>170</sup> It would also be more difficult for industry to resist an international Convention as opposed to domestic legislation, particularly if the country involved has modest influence.<sup>171</sup>

Fourthly, the characteristics of an oil rig spill are markedly different from a spill arising from a ship-source. A ship spill is limited to its oil carrying capacity therefore there is a known limit to the amount of oil that can be spilled. However the pool of oil that can be spilled from an oil rig is 'virtually unlimited' and when an oil rig is on a live well the reservoir is under pressure resulting in a spill of a greater volume that is much harder to contain and kill. Consequently, an oil rig spill has the potential to be both larger in magnitude and longer in duration, causing greater environmental damage. Whilst past risk assessments have concluded that offshore facilities pose a low risk this risk is growing due to new technology allowing greater well depths and an increase of oil rigs supplying a world hungry for oil.<sup>172</sup> The environmental and financial risk for countries is something that could soon eclipse past tanker incidents.

Finally, a country's domestic legislation may have previously sufficed when regulating for oil rigs as unlike tankers, they mostly remain fixed in place. However technology now enables rigs to explore farther offshore, thus posing a potential risk to other jurisdictions. This occurred in Montara when patches of oil were observed crossing into Indonesia's EEZ on 1 September.<sup>173</sup> As mentioned above, Indonesia has already lodged a claim for compensation for the oil pollution damage to Indonesian coastline and fisheries.<sup>174</sup> East Timorese President Ramos-Horta has also indicated that East Timor was seeking compensation from PTTEPAA and the Australian Government for damage done to the marine environment in East Timor.<sup>175</sup>

It is imperative that the international community develop and implement a regime that transcends borders for liability and compensation for oil spills occurring from oil rigs. Currently there is an international regulatory structure in place for both the shipping and fishing industries therefore a regulatory structure pertaining to the petroleum industry is already overdue.<sup>176</sup>

## 5 Recommendations

In Australia, Montara highlighted the glaring omission of oil rigs from the National Plan and from any sort of compensation and liability regime. Whilst the Montara Inquiry justifiably focused on oil industry regulation, safety, and prevention, the omission of a compulsory compensation and liability regime for oil rig spills should be the 'elephant in the room'. Whilst oil rigs are required to have insurance to cover any potential oil pollution as part of the permit process, this insurance currently only covers oil spill clean-up and does not provide for compensation for environmental damage.<sup>177</sup> The Commonwealth might look at the permit/licensing process and whether this could be tightened to offer further provisions for sufficient, compulsory insurance. There is also concern that the National Plan for oil spill clean-up is funded primarily from levies on the shipping industry with minimal contribution, apart from through AMOSC, from the offshore oil industry. There are currently no statutory provisions for any levies on the offshore oil industry.<sup>178</sup>

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<sup>169</sup> U.S. Geological Survey, U.S. Dep't Of The Interior, *Circum-Arctic Resource Appraisal: Estimates Of Undiscovered Oil And Gas North Of The Arctic Circle* (2008), available at <<http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>>; Andrew Van Wagner, 'It's Getting Hot in Here, So Take Away All the Arctic's Resources: A Look At The Melting Arctic and the Hot Competition For It's Resources' (2010) 21 *Villanova Environmental Law Journal* 189, 200.

<sup>170</sup> Mikhail Kashubsky 'Marine Pollution from the Offshore Oil and Gas Industry: Review of Major Conventions and Russian Law (Part II)' (2007) 151 *Maritime Studies* 1, 11.

<sup>171</sup> Gaskell, above n 22, 17.

<sup>172</sup> Australian Maritime Safety Authority, above n 69.

<sup>173</sup> Australian Embassy, Jakarta, 'Indonesia: Montara Oil Spill' (Media Release, 2 November 2009).

<sup>174</sup> Peter Alford, 'Deadline issued for Montara Damages on Oil Spill', *The Australian* (Sydney), September 30, 2010.

<sup>175</sup> McCormick, above n 165.

<sup>176</sup> Michael White, 'Offshore Oil & Gas Catastrophes: Montara Spill and Australian Offshore Oil and Gas Regulatory Laws' (Paper presented at International Law, Litigation and Arbitration Conference, Federal Court Sydney, 6 May 2011) 15.

<sup>177</sup> McCormick, above n 165.

<sup>178</sup> Montara Commission of Inquiry, above n 62, [6.48].

