OIL POLLUTION CONTROL: AUSTRALIA AND THE UNITED STATES

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Introduction by Michael White QC**

Because oil production and oil transport is largely an international enterprise most of the agreements concerning it have been on an international basis. It comes as no surprise, therefore, to learn that this is so also for marine pollution from spillages of oil cargoes from tankers. The United Nations established the International Maritime Organisation, as it is now called, ('the IMO') to deal with international sea transport and this it has done, with varying success but overall with substantial results, since the 1950s. As a result the numerous international conventions on marine pollution, which the IMO has organised, have attracted considerable support with most of the responsible oil producing and oil transporting nations ratifying the conventions.

One exception has been the USA which initially expressed strong support in the IMO conferences, where its experienced international diplomats and lawyers showed support, but which withered when confronted with domestic political pressure. As a result the USA was an international laggard in these matters when the ExxonValdez oil spill occurred in Alaska in 1989. The resulting public pressure for urgent legislative action saw the passage of the USA *Oil Pollution Act* 1991. This Act flew in the face of the international conventions and enacted a regime for oil pollution that was unique to the USA. The result is that the liability for oil pollution off the US coast is much higher than elsewhere and the insurance structure which underpins the recompense for oil spills under the international regime is unable to cope. Sea transport of oil in the USA jurisdiction has become a lottery for the ship owners, the oil

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companies, the US Coastguard and the likely parties who will suffer if another major oil catastrophe occurs. There are beneficial aspects of the *Oil Pollution Act* 1991, relating to research and development, which have not been controversial but about which space does not allow a discussion here.

Australia has largely followed the international conventions in its regime dealing with oil pollution (although it has taken it over 20 years to ratify the *Fund Convention*). As a result, a comparison of the legislative regimes between a traditional country in the field, like Australia, and an international renegade, like the USA, is particularly valuable. This is what Virginia Ryker has done in her article which follows.

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Only a minute amount of oil is spilled in comparison with the amount that is delivered safely (99.9995%).[1] International conventions and domestic legislation aim to keep it that way or reduce the risk of spill even further. International conventions on the prevention of and liability for oil pollution include

1. **MARPOL 73/78** (formerly OILPOL 54: *International Convention for the Prevention of the Pollution of the Sea by Oil*), completed in London, May 1954. Replaced by MARPOL, completed in London 1973, and amended 1978.
2. **Intervention Convention** (*International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*), completed in Brussels, November 1969, amended by Protocol 1973.
3. **Civil Liability Convention** (*International Convention on Civil Liability for Oil Pollution Damage*), completed in Brussels, November 1969, amended by protocol in 1976 and 1992.

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1 Gold, E, 'Marine Pollution Liability after "Exxon Valdez": The US "All or Nothing" Lottery' (1991) 22 *JMCL* (July - October).

4. **Fund Convention** (*International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage*), completed in London 1971, amended by Protocol 1992.

5. **OPRC** (*Convention on Oil Pollution, Response and Cooperation*), completed 1990.[2]

Of these, Australia has incorporated, by legislation, various provisions of MARPOL, the Intervention Convention, the Civil Liability Convention, and the Fund Convention. The US, on the other hand, has not adopted any of the conventions, but rather has approached oil pollution control completely through domestic legislation.

One might think that this would make the approaches of the two countries to oil pollution significantly different, but this is not the case. Because the goals of the Conventions followed by Australia and the domestic legislation of the US are virtually the same, the strategies followed by the US and Australia are very similar in effect. Essentially, they boil down to prevention, intervention and liability. That said, differences do arise particularly in the area of liability for damage or destruction of natural resources. Though Australian authorities, like US authorities,[3] have the right to intervene to prevent or minimise environmental damage,[4] there does not currently appear to be a liability or compensation scheme for natural resources or environmental damage in place in Australia. This will be borne out in the comparison of legislation that follows and particularly in Part IV.

Prevention of oil pollution is basically effected in both countries by safety, construction, maintenance, and navigation regulations. 'Would-be' polluters are coerced into complying with these regulations by the threat of what would happen if their noncompliance were to result in a discharge - assessment of fines and penalties, but more threatening, the assessment of liability for clean up costs and damages.

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2 For further discussion of the international conventions on marine pollution which bind Australia, see White, M, 'Oil Pollution in the Australian and New Zealand Region' (1993) 67 *ALJ* 191, and Butler, DA and WD Duncan *Maritime Law in Australia*, Legal Books, 1992, Chapter 9.

3 33 USC, s 1321.

4 See *National Plan to Combat Pollution of the Sea by Oil: Operations and Procedures Manual*, Australian Maritime Safety Authority, Belconnen, ACT, 1991 at 8.

