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International Maritime Conventions Legislation Amendment Bill 2001

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Law and Bills Digest Group
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Contents

International Maritime Conventions Legislation Amendment Bill 2001

Date Introduced: 4 April 2001

House: House of Representatives

Portfolio: Transport and Regional Services

Commencement: Generally, Royal Assent. Schedule 1 commences on Proclamation or within 6 months of the day on which the relevant international instrument comes into force for Australia.[1] Certain items within Schedule 3 have a contingent commencement which is discussed in the body of this Digest.

Purpose

To:

- amend the *Limitation of Liability for Maritime Claims Act 1989*, and update definitional provisions in the *Admiralty Act 1988* and *Navigation Act 1912*, to incorporate changes to the international instrument which underlies this Act
- amend the *Protection of the Sea (Powers of Intervention) Act 1981* to update a list of substances other than oil covered by the Act to incorporate a resolution of the body which is responsible for updating the underlying international instrument, and
- amend the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to implement amendments to the underlying international instrument, to change certain administrative and enforcement arrangements and to revise offences and penalties.

Background

This Bill follows other recent amendments to pollution-related maritime legislation. The *Protection of the Sea (Civil Liability) Amendment Act 2000* was introduced as a Bill on 28 June 2000. It proposed to amend the *Protection of the Sea (Civil Liability) Act 1981* to:

- broaden existing arrangements which require ships to maintain insurance cover in respect of marine oil pollution damage
- clarify the liability limit of shipowners in relation to clean up costs, and

- clarify the ability of the Australian Maritime Safety Authority to recover costs associated with combating oil pollution threats.

It is worth noting that the Draft Bunker Convention, which formed the basis of various measures in the *Protection of the Sea (Civil Liability) Amendment Act 2000*, was adopted by the International Maritime Organization (IMO) on 23 March 2001.[2]

The Maritime Legislation Amendment Bill 2000 was introduced on 31 August 2000. It proposed to rearrange Commonwealth, State and Territory responsibilities regarding safety regulation of Australian trading ships and foreign trading ships visiting Australia. Further background on these amendments and proposed amendments is available in Protection of the Sea (Civil Liability) Amendment Bill 2000, Bills Digest No. 27 2000–01 and Maritime Legislation Amendment Bill 2000, Bills Digest No. 44 2000–01.

Legal Bases

As a matter of constitutional law, the Commonwealth clearly has the power to regulate interstate or overseas trade and commerce[3] and associated navigation and shipping.[4] It also has power to control aspects of navigation and shipping, including prevention of marine pollution, via the external affairs power.[5] This is the key legislative power in the present context, given the extensive coverage of these issues in international law.

International Law

Pollution Prevention

Since 1926 the international community has been concerned about the impact of ship–sourced marine pollution, particularly the discharge of oil at sea. This concern, but particularly that of the United Kingdom, culminated in the *International Convention for the Prevention of Pollution of the Sea by Oil* (OILPOL) which came into force in 1954 and operated in relation to Australia between 1962 and 1988. The *Convention on the High Seas*, which came into force in 1962, also sought to restrict or regulate marine pollution.[6]

In 1973 OILPOL was replaced by a more general convention. The *International Convention for the Prevention of Pollution from Ships, 1973* extended the terms of OILPOL to cover all forms of marine pollution and to strengthen the international regulatory regime. It was extended by the *Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships of 2 November 1973*.[7] Essentially, the Protocol of 1978 imposed more stringent requirements in relation to Annex I (see below) and allowed State Parties to defer implementation of Annex II (see below). The 1973 Convention and the 1978 Protocol are collectively known as MARPOL 73/78.

Intervention and Limitation of Liability

Since 1969 the prohibitions on marine pollution have been coupled with intervention rights, rules regarding limitation of liability and rules regarding indemnification. Following a publicised incident, in which the United Kingdom intervened to limit the threat of a major oil spill on the high seas, the *Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969* (the Intervention Convention) was adopted permitting parties to take measures to control marine oil pollution in circumstances that might otherwise have been contrary to international law.[8] In 1973 the Convention was extended by the *Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973*. The 1973 Protocol came into effect in 1983.[9] Another development was the *Convention on Limitation of Liability for Maritime Claims, 1976* (the Limitation Convention) which substantially increased the liability limits for claims arising from personal injury or loss of life and property damage.[10] Other conventions have also been adopted which are briefly canvassed in Bills Digest No. 27 2000–01.

