

MARINE POLLUTION DAMAGE IN AUSTRALIA: IMPLEMENTING THE BUNKER OIL CONVENTION 2001 AND THE SUPPLEMENTARY FUND PROTOCOL 2003

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I INTRODUCTION

The grounding of the bulk carrier *Pasha Bulker* on Nobbys beach, Newcastle in June 2007 has again highlighted the risk from shipping posed to Australia's extensive and environmentally fragile coastline.¹ Whilst a pollution incident was averted in this case, spills from shipping in other states, such as the *Nakhodka* spill off Japan in 1997,² the *Prestige* spill off France in 1999,³ the *Erika* spill off Spain in 2003⁴ and the *Hebei Spirit* spill of South Korea in 2007,⁵ have required the constant monitoring and updating of the international regulatory regimes designed to prevent such incidents occurring and to provide compensation when they nevertheless do occur. Two recent additions to this international regulatory system are the *Protocol on the Establishment of a Supplementary Fund for Oil Pollution Damage*, 2003⁶ and the *International Convention on Civil Liability for Bunker Oil Pollution Damage* 2001.⁷ In 2008, Australia gave effect to these instruments, enacting the Supplementary Fund Protocol via the *Protection of the Sea Legislation Amendment Act* 2008 (Cth),⁸ while the Bunker Oil Convention is given effect through the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act* 2008

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¹ See: Australian Maritime Safety Authority, *Pasha Bulker Grounding*, (2007) <http://www.amsa.gov.au/about_amsa/corporate_information/Recent_Events/Pasha_Bulker.asp> at 12 August 2008; Australian Transport Safety Bureau, *Independent Investigation into the grounding of the Panamanian Registered Bulk Carrier the Pasha Bulker on Nobby's Beach, Newcastle, New South Wales*, (2007) <http://www.atsb.gov.au/publications/investigation_reports/2007/MAIR/pdf/mair243_001.pdf> at 12 August 2008.

² See Tosh Moller, *The Nakhodka Oil Spill Response* (1997) <<http://www.eumop.org/library/CASE%20STUDIES/ITOPF/6.pdf>> at 17 August 2008.

³ See International Oil Pollution Compensation (IOPC) Fund, *Erika* (2008) <<http://www.iopcfund.org/erika.htm>> and its *Annual Report 2007* <http://www.iopcfund.org/npdf/AR07_E.pdf> at 11 August 2008.

⁴ See: *Annual Report 2007*, above n 3; IOPC, *Prestige* (2008) <<http://www.iopcfund.org/prestige.htm>> at 11 August 2008.

⁵ In which 10,000 tonnes of crude oil affected 375 km of the western coast of the Republic of Korea. Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2008, 14 (Mr Dreyfus).

⁶ Entered into force 3 March 2005, ('Supplementary Fund Protocol').

⁷ Entered into force 21 November 2008, ('Bunker Oil Convention'). 'Bunkers' is a non-technical marine description of a ship's fuel, rather than its cargo. That fuel might be, eg, diesel or heavy fuel oil (HFO). The Bunker Oil Convention has a wide definition: see art 1(5) and below Part III(C)(1).

⁸ Which passed through the House of Representative on 25 June 2008.

(Cth),⁹ and the *Protection of the Sea (Civil Liability For Bunker Oil Pollution Damage) (Consequential Amendments) Act 2008* (Cth).¹⁰

The purpose of this article is to analyse these international instruments, describe how they came about and explain the Australian implementation of them.

A Changes in the Focus of Maritime Liability Rules

From the late 19th century, the main driver to unify international maritime law was the Comité Maritime International (CMI),¹¹ a non-governmental organisation with representation from all aspects of the shipping industry, but mainly representing private *commercial* interests rather than governments. Most of the focus was therefore on private law issues which affected those interests and where uniformity brought simplicity and ease of enforcement. In private maritime law, justice and fairness in the wider sense often come second to matters such as commercial certainty. The primary focus has traditionally been on the commercial position of the shipowner, whether as carrier of goods under a carriage contract, or as a party liable for collisions or other incidents. The sinking of the *Titanic* in 1912 led to an increasing international focus on improving *safety* in order to protect the lives of crew and passengers.¹²

The biggest catalyst for international change was the creation after World War II of the International Maritime Organization (IMO).¹³ Since that time, two obvious influences can be discerned. First, that the *regulatory* function has become a more significant driver than the commercial interests, creating public law obligations on states to enact standards which are usually enforced through the criminal law. Secondly, this work has been motivated and carried out by states, not by private bodies or through self-regulation. That factor alters the dynamic because states will be more likely to think of victims rather than commercial interests. Nevertheless, shipowners have had a major influence at IMO; not simply because IMO membership fees are payable by tonnage, but also because many states have, or wish to have, significant commercial fleets (whether for reasons of taxation, employment, prestige or general economic and political power). Debates at the IMO are heavily influenced by the impact of regulation on commercial shipping.

The 40 years since the oil tanker *Torrey Canyon* sank in 1967¹⁴ saw a further major change in the focus of international maritime law to protect a newer category of victim, the *environment*. Part XII of UN Convention on the Law of the Sea 1982 deals specifically with this new 'victim'. While much of this Part is naturally concerned with prevention issues and enforcement, rather than compensation, art 235 imposes obligations on states to ensure that their legal systems offer recourse mechanisms, including prompt and adequate compensation. Article 235(3) obliges states to cooperate in implementing and developing international law on liability and compensation, and mentions the need to develop criteria and procedures for payment of adequate compensation including 'compulsory insurance or compensation funds'.

⁹ Act no. 77 of 2008 ('Bunker Act').

¹⁰ Act no. 76 of 2008.

¹¹ See generally, CMI, <<http://www.comitemaritime.org>> at 18 August 2008.

¹² New safety rules were promoted in a series of international instruments from 1914, usually referred to as SOLAS (Safety of Life at Sea) Conventions.

¹³ A specialized agency of the United Nations with 167 Member States and three Associate Members: see generally, IMO <<http://www.imo.org>> at 28 September 2008.

¹⁴ This was the first major casualty involving a large oil tanker, and the British and French governments were ill-prepared to deal with some 117,000 tons of cargo that was lost.

The latter reference is significant because not only does it reflect the reaction to the *Torrey Canyon*, but it also presages developments in the last 25 years, including the Supplementary Fund Protocol 2003 and the Bunker Oil Convention 2001.

An important emerging principle in the protection of the environment has been the 'polluter pays' principle.¹⁵ While the concept has been used in the maritime context, its interpretation and application is not always straightforward. In the case of an oil tanker, for example, the polluter is not necessarily the tanker owner as it is very unusual for shipowners to carry cargo belonging to them. The ship is merely the mechanism for carrying somebody else's pollutants, and in the debates which followed the *Torrey Canyon* disaster in 1967, the shipowners were keen to counter the simple assumption that shipowners alone should pay (especially in circumstances where they were held liable without fault).¹⁶

The development of the environmental principle of sustainable development¹⁷ has also had an impact on the resulting international regulatory regime applicable to marine pollution, as reflected in the 1992 Rio Declaration on Environment and Development,¹⁸ which was itself a series of compromises between environmental protection and economic development.

The implementation of these emerging principles has been taken up within the IMO. Most of the activity of the IMO in protecting the marine environment has been focussed on the work of its Marine Environment Protection Committee (MEPC),¹⁹ and to some extent on its Maritime Safety Committee (MSC).²⁰ The MEPC, in particular, has drafted a host of regulatory measures enforced by flag and coastal states through public law mechanisms (such as the criminal law).²¹ Australia has played an active part in the drafting of such instruments and has ratified most of

¹⁵ For a history of the development of environmental law and the polluter-pays principle, see, Philippe Sands, *Principles of International Environmental Law* (2nd ed 2003), 25-69. See also, Louise De La Fayette, 'New approaches for assessing damage' (2005) 20 *International Journal of Marine and Coastal Law* 167, 169.

¹⁶ The solution adopted in the *International Convention on Civil Liability for Oil Pollution Damage* (CLC), 1969 (entered into force 19 June 1975) and the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (IOPC Fund) 1971 (entered into force 16 October 1978), was to recognise that there was a shared liability. See below Part I(D).

¹⁷ Sands, above n 15, 10-11, 252-83.

¹⁸ Ibid 252-3.

¹⁹ Louise De La Fayette, 'The Marine Environment Protection Committee: The Conjunction of the Law of the Sea and International Environmental Law' (2001) 16 *International Journal of Marine and Coastal Law* 155, 165.

²⁰ It has produced and revised general safety conventions such as SOLAS 1974, which protect the environment indirectly through the reduction of ship casualties.