In Part I, intervention provisions and contingency plans are discussed. First considered are the US provisions of 33 USC, section 1321, and then Australia's *Protection of the Sea (Powers of Intervention) Act* 1981 (Cth) and the development oil pollution contingency plans in Australia.

Part II will provide a section to section comparison of other protection of the sea legislation in Australia and the US. Part III will deal with civil liability issues, including who is responsible, for what and for how much, while Part IV will specifically review natural resources protection in the US.

Finally, to conclude, there will be discussion of advantages of both approaches to oil pollution control - by incorporation of international conventions and through strictly domestic legislation - and a recommendation for Australia.

Part I: Intervention and Contingency Plans

The aim of intervention legislation and contingency plans is to authorise and direct government authorities to respond to, and/or mitigate, the threat of, or actual, damage by oil pollution. Both countries have intervention procedures and contingency plans in place.

United States

33 USC, section 1321 empowers the President and delegated authorities to use National Contingency Plans

> to ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of discharge, of oil or a hazardous substance[5]

and provides the means which may be used.

Further, this section authorises the US to take all necessary steps (including by way of example: administrative penalties,[6] destruction of a discharging vessel,[7] and civil penalties[8]) to mitigate damage where there is substantial threat to public health or welfare '(including but not limited

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5 33 USC s 1321(c)(1)(A).
6 S 1321(b)(6) and (7).
7 S 1321(c)(1) and (2).
8 S 1321(e).

to fish, shell fish, wild life, other natural resources, and the public and private beaches and shorelines of the United States)'.[9]

These powers extend to cover substantial threat of discharge into or on navigable waters[10] (including inland waters, as well as those of the territorial sea) and the adjoining shorelines; discharge into or on the waters of the exclusive economic zone[11] (seaward of the shoreline approximately 200 miles); or discharge that may affect the natural resources of, or under the management or control of, the United States.[12]

The 1992 revision of section 1321 includes at subsection (d) a requirement that the President develop a National Contingency Plan to 'provide for efficient, coordinated and effective action to minimise damage from oil and hazardous substance discharges.' Under the National Contingency Plan, responsibilities and duties are to be delegated to federal, state and local authorities whose area is likely to be affected in the event of an oil discharge. Further, the plan shall provide for a national centre to coordinate plan operations, a system for surveillance, and a system of allocation of Oil Pollution Fund[13] monies to states in accord with 33 USC 2712.[14] Subsection (j) also provides that the President shall from time to time issue regulations consistent with the National Contingency Plan to aid in its implementation and provide for Coast Guard Response Units both at the national and local levels.

In addition to government contingency plans, section 1321 requires that tankers, as well as onshore[15] and offshore[16] facilities,[17] have

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9 S 1321 (c)(2)(A).

10 'Navigable waters' are defined in 33 USC, s 2701(21) to be the waters of the United States, including the territorial sea.

11 'Exclusive economic zone' is defined in 33 USC, s 2701(8) as the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the areas referred to as 'eastern special areas' in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990.

12 See 33 USC, s 1321.

13 See 26 USC, s 9509 - Oil Liability Trust Fund. See 'Oil Pollution Funds', *infra*.

14 33 USC, s 1321(d).

15 'Onshore facility' means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land: 33 USC ss 1321(a)(10) and s 2701(24).

16 'Offshore facility' means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other

response plans ready for a 'worst case discharge'.[18] 'Worst case discharge' is defined to mean, in the case of a vessel, a discharge in adverse weather conditions of its entire cargo; and in the case of an on or offshore facility, the largest foreseeable discharge under adverse weather conditions.[19] Such plans must be submitted to the President (or delegated authority) for review and amendment,[20] and filed in the Vessel Identification System maintained by the Secretary.[21] The President is empowered to authorise a vessel or facility to operate without an *approved* plan for up to two years after the submission of a plan, provided that the owner/operator of the vessel or facility has demonstrated that he has available the necessary private equipment and personnel to meet a worst case discharge.[22]

Australia

In Australia the relevant intervention provisions are sections 8 and 10[23] of the *Protection of the Sea (Powers of Intervention) Act* 1981 (effective 1984). Section 8 provides for Australian authorities to take responsive action as provided for in the international Intervention Convention. That is to say that the Australian authorities are empowered to take preventive and mitigating action beyond Australia's territorial sea against foreign vessels which by their discharge of oil pose a threat to the Australian coast or related interest.

Section 10 further empowers the Minister to take necessary intervention actions against any *Australian* vessel, and any other vessel which is in Australian coastal sea or internal waters.