UNCLOS

In addition to these conventions, there are other international instruments which deal with marine pollution. The *United Nations Convention on the Law of the Sea* ('UNCLOS')[11] came into force in 1994. It confirms Australia's rights over Australian ships and confers a wide range of rights over ships foreign ships that pass through various maritime zones. In general, within its 'internal waters'[12] Australia may enforce laws with respect to virtually any issue. Within the 'territorial sea'[13] foreign ships generally have a right of 'innocent passage'.[14] However, Australia may enforce laws regulating free passage in its 'territorial sea' for various purposes including the 'preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof'.[15] Within the 'exclusive economic zone' Australia has a more limited jurisdiction which includes control for the purposes of the 'protection and preservation of the marine environment'.[16] Part XII of UNCLOS, which deals more generally with the protection and preservation of the marine environment gives Australia further powers with respect to marine pollution over Australian and foreign ships.[17]

Domestic Law

Protection of the Sea Acts

In the past, Australia has been relatively slow to give domestic legal effect to the relevant international instruments governing maritime pollution, etc. Of the various 'Protection of the Sea' Acts passed in the 1980's,[18] the *Protection of the Sea (Powers of Intervention) Act 1981* (the Intervention Act) gave effect to the Intervention Convention and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (the Pollution Prevention Act) gave effect to MARPOL 73/78. The *Limitation of Liability for Maritime Claims Act 1989* (the LLMC Act) gave effect to the Limitation Convention.

External Affairs Power

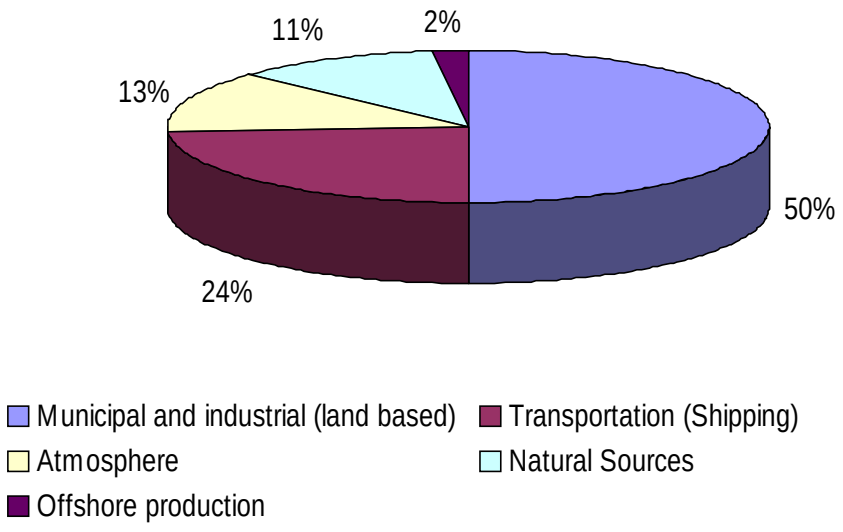
As an aside, it is worth noting two aspects of the external affairs power. As a general proposition the external affairs power will support a law regulating persons, places and matters which are external to (the *low watermark* of) Australia. It will also support a law whose purpose is to implement an international treaty or convention.[19] But the power is not confined to the implementation of treaties or treaty obligations. It will support measures which address matters of international concern at least where that concern is reasonably concrete.[20] It may extend to measures which implement recommendations of international agencies and to measures which pursue agreed international objectives.[21]

Marine Pollution Statistics

There are multiple types and causes of marine pollution. Despite the clear need for marine pollution prevention law, both domestically and internationally, it should be noted that land-based pollution, including atmospheric emissions, accounts for between 50 and 90 percent of marine pollution.[22] (It has been argued that ship-based pollution amounts to less than 5 percent of the total.[23]) This pollution includes 'oil sewage and industrial wastes, chemical fertiliser and pesticides, warm water from power stations, atmospheric discharges from vehicles, chimney fumes and sprayed agricultural chemicals'.[24] Of the marine-based pollution, some is deliberately or accidentally discharged, some is dumped, while some is a product of exploration and exploitation of the continental shelf.