²¹ Examples of such conventions include: the *International Convention for the Prevention of Pollution from Ships*, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78); the *International Convention on Oil Pollution Preparedness, Response and Co-operation* (OPRC) 1990 (entered into force 13 May 1995) and its *Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances*, 2000 (HNS Protocol) (entered into force 14 June 2007); the *International Convention on the Control of Harmful Anti-fouling Systems on Ships* (AFS) 2001 (entered into force 17 September 2008); the *International Convention for the Control and Management of Ships' Ballast Water and Sediments*, 2004 (not yet in force). Australia is a party to all these instruments except the HNS Protocol and the Ballast Water Convention.

them.²² It is probably fair to say that their introduction has been slow, cautious, and very often in reaction to actual disasters (rather than pre-empting them). The 9/11 attack has added yet a further focus, that of *maritime security*, prompted by the US. The environment was sidelined somewhat as new regulatory rules were adopted to combat terrorism.²³

The focus of this article, however, is on maritime *liability* conventions, i.e. those that create legal liabilities for shipowners and others to pay *compensation* for losses. For convenience, these may be called 'private maritime law conventions', in the sense that they are conventions creating liabilities for individuals and companies of an essentially private law type.

B IMO Conventions on Compensation for Damage to the Marine Environment

It is the Legal Committee of the IMO, set up after the *Torrey Canyon* disaster, which has produced a suite of conventions and amending protocols dealing with liability and compensation issues,²⁴ including:

- *The International Convention on Civil Liability for Oil Pollution Damage* (CLC), 1969 [and Protocols of 1976, 1992]²⁵
- *The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (Fund Convention), 1971 [and Protocols of 1976, 1992, and the Supplementary Fund Protocol, 2003]²⁶
- *The Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material* (NUCLEAR), 1971²⁷
- *The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea* (PAL), 1974 [and Protocols of 1976, 1990 and 2002]²⁸
- *The Convention on Limitation of Liability for Maritime Claims* (LLMC),

²² Indeed, the *Protection of the Sea Legislation Amendment Act* 2008 (Cth) gives effect to the latest amendments to Annexes I, II and IV of MARPOL. This article will not examine these public law measures, but see, for an introduction as to their effects, Explanatory Memorandum, *Protection of the Sea Legislation Amendment Bill* 2008 (Cth) 2-3,17-21.

²³ Thus work on the *Wreck Removal Convention* 2007, opened for signature 19 November 2007, was delayed, understandably, while a new 2005 Protocol was agreed to the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (SUA) 1988 (SUA entered into force on 1 March 1992, but the SUA Protocol is not yet in force).

²⁴ For the list of States Parties to IMO conventions generally, see above n 13.

²⁵ Australia is now a party to the CLC 1992, which is enacted in the *Protection of the Sea (Civil Liability) Act* 1981 (Cth). These, like the original CLC 1969 (and Fund Convention 1971) deal with compensation issues: other instruments such as the *International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* 1969 (entered into force 1969), dealt with public law issues. See also the *Protection of the Sea (Powers of Intervention) Act* 1981 (Cth).

²⁶ Australia is now a party to the Fund Convention 1992 which is enacted mainly in the *Protection of the Sea (Oil Pollution Compensation Fund) Act* 1993 (Cth).

²⁷ Australia is not party to this Convention, which has been of little relevance internationally.

²⁸ Australia is not party to the Athens Convention 1974, but it did play a part in the negotiation of the 2002 Protocol. The debates on terrorism defences are also relevant in the context of bunkers: see below Part III(C)(4).

1976 [and Protocol of 1996]²⁹

- *The International Convention on Salvage*, 1989³⁰
- *The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS)*, 1996³¹
- *The International Convention on Civil Liability for Bunker Oil Pollution Damage* (Bunker Oil Convention), 2001³²
- *The International Convention on the Removal of Wrecks* (WRC), 2007³³

With the exception of the Athens Convention, dealing with passenger carriage, all of the above can have a greater or lesser impact on the protection of the marine environment. The way in which that is done is not through the imposition of regulatory standards aiming to prevent pollution disasters, but to provide compensation mechanisms to try to eliminate or minimise the consequences of those disasters. The threat of large damage claims may well operate as some form of limit on environmentally risky activity, but from the shipowner's point of view these risks will usually be insured.

It follows that the maritime liability conventions can only really protect the environment from a harm that has already happened, usually by a casualty involving a ship. From an environmentalist's perspective, they will usually be less significant than the regulatory conventions: as they deal with compensation there is not really a punitive element, nor is it likely that that the compensation will ever be enough to remedy all environmental problems. Nevertheless, to states whose waters and coastlines are affected by marine pollution and to industries such as fishing and tourism, these conventions are a vital part of the armoury available to compensate for loss. Enormous technical expertise in handling oil pollution claims has been developed through the mechanisms of the CLC and Fund Convention, in particular, and significant advances have been made in developing pollution compensation law.

A further feature of the IMO work has been the development over nearly 40 years of a set of standard principles, and specific article wordings, which have been taken as 'boilerplate' text from one instrument to the next. Within the complicated and time-restricted dynamics of negotiations for international conventions³⁴ this has had the significant advantage of enabling agreement to be reached more quickly once fundamental principles have been settled. There is no need to spend a lot of time reinventing the wheel, for instance in the drafting of strict liability provisions and defences. In theory, the widespread use of standard text should also help to create more international uniformity of interpretation. The incremental approach to developing compensation conventions has certain parallels with the common law system, but also shares one disadvantage, namely that it becomes harder to advocate radical changes which break with the established pattern of the law.

²⁹ Australia is a party to the LLMC 1996, which is enacted in the *Limitation of Liability for Maritime Claims Act 1989* (Cth). This legislation is directly relevant to bunker claims: see below Part III(E).

³⁰ Australia is a party to the Salvage Convention 1989, which is now contained in the *Navigation Act 1912* (Cth), s 315 and sch 9.

³¹ This Convention is not yet in force, as a result of practical difficulties: see below Part III(A).

³² Australia will ratify this convention: see below Part III(B).

³³ Australia's position on this Convention is not yet finalised.

³⁴ See, N. Gaskell, 'Decision Making and the Legal Committee of the IMO' (2003) 18 *International Journal of Marine and Coastal Law* 155.

C Australia's Need for an Enhanced Marine Pollution Compensation Regime

Australia's special vulnerability to marine pollution is well-known³⁵ and was particularly emphasised in the debates on the 2008 legislation and in the Explanatory Memoranda.³⁶ In fact, Australia appears to have been extraordinarily lucky in that it has avoided the sort of catastrophic pollution disaster with major consequences that has struck other industrialised states. Table 1 shows major oil pollution incidents in Australia.³⁷

Table 1 Major Oil Pollution Incidents in Australia (t = tonnes)

DATE	VESSEL	TYPE	LOCATION	OIL
28/11/1903	Petriana	Tanker	Port Phillip Bay, VIC	1,300 t
03/03/1970	Oceanic Grandeur	Tanker	Torres Strait QLD	1,100 t
26/05/1974	Sygna	Bulk coal carrier	Newcastle, NSW	700 t
14/07/1975	Princess Anne Marie	Tanker	Offshore, WA	14,800 t
10/09/1979	World Encouragement	Tanker	Botany Bay NSW	95 t
29/10/1981	Anro Asia	Container	Bribie Island QLD	100 t
22/01/1982	Esso Gippsland	Tanker	Port Stanvac SA	unknown
03/12/1987	Nella Dan	Supply vessel	Macquarie Island	125 t
20/05/1988	Korean Star	Bulk carrier	Cape Cuvier WA	600 t
28/07/1988	Al Qurain	Livestock carrier	Portland VIC	184 t
21/05/1990	Arthur Phillip	Tanker/Bulk carrier	Cape Otway VIC	unknown
14/02/1991	Sanko Harvest	Bulk carrier	Esperance WA	700 t
21/07/1991	Kirki	Tanker	WA	17,280 t
30/08/1992	Era	Tanker	Port Bonython SA	300 t
10/07/1995	Iron Baron	Bulk ore carrier	Hebe Reef TAS	325 t
28/06/1999	Mobil Refinery	Offshore facility	Port Stanvac SA	230 t
26/07/1999	MV Torungen	Tanker	Varanus Island, WA	25 t
03/08/1999	Laura D'Amato	Tanker	Sydney NSW	250 t
18/12/1999	Sylvan Arrow	Chemical/Oil tanker	Wilson's Promontory VIC	<2 t

³⁵ See generally, Michael White, *Australasian Marine Pollution Laws* (2nd ed, 2007); *Ships of Shame: Inquiry into Ship Safety* – Report from the House of Representatives Standing Committee on Transport, Communications and Infrastructure, December, 1992.

³⁶ See, Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2008, 7 – 34; Explanatory Memorandum, *Protection of the Sea Legislation Amendment Bill 2008* (Cth).

³⁷ This table is based on that published by the Australian Maritime Safety Authority (AMSA) *Major Oil Spills in Australia* (2008) <http://www.amsa.gov.au/Marine_Environment_Protection/Major_Oil_Spills_in_Australia/> at 17 July 2008, updated 17 August 2008. For the practical difficulties faced by AMSA, see R Lipscombe, 'Australia's Tyranny of Distance in Oil Spill Response' (2000) 6 *Spill Science and Technology Bulletin* 13. For statistics on oil pollution disasters, see eg, the IOPC Fund *Annual Report 2007*, above n 3, Annex XXII, XXIII, and below Part III(A) for bunker pollution.

