

Legislation and Jurisdiction

- 4.1 Under the *Navigation Act* 1912, Articles 6 to 8, 12 to 19, 21 to 22, 26 and 30 of the 1989 Salvage Convention are given the force of law in Australia.

International Convention on Salvage, 1989

- 4.2 The International Convention on Salvage, 1989 replaced a convention on the law of salvage adopted in Brussels in 1910. The 'no cure, no pay' principle under which a salvor is only rewarded for services if the operation is successful, derives from the earlier convention.
- 4.3 Although 'no cure no pay' worked well in most cases, it did not take pollution into account. If a salvor prevented a major pollution incident (for example, by towing a damaged tanker away from an environmentally sensitive area) but did not manage to save the ship or the cargo, the company got nothing. There was, therefore, little incentive to a salvor to undertake an operation which had only a slim chance of success.
- 4.4 The 1989 Convention sought to remedy this deficiency by making provision for an enhanced salvage award, taking into account the skill and efforts of the salvors in preventing or minimising damage to the environment.

Special compensation

- 4.5 The 1989 Convention introduced a "special compensation" to be paid to salvors who have failed to earn a reward in the normal way (i.e. by salvaging the ship and cargo).

- 4.6 Damage to the environment is defined as "substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents."¹
- 4.7 The compensation consists of the salvor's expenses, plus up to 30% of these expenses if, thanks to the efforts of the salvor, environmental damage has been minimised or prevented. The salvor's expenses are defined as "out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used".²
- 4.8 The tribunal or arbitrator assessing the reward may increase the amount of compensation to a maximum of 100% of the salvor's expenses, "if it deems it fair and just to do so".³
- 4.9 If the salvor is negligent and has consequently failed to prevent or minimise environmental damage, special compensation may be denied or reduced. Payment of the reward is to be made by the vessel and other property interests, in proportion to their respective salvaged values.
- 4.10 Articles 9 and 11 of the International Convention on Salvage 1989, have not been adopted into Australian law.
9. Nothing in this Convention shall affect the right of the coastal state concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.⁴
11. A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.⁵

1 International Convention on Salvage, 1989 p. 8.

2 International Convention on Salvage, 1989 p. 13, Article 14, Clause 3.

3 International Convention on Salvage, 1989 p. 13, Article 14, Clause 3.

4 International Convention on Salvage, 1989 p. 11.

5 International Convention on Salvage, 1989 p. 11.

- 4.11 With regard to Article 11, Mr Ian Hoskison, Salvage Manager for United Salvage commented:

It is where the state is obligated to assist the salvor in protecting property and minimising the environmental issues, and with access to ports. That very important article is not in Australian law, and that is a great shame.⁶

Recommendation 5

- 4.12 **The Committee recommends that Articles 9 and 11 of the International Convention on Salvage 1989, be enshrined in Australian law.**

Australian Legislation

- 4.13 Salvage, as a commercial enterprise, is not something that any level of Government has any direct responsibility over. Emergency response, with particular reference to environmental protection is, however, the responsibility of both State and Australian governments.
- 4.14 With regard to waters under Australian government jurisdiction, three maritime Conventions impose quite specific obligations on the Government in relation to the protection of the marine environment:
- Article 56 (1) of the United Nations Convention on the Law of the Sea (UNCLOS), gives the Australian government jurisdiction to protect and preserve the marine environment in Australia's Exclusive Economic Zone which extends, generally, from the low water mark of the coast or coastal island, seawards to a maximum of 200 miles.⁷
 - Article 1.1 of the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPPRC) 1990, requires the Australian government to take all appropriate measures to prepare for, and respond to, an oil pollution incident. (An 'oil pollution incident' includes an occurrence which results, or *may* result, in a discharge of oil or which poses, or *may* pose, a threat to the marine environment).⁸

6 Ian Hoskison, transcript of evidence, Melbourne, 28 April 2004, p. 22.

7 United Nations Convention on the Law of the Sea, Article 56.

8 International Convention on Oil Pollution Preparedness, Response and Co-operation, Article 1, Clause 1 and Article 2, Clause 2.

- the International Convention on Salvage 1989 (discussed above and in Chapter 2).
- 4.15 The Committee notes that an appropriate salvage capability is essential to allow the Australian government to comply with these international obligations. It is for this reason, consistent with recommendation 2, that the Committee believes that the Australian government has a financial responsibility for the provision of salvage capability in Australian waters.
- 4.16 Beyond the three mile limit “...there is almost exclusive Commonwealth jurisdiction to control marine matters, subject to the limits placed by international law and the ‘nexus’ between the State and the activity offshore.”⁹
- 4.17 The Centre for Maritime Law points out that State governments have concurrent jurisdiction with the Australian government out to the three mile limit (and in particular cases further) as a result of the “Offshore Constitutional Settlement 1979”:
- The Commonwealth and the States and the NT agreed in 1979, in the “Offshore Constitutional Settlement”, that the States and the NT should have jurisdiction out to the three mile limit, but the Commonwealth also has jurisdiction. As a result much of the Commonwealth maritime legislation has a “roll back” provision, under which the Commonwealth power rolls back if the State or the NT passes identical legislation that applies in that area.
- The States and the NT also have some jurisdiction beyond the three mile limit where it is shown sufficient connection (nexus) with the State and NT requirement to legislate for the “peace good order and government” of that State.¹⁰
- 4.18 There is no direct part for local government to play in emergency response.¹¹ However, the Committee notes that co-operation between host local authorities and port authorities, is an important dimension in port security. It is suggested that onerous and obstructive by-laws and impositions affecting marine salvage operations as described in paragraph 4.22, should be removed.