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waters, other than a vessel or a public vessel: 33 USC, s 1321(a)(11) and 2701(22).

17 'Facility' means any structure, group of structures, equipment or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes: 33 USC, s 2701(9).

18 33 USC, s 1321(j)(5).

19 33 USC, s 1321(a)(24).

20 33 USC, s 1321(j)(5)(D).

21 33 USC, s 1321(j)(5)(H).

22 *Ibid.*

23 S 9 contains provisions very similar to those in s 8, however s 9 relates to substances other than oil.

Australia's contingency plans[24] preceded its adoption of the Intervention Convention legislation. The original National Plan was developed in response to the grounding of the *Oceanic Grandeur* in the Torres Strait in 1970. The grounding drew attention to the potential impact a major spill could have on Australia. The National Plan was implemented in October 1973 and involved combined readiness efforts of Commonwealth, state and local response teams. Supplemental plans, the National Contingency Plan, State Contingency Plans and REEFPLAN,[25] now form the National Plan. Though Australia presently has no requirement that tankers or facilities have contingency plans, if/when OPRC[26] is adopted into effect by legislation, Australia too will require contingency plans for these vessels and facilities.

The contingency plans in Australia are now coordinated by the Australian Maritime Safety Authority (AMSA). The AMSA was created by statute in 1990, and commenced operations on January 1, 1991, replacing the former Marine Operation Division of the Commonwealth Department of Transport and Communications. The AMSA also has responsibilities under other maritime acts.[27]

Part II: Prevention of Pollution of the Sea Provisions

Overlapping with the immediate intervention provisions are more general provisions for the prevention of pollution of the sea by oil. In Australia, these provisions are found in Part II of the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 which gives effect to Annex I of MARPOL 73/78. In the US, the same areas are covered in 33 USC 1321 - Oil and Hazardous Substances Liability Act.[28]

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24 *The National Plan to Combat Pollution of the Sea by Oil* (the "National Plan").

25 REEFPLAN is a special plan designed to provide special protection for the Great Barrier Reef areas.

26 *Supra n 2* and accompanying text.

27 AMSA is responsible for the *Lighthouse Act*, *Protection of the Sea (Prevention of Pollution from Ships) Act*, *Protection of the Sea (Shipping Levy) Act*, *Protection of the Sea (Shipping Levy Collection) Act*, *Shipping Registration Act*, *Submarine Cables and Pipeline Protection Act*.

28 Also sometimes referred to as 'Navigation and Navigable Waters - Chapter 26: Pollution Prevention'.

Not surprisingly, in both Australia and the US, the discharge of oil and oily mixtures at sea is prohibited.[29] In Australia a 'discharge' means any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting, or emptying of hazardous substances or effluents.[30] The term 'discharges' specifically does not include dumping in compliance with international convention, 'the release of harmful substances directly arising from the exploration, exploitation, and associated offshore processing of sea-bed mineral resources,' or 'the release of harmful substances for the purpose of legitimate scientific research into pollution abatement or control.'[31]

In Australia (as of 1983) fines for discharge were set not to exceed A$50,000 for a natural person and A$100,000 for a body corporate. These amounts have recently been increased to a maximum of A$1,000,000. However, fines may be waived

> if discharge or escape is for the purpose of securing safety of a ship at sea or a life at sea, if the escape is in consequence of unintentional damage to a ship or its equipment and all reasonable precautions were taken after its occurrence, or if a discharge was to combat specific pollution incidents.

Further, if a discharge or escape did not occur within a 'special area',[32] is more than fifty miles from the nearest land for some discharges, and is more than twelve miles from land for other, less contaminating discharges (essentially 'the amount of oil discharged, and its effect, is limited'[33]) subsections imposing fines will not apply.

In the US, a 'discharge' 'includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping' and specifically does not include any discharges in compliance with 33 USC

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29 See 33 USC, s 1321(b) and s 9 of *Protection of the Sea (Prevention of Pollution from Ships) Act* (Part II giving effect to Annex I of MARPOL).

30 Schedule I, article II(3)(a) of the *Protection of the Sea (Prevention of Pollution from Ships) Act*.

31 *Ibid* at Schedule I, article II(3)(b).

32 'Special area' means a sea area where for recognised technical reasons in relation to its oceanographic and ecological condition and to the particular character of its traffic the adoption of special mandatory methods for the prevention of sea pollution by oil is required: *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983, Schedule I - Annex I (Regulations for the Prevention of Pollution by Oil - Chapter I, Regulation 1 (10)).