1981 the United States National Academy of Sciences estimated that 3.2 million tonnes of oil entered the world's oceans annually. Of that amount around 45 per cent came from shipping and within that category, 12.5 per cent was attributable to tanker accidents.[25] In 1993 the estimates relating to shipping were revised, reducing the figure from 45 per cent to 24 per cent.[26] The following table illustrates the estimates, with the revised figures on shipping. It is understood that a sub-group of the IMO, the Joint Group of Experts on the Scientific Aspects of Marine Pollution, is currently attempting to update these estimates.

Figure 1: Sources of Oil in the Marine Environment (1993[27]



Main Provisions

Schedule 1 – Limitation of Liability

Item 3 of **Schedule 1** inserts **proposed Schedule 1A** into the LLMC Act to give effect to the *1996 Protocol to amend the Convention on Limitation of Liability for Maritime Claims* (the 1996 Liability Protocol).[28] The 1996 Liability Protocol increases the liability limits under the Limitation Convention and introduces a 'tacit acceptance' procedure for updating these amounts. The liability limits are, for most contracting parties, expressed in terms of units of account which are based on the *Special Drawing Right* of the International Monetary Fund.[29] The Second Reading Speech states that the new limits will 'provide a reasonable level of compensation in the case of an accident involving a ship while not making the limits so high that shipowners will not be able to obtain insurance coverage'.[30]

The 'tacit acceptance' procedure is a procedure in which 'the body which adopts the amendment [to the Convention or Protocol] at the same time fixes a time period within which contracting parties will have the opportunity to notify either their acceptance or their rejection of the amendment, or to remain silent on the subject. In [the] case of silence, the amendment is considered to have been accepted by the party'.[31] It is used in most of the IMO's technical Conventions and 'facilitates the quick and simple modification of Conventions to keep pace with the rapidly evolving technology of the shipping world'.[32]

The 1996 Limitation Protocol will come into effect 90 days after 10 countries have become parties. As at 31 March 2001, only 4 states were parties to the Protocol.[33] The delay in the entry into force of the Protocol is not unusual and reflects a long history of similar delays in the commencement of Conventions adopted by the IMO. Indeed, it was such delays that originally prompted the introduction of the 'tacit acceptance' procedure. It is worth noting that the 1988 Protocol to the Convention on the Safety of Life at Sea, the Convention at the heart of the 'tacit acceptance' reforms, took 12 years to come into force.[34] However, of all the Protocols which have not yet entered into force, the IMO has recently urged States to ratify or accede to the 1996 Limitation Protocol.[35]

Items 1 and 2 of **Schedule 1** amends the *Admiralty Act 1988* and the *Navigation Act 1912* to tie the definitions therein of the Limitation Convention to the definition in the LLMC Act. The definition in the LLMC Act incorporates the 1996 Limitation Protocol.

Schedule 1 will commence on Proclamation or 6 months after the day on which the 1996 Liability Protocol enters into force for Australia.

Schedule 2 – Powers of Intervention

As indicated above, the Intervention Convention permits States to take such measures on the high seas 'as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests' from oil pollution or the threat of oil pollution 'following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences'.[36] The 1973 Protocol permits States to take similar measures with respect to 'substances other than oil'.[37] For both instruments 'casualty' means 'a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo'.[38] In exercising a right to take intervention measures, a State must ordinarily consult with the flag State(s) and any known interested parties and must only take action which is proportionate to the actual or threatened damage and reasonably necessary to prevent, mitigate or eliminate the danger.[39]

For the 1973 Protocol, 'substances other than oil' include substances listed in the Annex to the 1973 Protocol. The list is updated by 'tacit acceptance', based on amendments by the Marine Environment Protection Committee (MEPC) of the IMO. On 10 July 1996 the MEPC adopted Resolution MEPC 72(38) which amended the list in the Annex.

Schedule 2 amends the Intervention Act to incorporate Resolution MEPC 72(38). The resolution will be inserted as **proposed Schedule 4** of the Intervention Act.