9 Centre for Maritime Law, submission no 15, pp. 10.

10 Centre for Maritime Law, submission no 15, pp. 9-10.

11 NSW Ministry of Transport, submission no 12, p. 7.

Australian Maritime Safety Authority (AMSA)

- 4.19 AMSA is the Australian government agency that has responsibility for the supervision of safety and other services to the Australian maritime industry. AMSA also has statutory authority for marine pollution matters within the jurisdiction of the Commonwealth of Australia.¹²
- 4.20 AMSA is largely self-funded, through levies on the commercial shipping industry. It is responsible for:
- the operation and maintenance of the Australian Government's coastal marine aids to navigation network, serviced via the Marine Navigation Levy under the Marine Navigation Levy Act 1989;
 - the protection of the marine environment through the management of the National Plan to Combat Pollution of the Sea by Oil and other Noxious and Hazardous Substances (the National Plan), funded by the Protection of the Sea Levy under the Protection of the Sea (Shipping Levy) Act 1981;
 - the safety and seaworthiness of Australian vessels through periodic assessment and survey;
 - the safety and seaworthiness of foreign vessels calling at Australian ports by random inspection to ensure compliance with international regulation or "Port State Control", funded by the Marine Navigation (Regulatory Functions) Levy under the Marine Navigation (Regulatory Functions) Levy Act 1991;
 - administration of the certification of seafarers training,
 - the operation of Australia's Rescue Co-ordination Centre and co-ordination of search and rescue operations for civilian aircraft and vessels in distress; and
 - representation of Australian interests at international forums for the development of maritime standards such as the International Maritime Organisation (IMO).¹³
- 4.21 The National Plan Management Committee is responsible for strategic management of the National Plan and reports to the Australian Transport Council through the Australian Maritime Group (AMG) and the Standing Committee on Transport (SCOT).¹⁴ The "potential polluter pays principle" is reflected in the funding arrangements for the National Plan via the Commonwealth's Protection of the Sea (Shipping Levy) Act.

12 http://www.amsa.gov.au/About_AMSA/Service_charter.asp

13 http://www.amsa.gov.au/About_AMSA/Organisational_structure/

14 http://www.amsa.gov.au/About_AMSA/Organisational_structure/

4.22 The Committee has received anecdotal evidence that at times there are difficulties for salvors in getting the necessary permission from local authorities, to carry out salvage operations. A particular case described to the Committee, was one where the salvors had to approach environmental and Aboriginal groups before being allowed to commence salvage. Its team members were also required to do building site safety training as the vessel to be salvaged was considered to be a “building site” by the local council.

4.23 The Centre for Maritime Law, in its submission to the Committee points to the lack of clarity in legislation for the maritime industry:

Due to the low priority of the marine transport segment, there is continuing lack of clarity for industry in legislation. Industry is frequently confronted with the complex task of deciphering the intertwined federal and state marine jurisdiction and legislation.¹⁵

4.24 The Committee has been made aware of the fact that a port authority which is requested to release a tug for an emergency response operation, may be placed in an awkward position which may leave it facing legal difficulties if it agrees. The issue was nicely encapsulated by Mr Ian Hoskison when he remarked during a roundtable discussion:

My point is complementary to that because, under port requirements, the port is required to run the port. It is not required to do anything else. So it is very difficult for a port manager to release a tug for something outside the port if it will delay vessels, because he and the port could be open to legal action by so doing. So they have to have some outside impetus to take that burden off their shoulders. If there is legislation under which some outside body can say to the port, ‘We require you to do it,’ there would be no problem, and if there were delays of a minor nature nobody would take too much notice of them.

It is a real problem that we have, particularly in Gladstone, where there are two salvage capable tugs that we can never use apart from in-port jobs. There is the case of the *Stolt Otome*, a gas carrier that was adrift in the Capricorn Channel, and we could not get a tug released from Gladstone. We had to send out the *Nelia* from Mackay in very bad weather, at the limit of its capability, and it had a heck of a job. We should not have to do that.¹⁶

15 Centre for Maritime Law, submission no 15, p. 11.

16 Mr Ian Hoskison, transcript of evidence, Melbourne, 28 April 2004, p. 22.

4.25 In the Committee's view two issues clearly need to be addressed. If Australia's salvage capabilities are to operate effectively, arrangements are needed to enable:

- a salvor to speak to one authorised person to obtain permission to carry out necessary salvage operations; and,
- the introduction of arrangements enabling a port authority to release tugs for emergency response, without fear of legal action.

Similar protection would also be needed for the tug operators, to protect them from legal repercussions if the tug's absence caused delays in the port.

4.26 The Committee recognises that some salvage aspects are covered by the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances, but industry representatives indicated that there is also a need for a national plan for salvage capability:

As far as legislation related to salvage capability is concerned, my belief is that we need national plan for salvage capability, as I said before.¹⁷

Recommendation 6

4.27 **The committee recommends that AMSA, in consultation with state governments, industry and other interested parties, develop a national plan for emergency response/salvage operations. The plan should have regard to the following needs/issues:**

- **the ability for a salvor to negotiate with one authorised person/authority so as avoid the necessity of separate negotiations with a number of interest groups in an emergency situation; and**
- **legislative protection for port authorities and tug operators to allow the release of tugs to carry out emergency response operations.**

17 Mr Paul Bendy, transcript of evidence, Melbourne, 28 April 2004, p. 21.