02/09/2001	Pax Phoenix	Bulk carrier	Holbourne Island, QLD	<1000 L
25/12/2002	Pacific Quest	Container	Border Island, QLD	>70 km
24/01/2006	Global Peace	Bulk coal carrier	Gladstone, QLD	25 t

It is not necessary to analyse here each of these incidents, but the four largest spills have involved oil tankers, the *Kirki*, the *Princess Anne Marie*, the *Petriana* and the *Oceanic Grandeur*. The *Kirki* was the largest of these, and lost 17,280 tonnes of a total cargo of 82,650 tonnes.³⁸ Other incidents involved oil tankers, but the spillages were relatively small, either because there was relatively minor damage to the ship,³⁹ or because there were minor operational spillages, whether deliberate⁴⁰ or careless.⁴¹

By comparison with disasters elsewhere in the world, such as the *Braer*, the *Erika* and the *Prestige*,⁴² the amount of oil lost in each of these oil tanker incidents is relatively small; still, even small amounts of oil can be expensive to clean up⁴³ or can cause disproportionate damage in particularly sensitive areas. The key point about these oil tanker spills is that compensation would today be covered by the

CLC 1992 and Fund Convention 1992 as enacted in Australia.⁴⁴ The Supplementary

³⁸ The *Kirki* also had on board 1,800 tonnes of heavy fuel oil bunkers, 200 tonnes of gas oil, 100 tonnes of marine diesel and 35 tonnes of lubricating oil. The *Princess Anne Marie* sustained hull damage resulting in a loss of 14,800 tonnes out of a total oil cargo of 62,800 tonnes. The *Oceanic Grandeur* lost 1,100 tonnes of a total of 55,000 tonnes. The *Petriana* was a tiny tanker, (1,821 gt), and her total cargo was deliberately off-loaded when she went aground. Where possible, all references in this article to ships' gross tonnages have been checked with Equasis records. See, Equasis <www.equasis.org> at 18 August 2008.

³⁹ The *Era* was an oil tanker (apparently of 18,000 gt) and the spill was from bunker tanks ruptured by the bow of a tug during berthing.

⁴⁰ The *Arthur Phillip* was a tanker which discharged an oil/water mixture.

⁴¹ The *Laura D'Amato*, a 54,962 gt crude oil tanker, lost 250 to 300 tonnes of cargo through an open sea valve system while discharging. Similarly, the oil tanker *Esso Gippsland* lost fuel oil cargo while loading. The *Sylvan Arrow* was a 22,587 gt chemical/oil products tanker which discharged an oily water mixture owing to an operational equipment failure. There was no casualty as such and no environmental damage. See, AMSA, *Major Oil Spills in Australia* <http://www.amsa.gov.au/marine_environment_protection/major_oil_spills_in_australia/Sylvan_Arrow/index.asp> at 17 August 2008.

⁴² For further information about these and similar disasters, see, IOPC, <<http://www.iopcfund.org>>, and Annual Reports, in particular the, 2007 Report, above n 3. Annex XXII gives a list of all major incidents under the Funds. See also, the International Tanker Owners Pollution Federation Ltd (ITOPF) <<http://www.itopf.com>> at 11 August 2008 for detailed worldwide statistics of the number and amounts of oil spills, and information on causes.

⁴³ The *World Encouragement* was an oil tanker that lost oil cargo from a rupture to the hull. The Supreme Court of NSW awarded the Maritime Services Board A\$209,557 under the *Prevention of Oil Pollution in Navigable Waters Act 1960* (NSW), as amended, which created civil liabilities prior to the enactment of the CLC 1969 by Australia: see, *Maritime Services Board of New South Wales v Posiden Navigation Incorporated* [1982] 1 NSWLR 72. In the *Sylvan Arrow* there was a criminal prosecution under s 9 of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*, as with many of the reported incidents, but the fine of A\$100,000 and investigation costs of \$26,555.59 would be relatively insignificant in relation to the potential clean-up costs, or, where relevant, the costs of salvage.

⁴⁴ See below Part I(D).

Fund Protocol 2003 is directed to those oil tanker cases which might have catastrophic consequences.⁴⁵

Of the other incidents listed in the table, it is significant that all (bar two⁴⁶) involved bunker pollution from non-tankers, usually bulk carriers. It is these incidents that are not covered by the CLC 1992 or Fund Convention 1992, and for which the Bunker Oil Convention is designed.⁴⁷ The loss of bunkers was usually the result of grounding,⁴⁸ or similar incidents,⁴⁹ but there are also examples of operational discharges, usually the result of illegal tank cleaning.⁵⁰

A typical example is the *Iron Baron*, a 21,975 gt bulk ore carrier, which grounded in 1995 with the loss of 325 tonnes of bunker fuel oil. There was considerable environmental damage.⁵¹ The ship was owned by a Panamanian company, but on a 5 year demise charter to BHP Transport Pty.⁵² Like the *Erika* disaster in France,⁵³ there are certain advantages to claimants if there is a local connection and BHP apparently committed itself to pay clean-up and research, the

⁴⁵ See below Part II.

⁴⁶ The *Torungen* was a 52,525 gt crude oil tanker moored at an offshore loading facility, but while raising the loading hose from the seabed a subsea valve was damaged, causing a hole in the pipeline, resulting in a spill from the subsea pipeline (not the ship). There was no recordable environmental damage. The *Mobil Refinery* incident did not involve a ship, but a leak from an offshore loading connection. These would not have been covered under the CLC and Fund Convention as the oil did not escape from a ship, although there may, for instance, have been liability in tort (and cf *Caltex v. Dredge Willemstad* (1976) 136 CLR 529), or possibly under the *Protection of the Sea (Civil Liability) Act 1981* (Cth) (see below Part III(D)(1)).

⁴⁷ See below Part III for how these incidents would have been resolved under the Convention.

⁴⁸ The *Korean Star* was a bulk carrier that went aground and lost bunkers. The *Nella Dan* was a supply vessel which went aground and lost 120t of diesel and 5t of lube oil. The *Anro Asia* was a container ship that lost 100 (of 1000) tonnes of bunkers when it went aground. The *Syyna* was a bulk coal carrier which went aground losing about 700 tonnes (from a total of 2,136 tonnes of bunker oil and 163 tonnes of diesel oil). The *Sanko Harvest* was a bulk carrier that struck a reef and lost 700 tonnes of bunkers, and see, Australian Transport Safety Bureau (ATSB) *Investigation Report* No. 27, 1991.

⁴⁹ The *Al Qurain* was a livestock carrier which struck a wharf and lost bunkers. The *Global Peace* was a bulk coal carrier which lost heavy fuel oil after a tug collided with it. This was Queensland's worst oil spill in 30 years. See, Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2008, 10 (Mr Trevor).

⁵⁰ The *Pacific Quest* was a 31,403gt container ship and the slick was of fuel oil (there was a negligent or deliberate operational discharge of an oily mixture). The *Pax Phoenix* was a 28,021gt bulk carrier where again there was an operational discharge of an oily fuel mixture.

⁵¹ See, AMSA, *The Response to the Iron Baron Iron Spill* (2005), <http://www.amsa.gov.au/Marine_Environment_Protection/National_Plan/Incident_and_Exercise_Reports/Iron_Baron_Spill/index.asp> at 11 August 2008, for the Report of the *Iron Baron* Review Group, 21 December 1995. See also, Environment Tasmania, *Oil Spill Environmental Impacts Report*, <http://www.environment.tas.gov.au/em_epps_iron_baron_oil_spill_environmental_impacts_report.html> at 11 August 2008.

⁵² See, ATSB Investigation, <http://www.atsb.gov.au/publications/investigation_reports/1995/MAIR/pdf/mair83_001.pdf> at 11 August 2008.

⁵³ Where the French group Total was involved as seller and voyage charterer.

total costs of which were estimated at one stage as A\$30 million.⁵⁴ The ship was evidently a constructive total loss and was eventually dumped. In the ordinary case of such a ship owned by a single ship company, there may be great difficulties in finding a solvent defendant as its only asset no longer exists.⁵⁵

There have also been instances of what might be described as 'near-misses' in Australian waters, where there were casualties, but no bunker pollution.⁵⁶ The *Peacock* was a refrigerated container ship which went aground in 1996 on Piper Reef with 600 tonnes of bunkers. No oil was spilled but response costs were some A\$600,000.⁵⁷ Similarly, in January 2006, the oil tanker *Desh Rakshak*, owned by the Shipping Corporation of India, was holed while entering the heads of Port Phillip Bay inbound for Geelong. Fortunately only a ballast tank, rather than the cargo tanks or bunkers was holed and no pollution resulted.⁵⁸ Perhaps the most notable near-miss was the grounding on 8 June 2007 of the *Pasha Bulker* in a gale off Newcastle, New South Wales. She was a 40,042 gt bulk coal carrier in ballast. The official report into the safety aspects of the incident⁵⁹ does not give details of any environmental threat, but contemporary reports indicated that she had on board 700 tonnes of fuel oil, 38 tonnes of diesel and 40 tonnes of lube oil.⁶⁰ None of the reports indicate that there were any oil spills, as there was no significant breach of the ship's inner hull, but the point is that there could easily have been a spill of bunker fuel.⁶¹

The source of an oil spill cannot always be identified. For example, an oil spill measuring seven nautical miles long by 200 metres wide was reported about seven nautical miles off Cape Otway lighthouse, Victoria. AMSA sprayed approximately

⁵⁴ See, SOE case study, <<http://soer.justice.tas.gov.au/2003/casestudy/a2/index.php>> at 11 August 2008. For Australian liability provisions introduced to deal with such casualties, see below Part III(D).