33 Michael White, QC, Marine Pollution Lecture Outline for Maritime Law course, University of Queensland, 1993.

section 1342 licensing. For discharge, administrative penalties may be assessed at up to US$10,000 each day not to exceed US$25,000 for a class I civil violation, or US$125,000 for a class II civil violation.[34] Alternatively,[35] violators may be subject to a civil penalty of up to US$25,000 each day to a maximum of US$1,000 per barrel discharged; and not less than US$100,000 (to a maximum of US$3,000 per barrel discharged) for a grossly negligent or wilful discharge.[36]

In order to implement oil pollution provisions, regulations may be drafted and brought into effect. In Australia, the Governor General may make regulation to give effect to the *Protection of the Sea (Prevention of Pollution by Ships) Act* 1983 and the Convention regulations annexed thereto.[37] In the US, the President/Administrator of 33 USC, section 1321 is required to make regulations for the implementation of the Act[38] and the National Contingency Plans.[39]

To ensure compliance with oil pollution regulations and determine if a discharge of oil has occurred, both countries provide for a right of inspection. Under section 27 of the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983, Australian authorities may board a vessel; inspect her holds, bunkers, tanks, etc; test equipment; examine the ship's books and records - including the oil book required to be kept under section 12 of the Act;[40] take samples; and require persons to answer questions. Failure to cooperate with authorities in Australia without reasonable excuse will result in a A$2,000 penalty.

In the US, inspectors have the right to board and inspect, but also have the further right to arrest, with or without a warrant, persons who violate section 1321 and 'any records, reports, or information obtained' under the inspection provisions shall be subject to public access and disclosure requirements.[41]

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34 33 USC, s 1321(b)(6).
35 *Ibid* at s 1321(b)(7)(F).
36 *Ibid* at s 1321(b)(7).
37 *Protection of the Sea (Prevention of Pollution by Ships) Act* 1983, s 33.
38 33 USC, s 1321(b).
39 *Ibid* at s 1321(d).
40 Ss 12-14 of the *Protection of the Sea (Prevention of Pollution by Ships) Act* 1983 requires that vessels carry and maintain an accurate oil record book. Penalties may be imposed for a failure to carry the book aboard the vessel, for the entry of a false or misleading statement, or for the failure to retain the book for one year after the date of the last entry therein.
41 See 33 USC, s 1318.

Part III: Civil Liability

Civil liability is the area which most interests people because it is usually the civil liability issues that give rise to the enormous damages reported in the press. In this section, jurisdiction, responsible parties and basis for liability, limited liability, oil pollution funds, and financial responsibility will be examined.

Forum and Time Limitations

Once a discharge, or threat of a discharge, of oil has occurred civil liability suits may be brought in the Australian state Supreme Courts vested with federal jurisdiction.[42] Rights to compensation will be extinguished unless action is brought within three years from the date the damage occurred, but not more than six years after the first occurrence of discharge or escape of oil.[43]

In the US, except for claims based on state law and regulations, civil liability claims should be brought in US Federal District Courts.[44] The limitation for removal costs is six years from the completion of removal actions.[45] For claims relating to damages the time limitation is three years

> from the time when the damage became reasonably discoverable with the exercise of due care, or in the case of natural resources damage under section 2702(b)(2)(A) ... if later, then the date of completion of the natural resources damage assessment in section 2706(e).[46]

Also, 22 USC, section 2702(h)(3) makes *specific* provision to delay the running of the time limitation in the case of minors or incompetents.

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42 *Protection of the Sea (Prevention of Pollution) Act* 1983, s 9.
43 *Protection of the Sea (Civil Liability) Act* 1981, Schedule I, article VIII.
44 33 USC, ss 2717(b) and 1321(n).
45 *Ibid* at s 2712(h)(1).
46 *Ibid* at s 2712(h)(2).

Responsible Parties and Basis for Liability

United States

In the US,

> notwithstanding any other provision or rule of law ... each responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for removal costs and damages as specified in subsection [2702] (b) that result from the incident.[47]

This statement, though concise, is loaded with meaning.[48] A responsible party includes the owner/operator (demise charterer) of a vessel, an on or offshore facility, a deep water port, or a pipeline.[49] A third party, whose conduct in relation to the discharge was wilful or grossly negligent, may also be a responsible party.[50]

'Removal' means:

> containment and removal of oil ... from water and shorelines or the taking of other actions as may be necessary to minimise or mitigate damage to the public health or welfare, including but not limited to, fish, shellfish, wildlife, and public property, shorelines and beaches.[51]