On a domestic level, there are a number of lessons to be learnt from Montara. Whilst the National Plan coped well with the oil spill it was not designed to deal with a spill of the magnitude and duration that occurred.<sup>179</sup> The National Plan provides for a response to be escalated if necessary, however the response of more than three months severely strained AMSA resources and National Response Team members.<sup>180</sup> There needs to be a more comprehensive equitable contribution by the offshore petroleum, exploration and production industry to oil preparedness and response arrangements.<sup>181</sup> This additional funding could provide better resources for AMSA and other relevant agencies. As approvals and projects in the offshore Australian oil industry increase, AMSA has recommended that an assessment of the preparedness for an oil spill response be undertaken with a focus on oil spills from oil rigs.<sup>182</sup>

A review of the National Plan has commenced and is due to be completed during the second half of 2011.<sup>183</sup> No doubt the issue of offshore oil rig liability and contributions to a possible levy will be discussed. The Montara Commission of Inquiry ('Inquiry') has recommended that the National Plan encompass a 'polluter pays' regime and that funding arrangements should ensure the costs associated with oil spill preparedness and response are equitably shared between the shipping and offshore industries.<sup>184</sup> AMOSC has further recommended that the sharing of cost be in accordance with the potential contribution to a risk based assessment of oil spill response needs.<sup>185</sup> The Inquiry has also recommended that the National Plan specify the cost of responding to an oil spill or other damage to the offshore marine environment will be totally met by the owner/operator.<sup>186</sup> The oil industry expects both the Commonwealth and State/Territory governments to clarify the legislative position regarding responsibility for cleanup costs and insurance cover as well as the issue of strict, no-fault liability, to ensure there is no legal ambiguity.<sup>187</sup>

The Commonwealth government has already made some progress with legislative change.<sup>188</sup> On a regulatory note,<sup>189</sup> the Commonwealth government has extended the powers of the National Offshore Petroleum Safety Authority ('NOPSA') to become the single independent authority responsible for safety, well integrity and environment plans.<sup>190</sup> The new authority will be called the National Offshore Petroleum Safety and Environmental Management Authority ('NOPSEMA') and will be operational from 1 January 2012. This new Authority will apply in Commonwealth waters and within designated coastal waters conferred on it by State or Territory legislation. Whilst NOPSA was the statutory authority responsible for administering occupational health and safety under the *OPGGSA*,<sup>191</sup> it was recommended by the Productivity Commission that extending the legislative coverage of NOPSA would reduce 'regulatory duplication and uncertainty'.<sup>192</sup>

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<sup>179</sup> Australian Maritime Safety Authority, above n 69.

<sup>180</sup> Australian Maritime Safety Authority, above n 69.

<sup>181</sup> Australian Maritime Safety Authority, above n 69, recommendation 8.

<sup>182</sup> Australian Maritime Safety Authority, above n 69, recommendation 7.

<sup>183</sup> Australian Maritime Safety Authority, *Review of the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances (the National Plan) and the National Maritime Emergency Response Arrangements* Australian Maritime Safety Authority <[http://www.amsa.gov.au/Marine\\_Environment\\_Protection/NP\\_Have\\_Your\\_Say.asp](http://www.amsa.gov.au/Marine_Environment_Protection/NP_Have_Your_Say.asp)>; The Hon Anthony Albanese Minister for Infrastructure and Transport, 'National Plan to Combat Pollution of the Sea to be Reviewed' (Media Statement, 1 February 2011).

<sup>184</sup> Montara Commission of Inquiry, above n 62, finding 90 and recommendation 91.

<sup>185</sup> Australian Marine Oil Spill Centre Pty Ltd, Submission on the Draft Government Response to the Report of the Montara Commission of Inquiry, February 2011, 6.

<sup>186</sup> Montara Commission of Inquiry, above n 62, recommendation 92.

<sup>187</sup> Australian Marine Oil Spill Centre Pty Ltd, above n 185, 6; Australian Maritime Safety Authority, above n 69, recommendation 5.

<sup>188</sup> White, above n 176, 13; Department of Resources, Energy and Tourism Resources Division, 'General Policy Review Bulletin No 15' (Newsletter, 2 May 2011).