⁵⁵ Claimants would be forced to try to track any proceeds of the hull insurance.

⁵⁶ For example, on 2 November 2000, the *Bunga Teratai Satu* ran aground on the Great Barrier Reef, while carrying more than 1,300 tonnes of fuel, oil and hazardous chemicals (see ATSB Investigation Report No. 162, 2001,1). No oil escaped, although there was 'mechanical' (physical) damage to the reef and some possible effects of the ship's anti-fouling paint. See Peter Glover, 'Marine Casualties in the Great Barrier Reef: 'Peacock', 'Bunga Teratai Satu' and 'Doric Chariot' (2004) 18 *Maritime Law Association of Australia and New Zealand Journal* 55.

⁵⁷ Ibid. Lipscombe, above n 37. See also below Part III(D), for Australia's legislative response to this threat.

⁵⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2008, 14 (Mr Dreyfus).

⁵⁹ For details of the incident, see, ATSB Investigation Report No. 243, May 2008.

⁶⁰ See, Lloyd's List reports from 8 June 2007-20 July 2007 (in Fortunes De Mer: Maritime Law <<http://fortunes-de-mer.com>> at 11 August 2008); a round figure of 800t was given in the charterer's press release of 8 June 2008 (see, Lauritzen Bulkers <<http://lauritzenbulkers.com>> at 1 July 2008).

⁶¹ ATSB Investigation Report No. 243,1. The exact identity and status of those operating a ship is obviously important in order to target the correct defendants, and may not always be easy to discover given the complexities of ship ownership and registration. For example, at the time of her grounding, the *Pasha Bulker* was owned by Wealth Line, Panama (where it was registered), was on a long-term charter to Lauritzen Bulkers, flew the Danish flag and was managed and operated by Fukujin Kisen Company, Japan. Cf. the Lauritzen website, above n 60, which declared that the ship was owned by Fukujin Kisen Co and that Lauritzen had sub-chartered her to another Japanese company. It would not be unusual for Wealth Line to be a single ship company, all of whose shares were owned by, eg, Fukujin Kisen Co. It is the latter which is described as the Ship Manager in the official Equasis website at the time of the incident (and also after the ship was renamed 'Drake' after the refloating): see Equasis, above n 38.

800 litres of dispersant over the slick. While an oil tanker registered in the Bahamas was sighted in the vicinity, the source of the spill was not definitively identified.⁶²

D Existing compensation regime for oil tanker pollution

The CLC 1969 and the Fund Convention 1971 introduced a composite regime with a number of key features. Those features were retained when the CLC and Fund Convention were revised in 1992 and it is the CLC and Fund 1992 which are currently in force in Australia. It is only necessary here to provide an introduction to the CLC and Fund 1992 scheme so that the context for the 2008 legislation can be better understood.⁶³ As already noted the CLC and Fund 1992 have provided the model for subsequent maritime liability conventions designed to compensate for environmental damage. They have been enormously successful, with the CLC 1992 having 120 Contracting States (with 93.66% of world tanker tonnage) and the Fund Convention 1992 having 102 Contracting States (with 96.31% of world tanker tonnage).⁶⁴

The key feature of the CLC and Fund system is that it provides a degree of financial security to potential claimants, thereby avoiding the problem of the single ship company with no assets.⁶⁵ The security is achieved in the CLC by requiring the registered shipowner to carry insurance (or its equivalent) for liabilities created by the CLC. Moreover, there is the possibility of direct action by the claimant against the insurer, who can only rely on limited defences, including the wilful misconduct of the shipowner assured, but not insolvency or other policy conditions. The express CLC direct action provision is particularly important where the shipowner is insolvent as although states might have national direct action provisions⁶⁶ these may have limitations,⁶⁷ or may be difficult to enforce against a foreign insurer (even if the existence of a policy could be detected). States enforce the CLC requirements through a compulsory insurance certificate which ships need to leave or enter ports in contracting states. This has been very effective. An additional element of financial security is provided by the fact that the CLC 1992 is designed to operate in tandem with the Fund Convention 1992.⁶⁸ CLC liabilities are limited to a first tier of liability, while the International Oil Pollution Compensation (IOPC) Fund becomes

⁶² Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2008, 26 (Mr Cheeseman).

⁶³ Extensive treatment can be found in White, above n 35, 58-68; Edgar Gold, 'Liability and Compensation for Ship-Source Marine Pollution: The International System', in Helge Ole Bergeisen, Georg Parmann, and Øystein B. Thommessen (eds.), *Yearbook of International Co-operation on Environment and Development* (1999), 31-37; Colin M De la Rue, *Shipping and the Environment: Law and Practice* (1998) and IOPC <<http://www.iopcfund.org>>. See also, Nicholas Gaskell, 'Developments in International Maritime Law' (1998) 28 *Environmental Policy and Law* 165-170, for an earlier version of part of the overview given here.

⁶⁴ IMO above, n 13. As at 20 May 2008, there were still 38 states party to the CLC 1969. The 1971 Fund ceased to operate on 24 May 2002, although it still has certain run off obligations.

⁶⁵ The *Torrey Canyon* problem, and see discussion on the *Iron Baron*, above Part I(C).

⁶⁶ In Australia, see, *Insurance Contracts Act* 1984 (Cth), s 54.

⁶⁷ See eg, UK *Third Party Rights Against Insurers Act* 1930 and *The Fanti and The Padre Island* [1991] 2 AC 1 where the House of Lords upheld a 'pay to be paid' clause in a P & I Club cover. See also, *Law Commission Report* No 272 (2001).

⁶⁸ Although states are not *required* to be party to both. China, for instance, is party to the CLC 1992, but only applies the Fund Convention 1992 to Hong Kong.

involved to a higher second (but aggregated) tier of liability where there are major incidents. The limits under the original 1969 and 1971 Conventions are set out below, along with those under the CLC 1992 and Fund Convention 1992, up until 2003.⁶⁹

Table 2: CLC and Fund Limits up to 2003

<u>1969 CLC Shipowner Limits</u>
133 sdr ⁷⁰ [about A\$236] per ton of ship's tonnage; up to a maximum 14 million sdr [about A\$25 million]
<u>1971 Fund Convention Limits</u>
Maximum [1971] 30 million sdr [about A\$53 million] Maximum [from 1987] 60 million sdr [about A\$107 million]
<u>1992 CLC Shipowner Limits</u>
Minimum shipowner liability 3 million sdr [about A\$5.3 million] then 420 sdr per ton of ship's tonnage [about A\$747]
Maximum: 59.7 million sdr [about A\$106 million]
<u>1992 Fund Convention Limits</u>
Maximum: 135 million sdr [about A\$240 million]

The CLC 1992 provides for the strict liability of a registered shipowner for oil pollution damage⁷¹ with some restricted defences.⁷² The owner is entitled to limit his liability according to the size of its ship (e.g. to A\$106 million, above).⁷³ Liability is channelled to the shipowner alone, who is not liable outside the Convention, for example, at common law. Other persons, such as employees, pilots and salvors are specifically exempted from liability.⁷⁴ The basis of liability of the Fund is the same as that for the CLC, i.e. strict liability, but apart from providing an additional tier of

⁶⁹ For later increases in limits see Table 3, below Part II(A).

⁷⁰ The sdr is the special drawing right of the IMF. All figures in this article have taken a random conversion date of 14 January 2008, where the conversion rate was 1 sdr =A\$1.7776: see, International Monetary Fund (IMF), *SDR Valuation* <http://www.imf.org/external/np/fin/data/rms_sdrv.aspx> at 14 January 2008. Note that the rates will change daily. When originally enacted, the 1969 and 1971 Conventions were expressed in terms of gold francs: the sdr figures above are those which were inserted by the CLC and Fund Protocols of 1976.

⁷¹ This is a restricted definition, see further below Part III(C)(1).

⁷² See below Part III(C)(4).

⁷³ This limit is separate to, and higher than, that allowed under the general maritime law, see eg, *Limitation of Liability for Maritime Claims Act 1989* (Cth): see below Part III(E).

⁷⁴ This has not stopped attempts by claimants to avoid the channelling provisions, eg, by suing in non-state parties such as the US (see eg, The *Amoco Cadiz* litigation [1984] 2 Lloyd's Rep. 304), or persons not specifically listed in the exempted list, such as a classification society (see eg, one part of the *Prestige* litigation, *Reino de Espana v. American Bureau of Shipping* [2008] AMC 83).

liability (e.g. aggregated to A\$240 million, above), there are circumstances where the Fund may have liability for all of a claim, for example, where the shipowner has a CLC defence, or is insolvent. In these cases the Fund's liability does not start at a second tier level, but may come down to the first dollar of liability. This is a very significant additional protection provided by the Fund.