Removal costs include all costs incurred by the United States, a state, or Indian tribe, and any other person acting under the National Contingency Plan.[52] Damages refers to damage to natural resources,[53] real and personal property, subsistence use of natural resources, revenue, profits and earning capacity, and net cost of additional public services.[54] Foreign interests may also recover damages and removal costs if the foreign interest can show that: it can not recover from another source;

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47 *Ibid* at s 2702(a).
48 Concepts such as 'facility', 'navigable waters', etc, that have already been defined in text or note will not be redefined.
49 33 USC s 2701(32).
50 *Ibid* at s 1321(g).
51 *Ibid* at s 2701(30).
52 *Ibid* at s 2702(1)(b).
53 Damage to natural resources is discussed *infra* at Part IV.
54 33 USC s 2702(2).

that its country would offer similar compensation to a similarly situated US interest; and that the discharge occurred from a facility on the outer continental shelf or a deep water port, from a vessel in the navigable waters or carrying between two US ports, or from a vessel in compliance with the Trans-Alaskan Pipeline Authority Act bound for a US port, but prior to arrival at the said port.[55]

Intervention costs, environmental response costs[56] and damages for personal injury and wrongful death may also be recovered from a responsible party[57] and from a third party who 'is grossly negligent or engages in wilful misconduct.'[58]

Australia

For civil liability, Australia gives effect to the Civil Liability Convention in Schedule I of the *Protection of the Sea (Civil Liability) Act* 1981. Schedule I, article II states that

> [t]he owner[59] of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.

This liability statement applies only to discharges from ships as defined in the Act, Schedule I, article I(1): 'any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo'; otherwise stated, 'all Australian, and all foreign ships which enter or leave an Australian port, carrying more than 200 tons of oil in bulk as cargo.'[60] It does not cover discharges from on or offshore facilities or other vessels.

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55 *Ibid* at s 2707.

56 Environmental response costs refer to costs incurred under the *Comprehensive Environmental Response, Compensation and Liability Act* (CERCLA).

57 33 USC s 1321(c)(4)(B) and (C).

58 *Ibid* at s 1321(c)(4)(B)(iv).

59 'Owner' refers to the registered owner of the vessel or if the vessel is not registered, then the actual owner: Schedule I, article III (3), *Protection of the Sea (Civil Liability) Act* 1981.

60 White, M, 'Marine Pollution: Australian Perspectives' (1993) 23 *Queensland Law Society Journal* 325.

Pollution damage refers to

> loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes cost of preventative measures and further loss or damage caused by preventative measures.[61]

Intervention cost may be recovered by the Commonwealth from a ship owner or two or more owners who are jointly and severally responsible[62] or by way of 'a charge on the ship, or on each of those [responsible] ships, as the case may be.'[63]

Exceptions and Defences to Liability

In both the US and Australia the basis for liability is strict.[64] However, there are limited exceptions and defences to strict liability. In Australia, the *Protection of the Sea (Civil Liability) Act* 1981 (Cth) provides that:

> No liability for pollution damage shall attach to the owner if he proves that the damage:
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> (a) resulted from an act of war, hostilities ... or a natural phenomenon of exceptional, inevitable and irresistible character, or
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> (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
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> (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or navigation aids in the exercise of that function.[65]

US exceptions and defences to liability are similar. The following are complete defences to liability: an act of God or war; an act or omission of a third party who is not connected to the discharger through agency, employment or contract, provided that the discharger can show that he

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61 *Protection of the Sea (Civil Liability) Act* 1981, Schedule I, article I (6).
62 *Ibid* at s 20.
63 *Ibid* at s 21.
64 See 33 USC s 2702(a) and Schedule I article 3 of *Protection of the Sea (Prevention of Pollution) Act* 1983.
65 Schedule I, article III (2).

exercised due care with respect to the oil and took precautions against foreseeable acts or omissions by third parties.[66] Further exceptions to liability are provided for discharges 'permitted by a permit issued under Federal, State, or local law'; for discharges from public vessels;[67] or for discharges under the Trans-Alaskan Pipeline Authorisation Act.[68] Though the definition of a public vessel includes vessels operated by the US government or a foreign nation, it is important to emphasise that when these vessels are engaged in commerce they are not exempt from civil liability.

Limitation of Liability

United States

In addition to defences, both countries usually allow a responsible party to limit his liability provided that there was no grossly negligent or wilful conduct by the responsible party, his employees or agents.[69] Further there will be no limited liability when the responsible party has failed to report a discharge or provide all reasonable cooperation and assistance required by a responsible official in connection with removal activities, or there has been a violation of applicable Federal safety, construction or operating regulations by the responsible party, his agents, employees, or those in pursuance of a contract with the responsible party. Additionally, there is no limit of liability for

> removal costs incurred by the US Government or any State or local official or agency in connection with a discharge or substantial threat of discharge of oil from any Outer Continental Shelf facility or vessel carrying oil as cargo from such a facility.[70]

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66 33 USC s 2703(a).