Schedule 3 – Pollution Prevention

Schedule 3 amends the Pollution Prevention Act to implement amendments to MARPOL 73/78, to change certain administrative and enforcement arrangements, and to revise offences and penalty provisions.

In passing it is worth noting various coastal regions recognised under domestic and international law:

- *Internal Waters*: sea on the landward side of the 'territorial baseline'.[40]
- *Territorial Sea*: sea within 12 nautical miles (nm)[41] of the 'territorial baseline'.[42]
- *Coastal Waters*: sea within 3 nm[43] of the 'territorial baseline'.
- *Exclusive Economic Zone*: sea to 200 nm of the 'territorial baseline'.[44]

Pollution Prevention

MARPOL 73/78 contains six annexes dealing with pollution by oil, noxious liquid substances, harmful substances carried by sea in packaged form, sewage and garbage and air pollution.

Table 1: Structure of MARPOL 73/78

Annex	*Subject*	*Entry into Force*
Annex I	Prevention of Pollution by Oil	2 October 1983
Annex II	Control of pollution by noxious liquid substances	6 April 1987
Annex III	Prevention of pollution by harmful substances carried in packaged form, or in freight containers or portable tanks or road and rail tank wagons	1 July 1992
Annex IV	Prevention of pollution by sewage	31 December 1988
Annex V	Garbage	31 December 1988
Annex VI[45]	Air pollution	*not yet in force*

(**Note**: The annexes in the shaded area are optional, hence their delay in entry into force)

Since their entry into force, there have been a number of amendments to the annexes. There have also been a number of recommendations made by the IMO which affect the interpretation and/or operation of MARPOL 73/78. Currently, the key amendments and recommendations are incorporated in fourteen Schedules to the Pollution Prevention Act. **Item 130** proposes to remove these Schedules from the Pollution Prevention Act on the basis that their inclusion 'does not provide an easily understood version of the text of MARPOL 73/78' and that 'is misleading as it can give the false impression that this is the latest text of any amendments – that is not so'.[46] **Items 1, 3 and 4** remove references to the Schedules in the corresponding definitional provisions of the Act. **Item 128** inserts **proposed section 29B** which, for evidential purposes, permits the Minister to issue certificates which set out the terms of the Convention and Protocol comprising MARPOL 73/78 (presumably as amended from time to time by MEPC Resolutions). The Second Reading Speech notes that text of the Convention and annexes, etc. is 'readily available…in electronic form'.[47] For that reason, links to the on-line versions of the Convention, Protocol, annexes, recommendations, etc are used in this digest if possible. However, it would appear that on-line versions of some Schedules are not available.[48]

Overview of the Act

The Pollution Prevention Act adopts a structure which parallels the structure of MARPOL 73/78. Annexes I-V are dealt with in Parts II-IIIC respectively. However, the Parts have varying degrees of detail. Parts II and III are fairly extensive, reflecting the obligatory nature and age of Annexes I and II. Both have prohibitions accompanied by housekeeping requirements, such as the requirement to keep record books and emergency plans, incident reporting requirements and associated penalties. Parts IIIA–IIIC are relatively minimal, reflecting the optional nature and recency of Annexes III–VI. Part IIIB does contain more specific provisions dealing with discharge of (untreated) sewage in the Antarctic Area.

Table 2: Structure of the Pollution Prevention Act

Part	*Subject*	*Commencement (of prohibition)*
Part II	Discharge of oil or oily substances	14 January 1988
Part III	Discharge of noxious substances	14 January 1988
Part IIIA	Jettisoning of packaged harmful substances	10 January 1995
Part IIIB	Discharge of sewage	
• Division 1	• near the Antarctic Area	29 December 2000
• Division 2	• in other areas	* not commenced *
Part IIIC	Disposal of garbage	14 November 1990

Overview of the Proposed Amendments

Oil and Oily Substances

Items 5–71 of **Schedule 3** amend the regime dealing with discharge of oil or oily substances in Part II. They restructure and increase offence and penalty provisions, clarify and expand incident reporting obligations, introduce powers to compel discharge of substances and convert existing penalty provisions into 'penalty units'. To a large extent, and where relevant, these amendments are duplicated in relation to Parts III–IIIC by the remainder of the Bill.