The CLC creates a regime of liability in respect of the ship that was actually involved in the spillage and that liability, in practice, is covered and handled by the normal liability insurers (usually a member of the International Group of P & I Clubs).⁷⁵ The second tier liability created by the Fund Convention 1992 is different in character. The defendant is a separate body with legal personality, the IOPC Fund 1992. The Fund is contributed to by large oil importers in State Parties. This represents part of an international compromise, in that it is the shipowners who contribute to the first tier and the oil cargo interests who contribute to the second tier. Note that it is not the individual owners of cargo on the particular ship that contribute, but oil importers in *all* States Party to the Fund Convention 1992. Payments made by the IOPC Fund will be financed through what is in effect an after the event levy paid by companies (not states), in the proportion to which their oil imports bear to the total imports of the global membership of the Fund system.⁷⁶ In practice, this means that states in the developed world, which are the major importers of oil, pay for the pollution caused by the transport of oil to their industries.⁷⁷ Unfortunately the largest importer, the US, is not party to this scheme of international co-operation,⁷⁸ nor is China (although it is party to the CLC).

The Fund has its own secretariat which processes claims. Contrary to expectations at the time of the creation of the 1971 Fund, the Fund works very closely with the P & I Clubs who insure the first tier.⁷⁹ By comparison with the ordinary tort system, claims can be paid relatively quickly after incidents⁸⁰ and local

⁷⁵ See, International Group of P & I Clubs <<http://www.igpandi.org/>> at 17 July 2008.

⁷⁶ A potential weakness of the system is that it depends on the administrative honesty and efficiency of states to report fully on oil imports so that contributions can be raised. The oil market is such that it is difficult to 'hide' large imports, but there has been consistent non-reporting from a number of states. In practice, this is probably not hugely significant, as these are mostly small or failing states, or those where the imports are likely to be very low in any event (and see *Annual Report 2007*, above n 3, 164).

⁷⁷ These contributions are mainly from a relatively small number of states. The IOPC Funds *Annual Reports* for 2007 and 2006 show the following contributions by national importers as percentages of the total (2006 in brackets): Japan 17.38% (18.27%), Italy 9.39% (9.81%), Republic of Korea 8.44% (8.32%), India 8.54 (7.52%), Netherlands 7.08% (7.49%), France 6.85% (7.17%), U.K. 4.91% (3.82%), and Australia 1.96% (2.33%). By contrast the *Annual Report 1997* had a similar order of states, with the exception of India, as the only major contributor from the developing world, which then came in at 3.61%.

⁷⁸ It has its own system in the *Oil Pollution Act 1990* (101 H.R. 1465, P.L. 101-380).

⁷⁹ Even so, there is a potential trap for victims (or their lawyers), in that there is a time bar, usually three years, under the CLC and Fund Convention 1992; and it is not sufficient, to stop time running against the IOPC Fund, for claims to be brought against the shipowner under the CLC. The Fund must be formally notified.

⁸⁰ Cf. the 2008 US Supreme Court decision on the *Exxon Valdez* disaster, *Exxon Shipping Co. v. Baker* 128 S.Ct. 2605 (2008), 21 years after the incident. But the result in US law was that Exxon spent US\$2.1 billion in clean up, settled a civil action to the US and Alaska of US\$900 million, paid another US\$303 million to private parties, and was made to pay punitive damages of some \$507.5 million.

claims offices have been regularly established. Claims handling is assisted by a clear code of jurisdictional cooperation where claims occur in more than one State Party.

Although legal disputes under the conventions fall for decision by the courts of State Parties, the Executive Committee of the Fund⁸¹ has, in effect, developed a body of precedent as to the type of claims that are 'admissible',⁸² i.e. which it will pay in principle if quantum is proved. The practice of the IOPC Fund has consistently been to make payments to economic loss claimants in certain defined circumstances, for example, where the claimant's business is closely related to the activities of the sea or coastline, such as through tourist hotels or fishing. In this sense, the Fund is achieving the aims of the governments which established it, namely to pay claims not to resist them. Where the Fund has opposed claims in principle, it has usually been upheld by national courts.⁸³

II SUPPLEMENTARY FUND PROTOCOL 2003

A *Need for Supplementary Fund*

When the CLC 1969 and Fund Convention 1971 were agreed, the parties assumed that the limits of liability then settled⁸⁴ would be sufficient to cover disasters like the *Torrey Canyon* of 1967. History has shown that the limits have become out of date very quickly. There are a number of reasons for this. Inflation has been higher than expected, but it is the size and expense of incidents that is the biggest factor. It seems as if each major disaster has provided evidence that the

⁸¹ The Executive Committee (and to some extent the Assembly) resembles both a tribunal and the board of an insurance company. It is not a court in any formal sense, although in practice it takes decisions (very often, final) on claims presented by pollution victims. The Executive Committee is like the board of directors of a P & I Club because it may decide which claims will be paid, knowing that its decisions will have a financial impact upon its own interests (in the Fund's case, its member states' own oil importers). The crucial distinction from an insurance company is that the Fund was established by states in order to *pay* claims, rather than to avoid payments where possible. It is a victims', not a defendants', Convention (see Gaskell, above n 63, 165).

⁸² The Fund practice was effectively codified in 1994, see the *IOPC Annual Report 2007*, 48 and the 1992 Fund Claims Manual (at <<http://www.iopcfund.org/publications.htm>> at 11 August 2008). Although not legally binding, this Manual is an extremely authoritative document, being based on decisions of the IOPC Executive approved by the Assembly. Costs of preventive measures are assessed on objective grounds, and do not include social or political reasons (eg, where a Government feels bound to take measures to meet media and public concern, but which are not justified on grounds of reasonableness). See also below Part III(C)(5).

⁸³ See eg. *Landcatch v IOPC Fund* [1999] 2 Lloyd's Rep. 316, *P & O . Braer* [1999] 2 Lloyd's Rep. 534 (the *Braer* case in Scotland); *Alglete Shipping Co Inc v IOPC Fund* [2003] 1 Lloyd's Rep. 123 (the *Sea Empress* case in Wales), where the underlying reasoning of the courts was probably more restrictive than the normal principles applied by the Fund in relation to economic claims (for which see *IOPC Annual Report 2007*, above n 3, 83-84). It is arguable that Australian tort law is closer to the Fund practice than that of English law (see, Martin Davies and Anthony Dickey, *Shipping Law* (3rd ed, 2004) 581). It is submitted that courts ought to have regard to the principles applied by the Fund in interpreting the Convention, particularly as an example of developing international practice.

⁸⁴ See Table 2, above.

existing limits are not high enough; but when the limits are eventually increased, a further disaster shows that the new limits are also inadequate.⁸⁵

It may well be that the level of limits set at any conference, as part of a political compromise, will always be conservatively low, but there is another factor at play – a form of ‘claims creep’. As the IOPC Fund reacts to each disaster, slowly expanding the list of admissible claims, it seems that there is a corresponding increase in expectations, and new types of claim emerge. The most significant factor has been an increase in the level of economic loss claims, by comparison with pure environmental claims (for example, for clean up or restoration). What has happened is that a convention system established ostensibly for environmental reasons has been submerged by a tidal wave of claims by economic interests, for example, relating to tourism, fishing and aquaculture. The size and type of claims received seems to grow immediately after each disaster such as the *Braer*, *Erika* and *Prestige*. This has had a number of consequences which were largely unforeseen in 1984-1992 when the present CLC and Fund 1992 system was created. First, the *Braer* showed that a single industry (salmon farming) could itself create losses and claims that exceeded the then limits. Secondly, the *Erika* and *Prestige* showed that pollution over several hundred kilometres of coastline could have widespread effects on an entire tourist industry (e.g. on the west coast of France). Thirdly, within a short time of such disaster, the claims received (and apparently admissible) tended to exceed the available limits. The Fund would then be obliged to stop paying claims in full, and to make pro rata payments until the total claims picture could be clarified. In practice this would only become clear when the three year time bar expired.

This pro rating was naturally extremely unpopular, but also led to two further consequences. One was that Governments felt reluctant, for national political reasons, to submit their own clean-up claims if the effect would be to use up the available funds and diminish the total pot. The UK Government, with *Braer*, and the French Government with *Erika*, actually agreed to postpone their own claims within the limitation funds, i.e. to put themselves at the end of a list of citizen claimants.⁸⁶ The irony here is that the very clean-up claims for which the CLC 1969 and Fund 1971 were established are now being left to the end of the queue or unpaid. The other consequence was that many perfectly genuine claims were being delayed or reduced because other claimants were making wild or unrealistic economic loss claims. There will always be exaggerated claims,⁸⁷ but there seems to be a wider social phenomenon in play. It is an expectation that Governments will arrange for citizens to be compensated economically for any misfortune that affects them, not only oil pollution disasters, but natural disasters such as floods or cyclones,⁸⁸ as well as economic disasters such as banking collapses. The broader question is how far

⁸⁵ The increases in limits indicated in Table 2 above, and Table 3 below, can usually be traced back to a particular incident. Thus, the *Amoco Cadiz* sinking in 1978 showed that the original 1969/1971 limits were inadequate and that led to increases in 1984 Protocols to the CLC and Fund. Those Protocols never entered into force, mainly because of the unexpected refusal of the US to ratify after *Exxon Valdez*; but the same figures from 1984 were used in the 1992 Protocols, which were in substance identical.