67 'Public vessel' means a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce: 33 USC, s 2701(29).

68 See 48 USC s 1651 *et seq.*

69 33 USC s 2704(c). In Australia, the appropriate language is actual fault or privity of the owner. Schedule I, article V(2) of the *Protection of the Sea (Civil Liability) Act* 1981.

70 33 USC s 2704 (c)(3).

In the US the amounts of limited liability are set out in 33 USC, section 2704:

(1) For a tank vessel,[71] the greater of:-

(a) $1,200 per gross ton; or

(b) (i) in the case of a vessel greater than 3,000 gross tons, $10,000,000 or

(ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;

(2) For any other vessel, $600 per gross ton or $500,000 whichever is greater;

(3) For an offshore facility, except a deepwater port, the total of all removal costs plus $75,000; and

(4) For any onshore facility and a deepwater port, $350,000.

Mobile offshore drilling units will be treated as tank vessels or offshore facilities dependant upon which classification provides the most liability.[72]

33 USC, section 2704 modifies any limitation allowed under the Federal *Water Pollution Control Act*, and either increases or does not affect the limit of liability for intervention costs under 33 USC, section 1321 (f).

Australia

In Australia, the *Protection of the Sea (Civil Liability) Act* 1981 limits liability. Schedule, I, article V provides that limits of liability will be on a vessel's per tonnage basis with the upper limit of liability set at A$21,500,000.[73] Insurers of the oil pollution risk of a vessel are entitled to similarly limit their level of liability with respect to the insured

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71 A 'tank vessel' is a vessel that is constructed or adapted to carry, or that carries oil or hazardous material in bulk as cargo or cargo residue, and that is a vessel of the United States, operates on the navigable waters, or transfers oil or hazardous material in a place subject to US jurisdiction.
33 USC s 2701(34).

72 33 USC s 2704(b).

73 See *supra n 60*.

vessels.[74] Further, various funds, discussed below, are available to help meet liability for removal costs and economic damages.

Oil Pollution Funds

United States

The US Oil Spill Liability Trust Fund was established under 26 USC, section 9509. The fund is available to compensate responsible parties, who are entitled to a complete defence against liability for removal costs. It is also available to cover excess costs above any limited liability amount. States, too, may apply to the fund for compensation and shall be granted reimbursement in accord with 33 USC, section 1321 (d)(2)(H). 26 USC section 9509(c)(2) provides that:

> [t]he maximum amount which may be paid from the Oil Spill Liability Trust Fund with respect to
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> (i) any single incident shall not exceed $500,000,000 and
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> (ii) natural resource damage assessment claims in connection with any single incident shall not exceed $250,000,000 (further limited by the requirement that natural resources claims not reduce the Trust Fund below a minimum balance of $30,000,000).

Provisions of the Oil Spill Liability Trust Fund legislation allow reimbursement payments to the international fund to be made, but only in proportion to the amount that the US Fund would have been liable on the claims.[75]

The US Oil Spill Liability Trust Fund is financed by a levy of US$0.05 on each barrel of 'crude oil received at a US refinery and on petroleum products entered into the United States for consumption, use, or warehousing,' as well as on 'any domestic crude oil used in or exported from the United States.'[76]

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74 Schedule I, article VII of the *Protection of the Sea (Civil Liability) Act.*
75 26 USC s 9509 (c)(1)(B)(ii).
76 *Ibid* at s 4611.

Australia

Australia recently ratified and enacted the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (Fund Convention).[77] The Fund Convention was a supplement to the Civil Liability Convention and provides for supplemental compensation for those who are not fully compensated under the Civil Liability Convention and to indemnify tanker owners whose conduct in relation to the incident was innocent, for a portion of the liability assessed under the Civil Liability Convention.

The International Fund created under the Fund Convention receives its monies 'by a compulsory levy on the owners of persistent oil being carried to tankers',[78] and is only available for claims for clean up costs and quantifiable economic loss. Claims for environmental damage are not accepted.[79]

Australia also presently relies on the voluntary agreements known as TOVALOP and CRISTAL. Under the TOVALOP[80] pooled risk agreement,

> the parties to it pay such levies as are needed to meet claims and TOVALOP administration becomes liable to indemnify tanker owners for costs incurred and payments made for compensation arising from oil spills.[81]

The present limit of indemnification by TOVALOP stands at $70 million.[82]

CRISTAL is a series of contract agreements between oil cargo owners and Cristal Limited, a Burmudan company with its day to day operations managed by Cristal Services Limited of London. In exchange for fees paid by its contractees, Cristal agree to act as the insurer of last report, when TOVALOP and all other sources have failed to meet the full liability, and only then if the cargo spilled or threatened to be spilled was that of a contracted party and was persistent hydro-carbon mineral oil.