<sup>189</sup> Whilst it is beyond the scope of this paper to consider the state of Australia's regulatory regime to prevent pollution/spills and to consider the occupational health and safety issues (including 'best practice', inspection of facilities and 'safety case') relating to the offshore oil industry; these issues are significant.

<sup>190</sup> Proposed bills: Offshore Petroleum and Greenhouse Gas Storage (National Regulator) Amendment Bill, Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No. 2) Bill as stated in: Department of the Prime Minister and Cabinet, *Legislation Proposed for Introduction in the 2011 Winter Sittings* (2011)

<[http://www.dpmpc.gov.au/parliamentary/docs/proposed\\_legislation.pdf](http://www.dpmpc.gov.au/parliamentary/docs/proposed_legislation.pdf)>; Department of Resources, Energy and Tourism Resources Division, 'General Policy Review Bulletin No 15' (Newsletter, 2 May 2011); Montara Commission of Inquiry, above n 61, recommendations 73 and 74; Productivity Commission, 'Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector' (Research Report, April 2009), recommendation 7.1 and ch 9 <<http://www.pc.gov.au/projects/study/upstreampetroleum/report>>; Minister for Resources and Energy, Martin Ferguson, above n 62, [42]; Montara Commission of Inquiry, above n 61, recommendation 75; NOPSA is also now the regulator for the *Petroleum (Submerged Lands) (Management of Well Operations) Regulations 2004* (Cth).

<sup>191</sup> *OPGGSA*, s 646(c).

<sup>192</sup> Productivity Commission, 'Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector' (Research Report, April 2009), 167 <<http://www.pc.gov.au/projects/study/upstreampetroleum/report>>; at the time of the Productivity Commission report, regulatory



The Commonwealth has also amended many offences in the *OGPPSA* to be ‘strict liability’ offences.<sup>193</sup> This effectively means that intention is no longer relevant and the duties of operators are increased.<sup>194</sup>

Whilst a domestic regime is required to ensure that liability and compensation for oil rig spills is thoroughly legislated for in Australian waters, the international community also needs to implement an international regime to ensure consistency in what is essentially a global industry.

There are advocates of simply keeping regional agreements in place, particularly as it may be politically easier to justify regional schemes with equivalent resources;<sup>195</sup> however the reality is that some countries do not have agreements. The oil industry is a global industry with universal players therefore an international regime will ensure certainty for all – no matter where rigs are situated.

The international community could implement a compulsory regime to cover oil exploration and production in two ways. Firstly, it could incorporate oil rigs expressly within the *CLC 92* and *Fund Convention*. These Conventions have been in place for some time and work well however not all countries are party to the Conventions, including one of the oil industry’s major players – the US. The US may reconsider their position if they were involved with revising these Conventions and higher limitations were specified for oil rigs. Provision would also have to be made to ensure contributions from tankers and the oil industry was equitable and fair. There is also the issue of economic claims increasingly surpassing clean-up and reinstatement costs and this may be something to address if these Conventions are amended to include oil rigs.<sup>196</sup>

It has also been suggested that consolidating all of the ‘disparate regimes’ for liability for pollution from whatever source or type of pollution may be possible in the long term.<sup>197</sup> The development of a more generalised single liability regime would fuse the ‘piecemeal accumulation’ of regimes that have dealt with particular problems as they arose.<sup>198</sup>

Another proposal is to develop a separate Convention for oil rigs. The *OPA* or regional agreements such as *OPOL* could be good templates to use. *OPOL* is particularly notable as it is a private agreement between oil companies in the UK and Northwest Europe and has the support of the UK government. Oil companies may be more willing to embrace and work with an agreement that stems from one they are already a party to. The *Canadian Draft* could also be a good starting point also; however the issue of marine pollution and liability would need to be more comprehensive and thorough than previous versions of the *Draft*.<sup>199</sup>

It is imperative that the regime:

- Provides adequate liability for clean-up and compensation damages. The *CLC 92* and *Fund Convention* allow for compensation for loss of income as a direct consequence of an oil spill (compensates fishing and tourism industries);<sup>200</sup>
- Ensures sufficient liability amounts to cover potential damages including a mechanism to increase liability (through ‘tacit acceptance?’);
- Ensures appropriate mandatory financial security requirements for oil rigs before drilling permits granted;
- Follows principles of strict liability and ‘polluter pays’ meaning less fuss for claimant, as in *CLC 92*;<sup>201</sup>

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responsibilities for Well Operations Management Plans, subsea equipment and Pipeline Management Plans were shared by the relevant Designated Authorities and NOPSA.