⁸⁶ See IOPC Fund *Annual Report 2007*, above n 3, 48.

⁸⁷ The Fund insists on objective documentary evidence and has much experience when claims for fishing losses diminish once evidence is required of average earnings from previous tax returns.

⁸⁸ In Australia this might be seen in the calls for assistance after the Queensland floods in 2008.

such expectations can be met, in particular by a compensation system such as that in the CLC and Fund where there can be liability without fault.

It is generally accepted that unlimited liability of a shipowner is not achievable, either politically (shipowner states would oppose it), or economically (insurance or re-insurance cover might not be obtainable);⁸⁹ and states like Japan which provide the largest contribution to the Fund are not going to agree to unlimited Fund liability as this would be in effect an open ended tax on their oil importers. States such as France and the UK which have been victims of big incidents have therefore been obliged to press for increases in limits of liability. The figures in Table 3 below show how the limits have been increased from 2003. It would have been possible to keep increasing the CLC/Fund 1992 limits indefinitely, but there is another factor at play. States in the developing world did not see why they should pay (through extra Fund contributions) for the particularly high costs of remedying spills in the developed world. The existing limits might be perfectly adequate for compensation in the developing states, especially where labour is cheap.

The CLC and Fund 1992 have their own mechanism for increasing limits without the need for a new Protocol.⁹⁰ Following the *Erika* disaster in 1999, the IMO Legal Committee agreed in 2000 to increase the CLC and Fund limits, as from 2003, to those set out below.

Table 3: CLC and Fund Limits from 2003⁹¹

<u>1992 Liability Convention Shipowner Limits [from 2003]</u>
Minimum shipowner liability: 4.51 million sdr [about A\$8 million]
then 631 sdr [about A\$1122] per ton of ship's tonnage up to
Maximum: 89.77 million sdr [about A\$160 million]
<u>1992 Fund Convention Limits [from 2003]</u>
Maximum: 203 million sdr [about A\$361 million]

Meanwhile, there were extensive debates about whether a more radical reform was necessary or possible. France pressed for EU action after the sinking of the *Erika* and the *Prestige*. There were proposals within the EU in 2000 for a new regime, known as COPE (Compensation Fund for Oil Pollution in European Waters), with a quite different liability regime from that in the CLC/Fund.⁹²

In April 2000 the IOPC Fund established a Working Group to reconsider the adequacy of the CLC and Fund regime. Amongst the proposals were short term revisions (including the possibility of a new third tier Fund) and longer term revisions, which might involve major amendments to the CLC/Fund 1992 texts. The Supplementary Fund Protocol 2003 was the first stage of that reform process and was recognised to be a short to medium term solution to the relatively low overall

⁸⁹ In theory, the ship owner's CLC limits could be broken if there were deliberate or reckless conduct (see Art V(2) CLC 1992), but if there is wilful misconduct this may remove the insurance cover (see below Part III (E)(2) and Part III (C)(9)).

⁹⁰ See eg, art 15 of the CLC Protocol 1992.

⁹¹ Amendments adopted 18 November 2000, to have effect from 1 November 2003.

⁹² This might have had different definitions and liability rules than those in the CLC/Fund, with limits possibly set at €1 billion (but much more easily breakable).

limits available under the CLC/Fund (at least as perceived by some states, such as France).⁹³

B Supplementary Fund Protocol Provisions

The Supplementary Fund Protocol 2003 is a very short Protocol to the 1992 Fund Convention. Its title accurately describes its purpose, namely to *supplement* the Fund Convention 1992. It provides a third tier fund, contributed to by oil receivers only. 1992 Fund states can choose to join the Supplementary Fund, or do nothing and stay with the 1992 Fund alone. The Supplementary Fund provides an increase in limits to a compromise figure, close to the €1 billion proposed within the EU. The new third tier limit (i.e. aggregated with CLC and Fund 1992 limits of 203 million sdr) is set out in Table 4, below.⁹⁴

Table 4: Supplementary Fund 2003 limits

<u>Supplementary Fund Protocol 2003</u>
Maximum: 750 million sdr [about A\$1.3 billion]

The Supplementary Fund Protocol entered into force on 3 March 2005. As at 31 October 2008 there were 21 States Party to the Protocol. With the exception of Japan and Barbados, these states were from the EU.⁹⁵ It remains to be seen whether the limits of liability are sufficient, or whether they will yet again be tested by a major disaster with large economic consequences. The burden of such a disaster will obviously fall on a smaller number of participants,⁹⁶ but that is the price they are prepared to pay – almost as a form of insurance against a big disaster. The advantage for such states will be that if there is a big disaster, it is likely that most admissible claims will be paid in full from the start, thereby avoiding unpopular pro-rating.

The Supplementary Fund has its own administrative organs, e.g. an Assembly composed of all States Parties to the Protocol, and this met first in October 2005. In practice, although legally separate from the 1992 Fund, the Supplementary Fund is administered jointly by the same Director and secretariat as the IOPC Fund 1992. There have been no claims against the Supplementary Fund since its creation, although levies have already been taken to cover advance administrative expenses.

C Protection of the Sea Legislation Amendment Act 2008

The 1992 Fund is implemented in Australia by the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth) (OPCF Act).⁹⁷ It gives effect to the

⁹³ See 92FUND/A.6/4, 10 August 2001, 92FUND/A.6/4/1 14 September 2001, *Annual Report 2003*, 32.

⁹⁴ Conversion of 1 sdr =A\$1.7776, as at 14 January 2008: see above n 70.

⁹⁵ While Australia has not yet ratified the Convention, it is anticipated that this will occur in early 2009. Marine Order 16/2008, 3 September 2008.

⁹⁶ In the latest year for which contribution statistics are available (2005), the percentages of contributing oil were: Japan 28.91%, Italy 15.63%, Netherlands 11.77%, France 11.39%, UK 7.9% and Barbados 0.03%. These figures can be compared with those under the 1992 Fund (see above Part I(D) and n 77).

⁹⁷ For an introduction, see, Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2008, 7 (Mr Thomson) and Davies and Dickey, above n 83, 590-5.

compensation regime, including the requirements that oil importers keep records of relevant cargo receipts and make corresponding contributions to the Fund. The *Protection of the Sea Legislation Amendment Act 2008* (Cth) (2008 Amendment Act) amends, amongst a number of instruments, the OPCF Act, giving effect to the Supplementary Fund Protocol, paving the way for Australia to become a party.⁹⁸ Recognising that two funds will thereafter exist, the amendments to the legislation includes a change in its title, altering the term 'Fund' to its plural so as to read *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (Cth).⁹⁹

The Supplementary Fund Protocol is incorporated into the OPCF Act, via the amendments made in the 2008 Amendment Act, as directly as possible without actually incorporating the Protocol itself, or including it as a Schedule or Annex.¹⁰⁰ Thus, while some sections provide that certain provisions of the Supplementary Fund Protocol will have the force of law in Australia,¹⁰¹ others incorporate the relevant sections of the Protocol as amended and appropriate for Australia, found generally throughout a new Chapter 3A of the OPCF Act.¹⁰²

Importantly, s 46A provides that the 'purpose of the Supplementary Fund is to provide compensation to a person who has established a claim for compensation for certain oil pollution damage and who has not been able to obtain full and adequate compensation for the claim from the 1992 Fund, because the damage does or may exceed the compensation limits for that Fund.' This compensation regime is then largely incorporated directly into the OPCF Act,¹⁰³ with only some adjustment to allow for cross vesting of jurisdiction between Federal and State and Territory Supreme Courts.¹⁰⁴

In the same manner as the 1992 Fund system, the Supplementary Fund 2003 requires two types of national administrative action. First, there is a need to ensure that the appropriate oil importers contribute to the Supplementary Fund when required. Secondly, for those importers to be sent bills, the state has an obligation to collect statistics in order to report to the Fund which contributors have imported more than 150,000 tonnes of oil in the appropriate period.

The first of these objectives is dealt with in the new Part 3A.5, Division 1 of the OPCF Act. Because s 55 of the Australian Constitution provides that laws imposing taxation must deal only with taxation, that part of the Fund 1992 dealing with financial contributions (in effect levies or taxes) is not dealt with directly in the

⁹⁸ The 2008 Amendment Act addresses a number of other protection of the sea issues; that is, to amend the OPCF Act to give effect to MARPOL amendments (schedule 2), and to amend a range of acts that address shipping and marine navigation levies (schedule 3). The amendment of the OPCF Act is to take effect on the day the Convention comes into force for Australia. The Minister must announce this date by notice in the *Gazette*. 2008 Amendment Act, s 2.