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77 *Protection of the Sea (Oil Pollution Compensation Fund) Act* 1993 (Cth).
78 White, *supra n 60.*
79 *Ibid.*
80 Tanker Owner's Voluntary Agreement on Liability for Oil Pollution.
81 White, *supra n 60.*
82 *Ibid.*

Cristal's upper limit of liability is $36 million for up to 5000 gross tons, and $733 for each additional ton up to a maximum of $135 million.[83]

Financial Responsibility

United States

Governments have an interest in guaranteeing that potentially responsible parties will be able to meet any liability to which they may be subject. In the US owners/operators of vessels over 800 gross tons, and any vessel involved in transhipping or lightering of oil traversing the Exclusive Economic Zone bound for any place within US jurisdiction, must maintain evidence of financial responsibility sufficient to meet its maximum limited liability in case of a discharge.[84] Offshore facilities must also demonstrate financial responsibility up to US$150 million.[85] However, in the event that the owner/operator owns or operates more than one vessel or facility, financial responsibility need only be demonstrated up to the maximum liability amount of the vessel/facility with the greatest possible liability.[86]

With respect to deepwater ports, each responsible party must maintain evidence of financial responsibility up to the maximum amount for which the party may be subject. The Secretary has the authority to lower the amount for which the responsible party need show financial responsibility. This is significant for Outer Continental Shelf Facilities and vessels carrying cargo from such facilities for which there is not limited liability.

The failure to comply with financial responsibility requirements may result in sanctions and civil penalties. If a vessel is not in compliance, the Secretary may revoke or withhold clearance, deny entry into any place in the United States or navigable waters, or detain it at the place where the vessel is.[87] 'Any vessel which is found in the navigable waters without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeit to the United States.'[88]

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83 *Ibid.*
84 33 USC s 2716(a).
85 *Ibid* at s 2716(b).
86 *Ibid* at s 2716(a) and (c)(1).
87 *Ibid* at s 2716(b)(2).
88 *Ibid* at s 1716(b)(3).

Any person failing to comply with the evidence of financial responsibility provisions under 33 USC, section 2716 may be subject to administrative penalties under section 2716(a) of up to US$25,000 per day, or be judicially ordered to comply at the pursuance of the Attorney General upon request from the President.

Financial responsibility can be demonstrated by evidence of insurance, surety bond, guarantee, letter of credit, qualification as self insurer or other evidence of financial responsibility acceptable to the President or Secretary.[89]

Australia

In Australia, the Civil Liability Convention provisions govern the requirement of financial responsibility. Article VII of schedule I of the *Protection of the Sea (Civil Liability) Act* requires that ships 'maintain insurance or other financial surety such as a guarantee of a bank or certificate delivered by and international compensation fund' for an amount equal to the vessel's potential maximum calculated limited liability. As in the US, the certificate must be carried aboard the vessel.

Any failure of a vessel to comply with the requirements may subject its master to a penalty of up to A$50,000 and the owner, in the case of a natural person, to a penalty up to A$50,000, or in the case of a body corporate, a penalty of A$100,000.[90] If there is in fact insurance but the vessel is lacking the documentation, fines are only assessed up to A$2,000 for the master and a natural owner, and up to A$5,000 for a body corporate.[91]

Two final miscellaneous notes: (1) if an officer believes that a vessel is attempting to leave port without the required certificate on board, the officer may detain the vessel until such certificate is obtained or produced for the officer's inspection;[92] and (2) the Minister, if he or she is satisfied that a vessel is complying, may issue or extend a certificate in respect of a vessel where it is reasonable to do so.[93]

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89 *Ibid* at s 1716(e)1. Note: this section is different from s 2716(e).
90 S 15(1) and (2) of the *Protection of the Sea (Civil Liability) Act* 1981.
91 *Ibid* at s 15(3).
92 *Ibid* at s 15(5).
93 *Ibid* at ss 16 and 17.