<sup>193</sup> *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Act 2010* (Cth), pt 3.

<sup>194</sup> White, above n 176, 13

<sup>195</sup> Gaskell, above n 22, 19.

<sup>196</sup> *Ibid* 7.

<sup>197</sup> *Ibid* 4.

<sup>198</sup> *Ibid*.

<sup>199</sup> Kashubsky, above n 170, 6.

<sup>200</sup> Australian Maritime Safety Authority, above n 30.

<sup>201</sup> White, above n 28, 59; polluter pays principle: *Rio Declaration, principle 16*. It should be noted that the Commissioner of the Montara Commission of Inquiry, David Borthwick has recommended that the ‘polluter pays’ principle be enshrined in both the *Environment Protection and Biodiversity Conservation Act 1999* and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and should apply to both prospective and existing operations in Commonwealth waters..

- Ensures fair contributions from the oil industry and oil rig operators involved in well operations (perhaps by taxing oil per barrel, mandatory bond from oil companies, or by basing contributions on the proportion of oil extracted amongst states that are party to any convention?<sup>202</sup>);
- Provides clear guidelines regarding ageing rigs which have been identified as a problem in Australia.<sup>203</sup> These rigs pose a particular threat and are often moved to developing countries which have lower regulatory thresholds and potentially have less provision for clean-up costs and compensation;
- Provides higher liability and damages for rigs located in environmentally sensitive areas such as the Arctic.

The international community now has an important decision to make.

## 6 Conclusion

AMSA declared that Montara was their first experience at responding to a significant oil spill so far offshore and for such a long duration. It noted that this drew international attention to their clean-up work.<sup>204</sup> The lessons from Montara and the *Deepwater Horizon* are clear for both Australia and the international community. The international community waited too long after a raft of devastating oil pollution spills from tankers before it acted. It is now time for international governments and the oil industry to work together to ensure an adequate international convention is developed pertaining to oil rigs that ensures sufficient liability for oil spill clean-up and a good compensation scheme for parties affected by oil spills. Resolving this issue is vital to securing certainty and fairness for future oil rig spill response, particularly with approvals and projects in the offshore oil industry increasing.

Arguably, an international regime for oil rig liability and compensation would clarify the Australian government's position should they be pursued for environmental damage claims by Indonesia and East Timor following Montara.

Currently there is an array of regimes and regional agreements in place throughout the world covering oil. In the short term, Australia can improve its own regime to protect its own coastline and resources but in the long term, the oil industry is a global industry and participants would benefit from a harmonised system with certainty in relation to liability and damages for oil pollution from oil rigs. An international Convention takes time to develop so the international community must act promptly.<sup>205</sup>

Montara was Australia's warning sign. It is no longer sufficient to rely on an operator's need to remain a player within the Australian oil industry to compel an admission of liability and payment of compensation. If the oil spill damage from Montara was on a comparable scale to the *Deepwater Horizon*, with the resources of PTTEPAA being significantly smaller than that of BP and with the legislation within Australia being much less sophisticated than the US with regards to liability, compensation and insurance, Montara may have left an unimaginable stain on the waters, coastline, fishing and tourism industries, and ultimately in our courts. Whilst BP have made vast sums available to the US government for compensation and liability arising out of *Deepwater Horizon* it could be argued that BP is particularly dependent on the US for commercial reasons.<sup>206</sup> Could PTTEPA be said to have the same assets and dependence on Australia?

The Australian government must enshrine liability and compensation for oil rigs in legislation and be a driving force for change within the international convention landscape.

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<sup>202</sup> Gaskell, above n 22, 18.

<sup>203</sup> Department of Resources, Energy and Tourism, *Government Response to the Offshore Petroleum Safety Regulations Inquiry (June 2009) and Review of the National Offshore Petroleum Safety Authority Operational Activities (March 2008)*, (September 2010) <<http://www.ret.gov.au/resources/Documents/Offshore%20Petroleum%20Safety/GovtResponse-NOPSAReviewSept2010.pdf>>, Executive Summary.

<sup>204</sup> Australian Maritime Safety Authority, above n 69, 32.

<sup>205</sup> Gaskell, above n 22, 1.

<sup>206</sup> *Ibid* 7.