⁹⁹ The original, and singular, title will be used throughout this article.

¹⁰⁰ 2008 Amendment Act Sch 1, s 17 refers to the Australian Treaty Series which contains the protocol itself: see Australian Treaty Series [2005] ATNIF 21.

¹⁰¹ *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth), s 46E (as inserted by *Protection of the Sea Legislation Amendment Act 2008* (Cth), Sch 1).

¹⁰² The UK enacted the CLC and Fund Conventions in the worst way, namely by redrafting the carefully weighed convention language into the straight-jacket of parliamentary drafting; this has made the UK provisions difficult to follow, by comparison with the simple order of the original. See generally N. Gaskell, 'The Interpretation of Maritime Conventions at Common Law', in J. P. Gardner (ed.), *United Kingdom Law in the 1990s* (1990) 218, 220.

¹⁰³ OPCF Act s 46E.

¹⁰⁴ OPCF Act ss 46F and H.

OPFC Act,¹⁰⁵ but in three separate Acts relating exclusively to customs and excise.¹⁰⁶ Nevertheless, it is by way of the amendment to the OPCF Act that s 10 of the Supplementary Fund Protocol, which deals with the liability to make contributions to the Supplementary Fund, is incorporated by reference to the extent that it applies to ports and installations in Australia.¹⁰⁷ Since the liability to make a contribution to the Supplementary Fund is imposed on persons in receipt of more than 150,000 tonnes of oil, the risk arises that entities will dissociate themselves in order to disaggregate the amount of oil imported. The solution provided in art 10 of the Protocol is to determine this threshold import quantity by reference to an aggregated quantity received by any 'associated person', which is defined to mean 'any subsidiary or commonly controlled person', though this is to be determined by reference to the national law of the State Party. Importantly, this, the amendment to the OPCF Act directs, is to be by reference to s 50 of the *Corporations Act 2001* (Cth).¹⁰⁸ As to the method of calculating the contributions to be made to the Supplementary Fund, the legislation merely incorporates directly art 11 of the Protocol as applicable.¹⁰⁹ Contributions, including late payment penalties,¹¹⁰ are to be paid to the Commonwealth; all of which is then payable to the Supplementary Fund.¹¹¹ The Supplementary Fund itself¹¹² may recover contributions and late payments directly, on behalf of the Commonwealth as a debt due to the Commonwealth; though it will not be able to recover any cost or expenses incurred in such an action from the Commonwealth.¹¹³

The second objective is achieved by the new Part 3A.5, Division 3, which enables regulations to be made which impose an obligation on parties to report relevant matters allowing for the determination of liability to make contributions.¹¹⁴ AMSA will be the designated authority for the purposes of collecting this information, as already occurs in respect of the existing Fund contributions.¹¹⁵ An offence of strict liability is imposed for a failure to provide the necessary information, or to provide false or misleading information.¹¹⁶ Strict liability was considered appropriate not only because the importer of oil is to be expected to be fully aware of the requirements of the legislation, including the reporting requirements, but also because of the detrimental consequences of non compliance, including the possible unequal sharing on the burden of costs in the event of an oil

¹⁰⁵ OPCF Act s 46J(2).

¹⁰⁶ See: *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund—Customs) Act 1993* (Cth); *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund—Excise) Act 1993* (Cth); *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund—General) Act 1993* (Cth); explained in Davies and Dickey, above n 83, 555, 591.

¹⁰⁷ OPCF Act s 46J(1).

¹⁰⁸ OPCF Act s 46J(3)(b). The *Corporations Act 2001* (Cth) s 50 provides that where a body corporate is: (a) a holding company for another body corporate; or (b) a subsidiary of another body corporate; or (c) a subsidiary of a holding company or another body corporate; the first mentioned body and the other body are related to each other'.

¹⁰⁹ OPCF Act s 46K.

¹¹⁰ OPCF Act s 46M.

¹¹¹ OPCF Act s 46N.

¹¹² The Supplementary Fund has the same legal personality as a company incorporated under the *Corporations Act 2001* (Cth). OPCF Act s 46C.

¹¹³ OPCF Act s 46P.

¹¹⁴ OPCF Act s 46S.

¹¹⁵ OPCF Act ss 46R and 43, Sch 1, art 15 .

¹¹⁶ OPCF Act ss.46T and 46U.

spill and a potentially detrimental lack of confidence in the oil industry.¹¹⁷ The existence of strict liability does not, however, mean that no defence is available, and defences available to an accused, such as the defence of honest and reasonable mistake, are still available.¹¹⁸

D More Radical Reform?

Although the Supplementary Fund Protocol was agreed in 2003 and entered into force in March 2005, the nine meetings of the IOPC Fund Working Group between 2000 – 2005 considered potentially more radical changes to the CLC/Fund system. A group of seven States, including Australia, France and the UK, identified a rather longer list of possible reforms.¹¹⁹

It may be helpful to give an outline indication of the range of issues that were canvassed before 2005, as these will give an insight into the defects identified by some States in the current CLC/Fund system.

- a) Should changes be made to the liability scheme of the CLC/Fund System?¹²⁰
- b) Should it be made easier to ‘break’ limitation?¹²¹
- c) Should the channelling protection of the CLC 1992 be removed?¹²²
- d) Should individual cargo owners (or charterers) be made liable if they use substandard ships?
- e) Should there be compulsory insurance for all oil tankers?¹²³
- f) Should the definition of ‘ship’ be changed?¹²⁴

¹¹⁷ Explanatory Memorandum, *Protection of the Sea Legislation Amendment Bill* 2008 (Cth) 15-16.

¹¹⁸ Ibid 16. 300 penalty units are imposed for a failure to give information or oil import returns to AMSA, and 500 penalty units imposed for the intentional lodgement of false information or returns. These are in line with those that already exist under the OPCF Act ss 45 and 46.

¹¹⁹ See eg. 92FUND/WGR.3/5/1, 26 February 2001.

¹²⁰ For example an extension to the somewhat restrictive definition of environmental damage in art I(6) (see below Part III(C)(5)); or an express terrorism defence for shipowners post 9/11, even though the system has been in operation since the 1971 Fund Convention (see Part III(C)(4)).

¹²¹ For example, so that the shipowner’s right would be lost if there was a ‘substandard ship’; or if there was misconduct of servants or agents (and not only the senior management of the shipowner); or if a gross negligence test was used as in the EC Directive on Ship Source Pollution 2005/35/EC (instead of recklessness). Cf below Part III(E)(2).

¹²² For example by reverting to the CLC 1969 which did not specifically exclude the liability of salvors or charterers. The latter, in particular, might be worth targeting as they might be hiring substandard ships cheaply. It makes no sense to make salvors liable, as that would only deter responders who could reduce pollution (Cf below Part III(C)(8)).

¹²³ The CLC only requires insurance certificates for tankers actually carrying *more* than 2000 tonnes in bulk. Increased certification would impose additional burdens on States and there was little evidence that tankers did not already have cover, see eg. with a P & I Club. Cf below Part III(C)(9).

¹²⁴ The CLC covers oil tankers, in a very complex definition in art 1, but there have been uncertainties about categories of ‘vessels’ that may be used for oil storage services, for example where wastes are stored in a permanently moored ‘tanker’. There have also been debates about FPSOs (Floating Production Storage and Offloading vessels), see eg, when they are in transit. These are the sort of technical legal issues that can probably be agreed by the Executive Committee, or ultimately by national courts.

- g) Should the mechanism for increasing limits be changed?¹²⁵
- h) Should other miscellaneous 'house-keeping' changes be considered?¹²⁶

All of these issues were reasonable debating points, but their very diversity meant that it would become almost impossible to achieve unanimity – while at the same time there was a threat that the established system (with its strengths and weaknesses) could be undermined. One of the EU Commission criticisms was that the focus was too much on compensation rules, but that there was no deterrent to the actual polluter. It pointed to the fact that the shipowner could rely on virtually unbreakable liability limits and that cargo owners had no direct liability and were covered in a sense by the IOPC Fund. The Commission response was to assert that there was a need for greater criminal sanctions,¹²⁷ but the EU debate goes beyond this article.¹²⁸ But a crucial question concerned the purpose of any legislative change: was it to benefit victims, or to rebalance liabilities as between ship and cargo interests?

For at the same time as the debates about radical changes, mainly to increase liabilities, there was a dispute between the two sides of the industry as to who should be paying for any such increases. The oil industry saw in the introduction of the new Supplementary Fund an increase in their contributions to a third tier, and sought a better balance with the shipowner interests (whose liabilities were not increased by the Supplementary Fund Protocol). This balance was at the heart of the 1969/1971 compromise.

An IOPC study¹²⁹ showed that there had been 5,802 incidents in the period 1978-2002 (excluding the USA). Of these, the shipping industry paid 45% of costs and oil cargo interests paid 55% of costs. The study also showed that where the tanker was under 20,000 gt the effect of the CLC limits was that cargo interests paid proportionately more than shipowners. For tankers between 20,000 – 80,000 gt, the burden was borne equally. For tankers over 80,000 gt shipowners paid proportionately more.¹³⁰ Moreover, if one inflated these old costs to 2002 and 2012 monetary values, there was an overall increase in cargo contributions by comparison with shipowners. Various complicated alternatives were suggested to achieve a rebalancing, including a four tier system, a split third tier, and a shared (not staged) third tier.