Currently, if any oil or oily substance discharges from a ship into the sea, the master or owner of a ship is guilty of an offence which is subject to a maximum fine of $200 000 (subsection 9(1)). This provision applies generally to Australian ships, but does not apply

to foreign flag vessels unless the discharge occurs in the sea 'near' a State or Territory or in the Exclusive Economic Zone (subsection 9(1B)). It does not apply to the sea 'near' a State or Territory if the discharge is regulated by a State or Territory law (subsection 9(1A)). Legislation dealing with marine oil pollution exists in a number of jurisdictions.[49]

Statutory defences are available in some cases, including where the discharge occurred:

- for the purposes of securing the safety of a ship or saving a life (subsection 9(2))
- as a result of damage 'other than intentional damage' and 'all reasonable precautions' were taken to prevent or mitigate the discharge (subsection 9(2)), or
- in compliance with conditions relating to the place, ratio and rate of discharge (subsection 9(4))

Item 5 deletes subsections 9(1)–(1B) and inserts **proposed subsections 9(1)–(1C)**. These provisions create separate offences in relation to the master or owner and the wrongdoer:

- The master and owner of a ship are each guilty of an offence if any oil or oily substance discharges from their ship. The maximum penalty is 500 penalty units. One penalty unit is currently $110.[50] Thus, the maximum penalty is $55 000.
- The person who is responsible for the discharge, that is, whose conduct directly causes a discharge, is guilty of an offence if they acted negligently or recklessly in relation to the discharge. The maximum penalty is 2000 penalty units or $220 000.

There would seem to be a policy shift in relation to the imposition of penalties.

The penalty upon the master and owner is substantially less than the current penalty. However, it is consistent with other penalties that apply, for example, in relation to failure to report prescribed incidents[51]or to keep a shipboard oil pollution emergency plan.[52] Moreover, the penalty upon the wrongdoer is slightly more than the current penalty.

One reason for the difference is that, whereas the latter offence requires a 'mental element', the former is one of 'strict liability'. That is, there is no requirement to prove any intention, negligence or recklessness on the part of the master or owner. Arguably, it is appropriate to punish negligence or recklessness, but may be inappropriate to impose a substantial penalty on the master or owner of the vessel for the conduct of others. It is also worth noting that, in some circumstances, the master, or owner, may be liable under both of the offences either because they personally caused the damage or perhaps because they did not exercise reasonable care in relation to the training and management of the crew.

One difficulty with this policy shift is that it may reduce the deterrent effect of the Act. Ultimately, while the introduction of a new offence with a higher penalty will discourage negligent and reckless breaches of the Act, its deterrent effect will depend on the extent to which it is or can be enforced. Enforcement will require proof of a failure to maintain a particular standard of care or the existence of a particular subjective state of mind. This

can be a costly exercise and to the extent that these matters cannot be shown, the deterrent effect of the Act relies on the strict liability of the master and owner which is intended to 'discourage careless non-compliance as well as negligent and reckless breaches'.[53] Notwithstanding the need to target fault, the penalty for this offence has been reduced.

Item 20 deals with the reporting of 'prescribed incidents'.

Under the existing provisions, the master is obliged to report any 'prescribed incidents' involving discharges of oil or oily substances (subsection 11(1)). 'Prescribed incidents' are those involving discharges or probable discharges which are not exempted under section 9 (subsection 11(10)). There is a defence if the master is *unable* to comply with this requirement. In this case the owner, charterer, manager or operator is obliged to make the report (subsection 11(3)). **Item 18** extends the latter obligation to the case where the master, whether able or not, *fails* to comply with the requirement to report incidents.

Item 20 extends the list of 'prescribed incidents' to include incidents, for ships of 15 metres or more in length, involving 'damage, failure or breakdown that:

- 'affects the safety of the ship' (**proposed paragraph 11(1)(c)**), or
- 'impairs the safety of navigation of the ship' (**proposed paragraph 11(1)(d)**)

Item 24 inserts **proposed new section 14A** which empowers 'prescribed officers' to require, where reasonable, that the owner or master of a ship arrange for quantities of oil or oily mixtures to be discharged at specified reception facilities. This strengthens the ability of the regime to preempt and prevent incidents that may involve discharges.