Part IV: U.S. Natural Resources Protection and Damage Liability Scheme

The US has a unique feature in its oil pollution control and liability scheme, that is its emphasis on natural resources. 33 USC., section 1321 (f)(4) states that:

> The cost of removal of oil ... for which the owner or operator of a vessel or onshore or offshore facility is liable ... shall include any costs or expenses incurred by the Federal Government or any State Government in the restoration or replacement of natural resources damage or destroyed as a result of a discharge of oil...

This section is explained and expanded by 33 USC, section 2706 which deals specifically with natural resources. Under section 2706, Federal Trustees[94] are responsible for assessing natural resources damage and may, upon request of a State or Indian tribe, assess damages to natural resources under the State's or tribe's trusteeship.[95] They are further responsible (in conjunction with public notice, opportunity for public hearing and comment) for the development and implementation of a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of natural resources under their trusteeship.[96]

Damage assessments are to be made in compliance with Federal regulations for such assessment,[97] and any assessment prepared by the trustee is given the force and effect of a rebuttable presumption in favour of the trustee.[98] In other words, once an assessment has been made in compliance with the regulations it is up to the liable party to show that he or she was not liable for certain damages, and/or that the costs of the assessment and corrective measures have been miscalculated.

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94 Trustee designations are provided for in 33 USC s 2706(b). US trustees for natural resources include the Secretaries of Defense, Interior, Agriculture, Commerce and Energy. See note under 42 USC, s 9615.

95 33 USC, s 2706(c)(1)(A) and (B).

96 *Ibid* at s 2706(c)(5).

97 *Ibid* at s 2706(e)(1).

98 *Ibid* at s 2706(e)(2).

The measure for damages is set out in 33 USC., section 2706(d)(1) to be:

> (A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;
>
> (B) the diminution in value of those natural resources, pending restoration; plus
>
> (C) the reasonable cost of assessing those damages.

Trustees may recover 'damages for injury to, destruction of, loss of, or loss of use of natural resources including the reasonable cost of assessing the damage.'[99] Also, individuals are permitted to claim damages for loss of subsistence use of natural resources irrespective of their ownership interests.[100]

CONCLUSION: Recommendation for Australia

Oil pollution control and liability, regardless of how it is imposed, is important. Regulations, be they under international convention or domestic legislation, play an important role in prevention of oil discharges at sea. Provisions for intervention and contingency plans are crucial, too, in that they provide for co-ordinated and effective responses to oil discharges or threatened discharges. Finally, liability schemes are also important because the cost of oil clean up and interventionist actions do not come cheap.

There are some advantages to providing oil pollution control through the adoption of international conventions as Australia has. First, the very nature of an international convention encourages its signatories to cooperate with other signatories on the implementation and enforcement of the provisions of the convention, generally without the need for independent bilateral negotiation. This can be of great benefit when time is of the essence, as it often is in mitigating oil pollution damage after a major spill or discharge.

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99 *Ibid* at s 2706(b)(2)(A).
100 *Ibid* at s 2706(b)(2)(C).

Second, signatories can readily understand and comply with the laws of signatory states because of the similarity that results from having a convention as the foundation of oil pollution control.

Third, relating specifically to the Fund Convention, signatories can be assured of access to funds for clean up which, because of their own domestic problems, might not otherwise be available. By pooling the risk on an international level, fund amount can be enormous.

Domestic legislation has its own benefits. It can be more reflective of the needs, desires, values and resources of the enacting nation. Further, amendments can be made without lengthy consideration and approval of other countries. However, what works in one country can be a confusing nightmare for another country trying to understand and comply with foreign domestic legislation. It is only because of the tremendous amounts of money and volume of oil trade in and out of U.S. ports that the U.S. can implement its own policy with regard to oil pollution control.[101]

At present Australia has an oil pollution scheme that is more reflective of international norms than the specific protection of Australia. Though Australia need not radically alter its international approach to oil pollution, it should give more consideration to the protection of its natural resources at significant risk for oil pollution damage, in particular, the Great Barrier Reef. Though this region is a special area in which liability for discharge exists, a civil liability scheme from damage to natural resources would encourage carriers to use even greater care in the shoal ridden area. Despite the argument that if the reef were damaged by oil no amount of money could replace the five hundred years of coral growth, a civil liability scheme would provide funding for the research and redevelopment that would be needed to re-establish the reef and its fish after major oil damage.

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101 For another comparative analysis of the Australian and USA (and Canadian) approaches to marine pollution see White, M, 'The USA and Canadian Situation in the Marine Pollution Scene - An Australian Commentary' (1993) 12 *AMPLA* 146. For discussion of the Australian oil spill by the MV *Kirki* off the WA Coast in July 1991, see White, M, 'The *Kirki* Oil Spill: Pollution in WA' (1992) 22 WALR 1.