Oil Residues

Under the existing regime, if oil residue, which cannot be discharged into the sea without committing an offence, is not retained on board an Australian ship the master or owner of a ship is guilty of an offence which is subject to a maximum fine of $200 000 (section 10). Oil residues may, however, be discharged to onshore reception facilities.

Item 15 replaces this requirement to retain with a prohibition on discharge. It will be an offence under **proposed section 10** to discharge oil residues into the sea, where that would be an offence under **proposed sections 9(1)** and **9(1B)**, unless the discharge is made to a reception facility.

Two unintended consequences may arise from the drafting of **proposed section 10**. First, it is possible that the section permits the discharge of oil residues into the sea where the discharge is being made to an onshore reception facility.[54] Second, it is possible that the section permits discharge of oil residues between vessels at sea or elsewhere onshore.[55]

Other Pollution Generally

The amendments proposed by **item 5** are substantially replicated in relation to other forms of pollution regulated by the Pollution Prevention Act.

Table 3: Corresponding Amendments

Description	*Item*					
	Part II	*Part III*	*Part IIIA*	*Part IIIB Div. 1*	*Part IIIB Div. 2*	*Part IIIC*
Separate offences for master or owner and wrongdoer	**5 & 15**	**33**	**72**	**86**	**92**	**107**
Notification for prescribed incidents involving ships ≥ 15 m.	**20**	**67**	**85**			
Power to require discharge to reception facility	**24**	**71**			**105**	**126**

More detailed amendments are made to Part IIIC (disposal of garbage). **Item 126** introduces housekeeping requirements relating to:

- keeping and retaining garbage record books
- shipboard waste management plans, and
- notices to crew and passengers regarding garbage disposal requirements.

Items 92–105 commence on Royal Assent. However, if Part IIIB Division 2 of the Pollution Prevention Act has not commenced before this day, these items will commence when Part IIIB Division 2 commences.

Schedule 4 – Submarine Cables and Pipelines

Schedule 4 amends the *Submarine Cables and Pipelines Protection Act 1963* to update references to the international law of the sea. Currently, this Act refers to the *Convention on the High Seas* of 1958. This convention was the predecessor to UNCLOS. Essentially, the proposed amendments incorporate the change to UNCLOS and the introduction of the concept of the Exclusive Economic Zone.

Endnotes

1 Ordinarily, it is official policy that Australia will enact 'implementing legislation' prior to the commencement of any obligations arising out of a convention: see for example, Parliament of Australia, Senate Legal and Constitutional References Committee, *Commonwealth Power to Make and Implement Treaties – Report*, 1996, para 7.25. This is not always the case and there have been notable exceptions, for example in relation to the Convention on the Rights of the Child and and IL0 Convention No. 158 on the termination of employment: see generally Anne Twomey, 'Procedure and Practice of Entering and Implementing International Treaties', *Background Paper No. 27 1995*, Parliamentary Library, Canberra, 1995, p 12. In the present context, however, the matters under the relevant international instrument which require legislation arise not as a result of Australia's entry into that instrument but as a result of a 'tacit acceptance' procedure which is described in the Main Provisions section of this Digest. As a result the 'implementing legislation' is necessarily responsive.

2 International Maritime Organization, 'IMO adopts Convention on Liability and Compensation for Pollution from Ships' Bunkers', *IMO Briefing No. 6 2001*, 23 March 2001.

3 *Constitution*, section 51(i).

4 *Constitution*, section 98.

5 *Constitution*, section 51(xxix).

6 For example, this Convention required parties to 'draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject' (Article 24).

7 The text of the Protocol of 1978 can be found in Australian Treaty Series 1988 No 29 at http://www.austlii.edu.au/au/other/dfat/treaties/1988/29.html [9/4/01]

8 Australian Treaty Series 1984 No. 4, at http://www.austlii.edu.au/au/other/dfat/treaties/1984/4.html [9/4/01].

9 Australian Treaty Series 1984 No. 5, at http://www.austlii.edu.au/au/other/dfat/treaties/1984/5.html [9/4/01].

10 Australian Treaty Series 1991 No. 12 at http://www.austlii.edu.au/au/other/dfat/treaties/1991/12.html [9/4/01].

11 10 December 1982, UN Doc A/Conf 62/122; 21 ILM 1261 (1982).

12 For a definition of 'internal waters' see the discussion below in the Main Provisions section of this Digest under Schedule 3 – Pollution Prevention.

13 ibid.

14 That is, passage that is 'not prejudicial to the peace, good order or security of the coastal state': UNCLOS, Article 19(1).

15 ibid, Article 21(1)(f).

16 ibid, Article 56(1)(b)(iii).

17 ibid, Article 211.

18 These Acts were:

- *Protection of the Sea (Civil Liability) Act 1981*
- *Protection of the Sea (Powers of Intervention) Act 1981*
- *Protection of the Sea (Shipping Levy Collection) Act 1981*
- *Protection of the Sea (Shipping Levy) Act 1981*, and
- *Protection of the Sea (Prevention of Pollution From Ships) Act 1983*.

19 That is, provided the law selects means which are 'reasonably capable of being considered appropriate and adapted to implementing the treaty': *Victoria v Commonwealth* (1996) 187 CLR 416 at 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. See also at 488.

20 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 per Murphy J at p 242; *Polyukovich v Commonwealth* (1991) 172 CLR 501, per Brennan J at pp 560-562 and Toohey J at pp. 657–658.

21 See generally, *R v Burgess, Ex Parte Henry* (1936) 55 CLR 608, per McTiernan J at p 687; *Commonwealth v Tasmania* (1983) 158 CLR 1, per Deane J at pp 258-259 and Murphy J at pp. 171–172.

22 Douglas Brubaker, *Marine Pollution and International Law: Principles and Practice*, Bellhaven Press, London, 1993, p 33–34.

23 Edgar Gold, *Handbook on Marine Pollution*, Halifax, 1985, pp 18 and 142, cited in Brubaker, op cit, p. 35.

24 ibid.

25 CSIRO, 'Illegal Oil Dumping Kills, Injures Penguins', *Media Release*, 8/01/99.

26 IMO, Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP), 'Impact of oil and related chemicals and wastes on the marine environment', *GESAMP Report No.50*, London 1993

27 IMO, Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP), 'Impact of oil and related chemicals and wastes on the marine environment', *GESAMP Report No.50*, London 1993.

28 *Select Documents on International Affairs* No. 44 (1996) at http://www.austlii.edu.au/au/other/dfat/seldoc/1996/4407.html [9/4/01].

29 An overview of the SDR is given in International Monetary Agreements Bill 2000, Bills Digest No. 69 2000-01. Currently, one SDR is worth just over A$2.55: see International Monetary Fund, 'SDR Valuation' at http://www.imf.org/external/np/tre/sdr/basket.htm [9/4/01] and the Reserve Bank of Australia at http://www.rba.gov.au/ [9/4/01].

30 Peter McGauran, MP, International Maritime Conventions Legislation Amendment Bill 2001, Second Reading Speech, House of Representatives, *Debates*, 4 April 2001, p 25514.

31 Paper prepared by the Secretariat of the Legal Committee of the International Maritime Organization for the 12th Session in 1972, LEGXII/8 Annex II, p 8, reproduced in International Maritime Organization, *Focus on IMO*, September 1998, p 11.

32 International Maritime Organization, *Focus on IMO*, September 1998, p 8.

33 International Maritime Organization, 'Summary of Status of Conventions as at 31 March 2001'.

34 International Maritime Organization, 'Summary of Status of Conventions.

35 International Maritime Organization, 'IMO adopts convention on liability and compensation for pollution from ships' bunkers', *IMO Briefing No. 6 2001*, 23 March 2001.

36 Intervention Convention, Article 1(1).

37 1973 Protocol, Article 1(1).

38 Intervention Convention, Article 2(1), incorporated into the 1973 Protocol by Article 2(1).

39 Intervention Convention, Articles III–VI, incorporated into the 1973 Protocol by Article 2(1).

40 UNCLOS, Article 2(1). In general, the territorial baseline is the low-water line along the coast, but may be drawn between headlands and other geographical features.

41 A nautical mile is equal to 1,852 metres: Schedule 1.(1) of the *Seas and Submerged Lands Act 1973* and see Australian Surveying and Land Information Group, 'Maritime Boundaries', at http://www.auslig.gov.au/marbound/mile.htm [25/1/00].

42 UNCLOS, Article 3. The *Seas and Submerged Lands Act 1973* provides for the inner limits (baselines) and outer limits (breadth) of the territorial sea to be determined by proclamation in accordance with international law (s 7). The inner limits of the territorial sea were proclaimed as early as 1974 (Proclamation in Gazette S 89A, Thursday, 24 October 1974, and Proclamations in Gazette No. S 29, Wednesday, 9 February 1983 and Gazette No. S 57, Tuesday, 31 March 1987). At common law, it was widely thought that the territorial sea was limited to 3 nm: Richard Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes*, The Federation Press, Sydney, 1990, p 14. The outer limit of territorial sea was left to be determined according to common law until the full 12 nm limit was proclaimed in 1990 (Proclamation in Gazette No. S 297, Tuesday, 13 November 1990).

43 *Coastal Waters (State Powers) Act 1980*, subsection 4(2). Notwithstanding the expansion of the territorial sea for the purposes of the *Seas and Submerged Lands Act 1973*, the definition of 'coastal waters' retains the 3 nm limit.

44 Articles 55 and 57.

45 Annex VI was added to MARPOL 73/78 by

46 Peter McGauran, MP, International Maritime Conventions Legislation Amendment Bill 2001, Second Reading Speech, House of Representatives, *Debates*, 4 April 2001, p 25514.

47 Ibid.

48 The author was unable to access on-line versions of MEPC.42(30), 48(31) and 47(31) which correspond to Schedules 8-10 of the Act. Access may be available via the Australian

Maritime Safety Authority Website (http://www.amsa.gov.au/imo/index.html), but access to the database is restricted and users must obtain a password.

49 *Marine Pollution Act 1987* (NSW), *Transport Operations (Marine Pollution) Act 1995* and *Transport Operations (Marine Pollution) Regulations 1995* (QLD); *Protection of Marine Waters (Prevention of Pollution from Ships) 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 1987* (WA). The *Prevention of Pollution of Waters by Oil Act* (NT) is based on OILPOL and thus deals only with oil pollution. As to the meaning of the sea 'near' a state, it includes the 'territorial sea' and the sea on the landward side of the 'territorial baseline', ie the 'territorial sea' and the 'internal waters': *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*, subsection 3(1A). The State and Territory legislation generally applies in relation to the adjacent 'coastal waters' or 'territorial sea' for the purposes of the *Seas and Submerged Lands Act 1973* which is 12 nm (see above).

50 *Crimes Act 1914*, subsection 4AA(1).

51 Subsections 11(1) and (3).

52 Subsection 11A(7).

53 *Explanatory Memorandum*, p. 6.

54 Paraphrasing **proposed subsection 10(2)** if oil residue is 'discharged into the sea; *and* … the discharge is … made to a reception facility' there will be no offence. In practice it is not possible to discharge oil residue both into the sea and to a reception facility. The section could be read as meaning that if oil residue is 'discharged into the sea; ***while*** … the discharge is … made to a reception facility' there will be no offence. It is reasonably clear from the Explanatory Memorandum that the rewording of section 10 is only intended to introduce the strict liability offence which is introduced elsewhere in the Bill. Moreover, permission to discharge oil residue into the sea is inconsistent with other provisions of the Pollution Prevention Act and MARPOL 73/78. It may be advisable to amend the provision to avoid any possibility that the suggested interpretation is made.

55 Arguably substituting a prohibition for the requirement to *retain* relaxes one aspect of the existing regime. In practice, it may be possible for a vessel to discharge oil residue to another vessel at sea or to discharge oil residue to land without breaching this provision. As above, permission to discharge between vessels or to other places onshore may be inconsistent with other provisions, and the scope, purpose and object, of the Pollution Prevention Act and MARPOL 73/78. It may also be inconsistent with other prohibitions under domestic or international law. Likewise, it may be advisable to amend the provision to avoid any possibility that the suggested interpretation is made.