¹²⁵ For example by revising the 'tacit amendment procedure' in art 15 of the CLC Protocol 1992 to allow for automatic uplifts, rather than requiring a lengthy process for proposing and agreeing new limits. There are constitutional implications here for some states in allowing another body to determine financial figures.

¹²⁶ For example on quorum, or sanctions on states which did not provide regular reports to the Fund on oil imports: see above n 76.

¹²⁷ In July 2005 two measures were agreed, an EC Directive on ship source pollution and the introduction of sanctions for infringements (2005/35/EC) and an EC Council Framework Decision (2005/667)

¹²⁸ Eventually, the EU agreed not to enact measures conflicting with the CLC/Fund system and the EC Directive on Environmental Liability 2004/35/EC Art 4(2) now contains exceptions so that it does not affect rights under international agreements on civil liability: Annex IV excludes the IMO Conventions on CLC, Fund, HNS, and Bunkers. In October 2008, the EU Council agreed to withdraw civil liability provisions from another controversial draft directive (COM/2007/0674 final), so that it only dealt with issues such as compulsory insurance of shipowners: see, press release no. 276 13649/08.

¹²⁹ 92FUND/WGR.3/22, 14 May 2004.

¹³⁰ As a result of the sliding scale on which limits are calculated according to the tonnage of the ship: see Table 3, above.

The P & I Clubs (the main payers of the first tier) agreed at the 2003 diplomatic conference to produce a voluntary scheme in which they accepted higher limits for small ships. This was called the Small Tanker Oil Pollution Indemnification Agreement (STOPIA). Under this the Clubs promised to indemnify the IOPC Fund for all claims up to 20 million sdr [about A\$36 million] if the CLC 1992 limit was lower (e.g. for ships under 29,548 gt). STOPIA was to apply to pollution damage in Supplementary Fund states (from 3 March 2005 when the Fund entered into force). This concession was to apply in those states, even if the Supplementary Fund was not needed (i.e. if the 1992 Fund limits were sufficient).

It was not clear if this would be enough to satisfy the oil industry, which really wanted shipowners to contribute to the third tier Supplementary Fund. There were industry negotiations about how to meet this demand, and eventually in 2005 the Clubs proposed an alternative to STOPIA, namely TOPIA (the Tanker Oil Pollution Indemnification Agreement).¹³¹ Under this, the Clubs agreed to indemnify the Supplementary Fund for 50% of amounts paid by the Supplementary Fund. This was part of a bigger aim to head off any more radical changes to the CLC/Fund system, and (somewhat naively) stated that the TOPIA offer was conditional on there being no further convention revisions.¹³²

The IOPC Working Group, in its final meeting in March 2005, was unable to reach agreement on whether to revise the conventions, or to accept the voluntary proposals in STOPIA or TOPIA.¹³³ It decided to leave final decisions for the IOPC Fund Assembly which was due to meet from 17-21 October 2005 to consider the way forward. The Working Group, however, put two questions back to the Clubs: would they be prepared to extend STOPIA to *all* 1992 Fund parties (not simply those who were also parties to the Supplementary Fund 2003), and would the Clubs implement *both* STOPIA and TOPIA?¹³⁴

Before the Fund Assembly meeting, a 'Group of 11 States',¹³⁵ accepted that some of the more radical proposals for change were not acceptable¹³⁶ but continued to press for limited revisions in six areas,¹³⁷ while expressing concern about the nature of voluntary agreements by contrast with convention revisions. Shipowner states, such as Greece, had consistently opposed the revisions – partly out of a fear that the CLC limits themselves would be revisited. There was also a recognition that there were nearly 100 Fund Member States who were party to a system that was working, and that revisions could undermine it.

On 14 October 2005 there was a dramatic last minute submission by the Clubs. They offered to extend STOPIA to *all* 1992 CLC States, *and* to share in the Supplementary Fund through TOPIA.¹³⁸ The submission also addressed four other concerns.

- (i) The recognition of the legal status of STOPIA and TOPIA as contractual documents, rather than as international instruments. The Clubs agreed to give notice if for any reason they wanted to withdraw. Most tankers in the

¹³¹ See 92FUND/WGR.3/25/2, 4 February 2005.

¹³² Such a negotiating ploy, appropriate in commercial negotiations, was not calculated to be well received by sovereign states addressed by an NGO.

¹³³ See the final report of the Working Group, 92FUND/A.10/7, 10 May 2005.

¹³⁴ Ibid, para 6.14.

¹³⁵ Including Australia, New Zealand, France and the UK: see 92FUND/A.10/7/5, 16 September 2005.

¹³⁶ For example increasing the limits and changing the test for breaking limits.

¹³⁷ Including compulsory insurance for all ships, and the definition of 'ship'.

¹³⁸ 92FUND/A.7/3/1, 14 October 2005.

world would be covered through automatic STOPIA entry (there were already 5,460 entered).¹³⁹ The Clubs would also supply to the IOPC Fund a monthly 'Entered List' of tankers.

- (ii) There would be a reconsideration of the ship/cargo liability balance in 2010.
- (iii) The Clubs also agreed to revise the 1980 Memorandum of Understanding between the Clubs and the IOPC Fund on the handling of claims.
- (iv) A Working Group should be established to address ship standards from the insurance perspective.

In the debates at the Assembly,¹⁴⁰ States were divided on whether the limited revisions proposed by the Group of 11 should proceed. The EU stated that it wished to preserve the global character of the existing system, but that if there was fragmentation, the EU would look to 'regional solutions'.¹⁴¹ There was a slight majority for the Greek view and not sufficient support for that of the Group of 11. The conclusion was that it was agreed to terminate the Working Group, that the revision of the CLC/Fund system be removed from the Agenda, and that terms of reference be set out for a Working Group on the Safety of Navigation. The Clubs agreed to revise the wording of their proposals for the 2006 Assemblies of the 1992 and Supplementary Funds.

Revised versions of STOPIA and TOPIA were agreed in February 2006, entered into force on 20 February 2006¹⁴² and a memorandum of understanding was signed on 19 April 2006 between the Funds and the Clubs concerning claims procedures.¹⁴³ Under STOPIA 2006 the minimum tanker liability is as set out in Table 5:

Table 5: STOPIA limit

STOPIA 2006

Shipowner minimum liability: 20 million sdr liability [about A\$36 million]

STOPIA 2006 applies to all parties to the 1992 Fund (not only to the parties to the Supplementary Fund Protocol). STOPIA 2006 provides an indemnity by the shipowner involved to the difference between the limitation amount applicable to the ship under the CLC 1992 and the total amount of the admissible claims or 20 million sdr, whichever is less. It is given to the 1992 Fund, and does not give rights to claimants, but will be reviewed after 10 years. STOPIA 2006 is probably a recognition that the minimum CLC 1992 limit of 4.51 million sdr (about A\$8 million) is inadequate. The Clubs were probably prepared to make the concession because an amendment to the CLC by a new Protocol would almost certainly have

¹³⁹ In 2007/8 there were 4,540 tankers entered in STOPIA (and 361 which were not), a 92.6% coverage: See IOPC Fund *Annual Report 2007*, above n 3, 43.

¹⁴⁰ See, 92FUND/A.10/37, 21 October 2005, 92 FUND/A/ES.10/13, 1 February 2006, para 5.5.

¹⁴¹ See, 92FUND/A.10/37, para 8.25.

¹⁴² See, 92FUND/A/ES.10/3, 1 February 2006 for the text of the agreements and the summary in the IOPC Fund *Annual Report 2007*, above n 3, 42-44. See also, P & I Club information, see eg, 'STOPIA and TOPIA 2006 – What, why and when?', 182 *Gard News*, 9 (at <<http://www.gard.no>> at 17 July 2008), and West of England P & I Club Notice to Members No. 13 2005/2006 (<<http://www.westpandi.com/WestPandi/NoticesToMembers>> at 17 July 2008).

¹⁴³ See, 92FUND/A/ES.11/6, 20 April 2006.

raised the net liability costs, or resulted in a fracturing of the system with consequent uncertainties.

Under TOPIA 2006, the shipowners (in practice, the P & I Clubs) agree to indemnify the Supplementary Fund for 50% of claims falling on the Supplementary Fund. It applies to all sizes of tankers and will again be reviewed after 10 years.

The upshot of all this activity is that when Australia accepts the Supplementary Fund Protocol it does so as part of a larger compromise package that does not appear in the Protocol. The STOPIA 2006 and TOPIA 2006 agreements do not affect individual claimants.¹⁴⁴ They will, however, affect the levies that may be borne by oil importers in the states affected.

III BUNKER OIL CONVENTION 2001

A *Need for further Pollution Conventions?*

After the CLC 1969 and Fund Convention 1971, it was recognised that there needed to be further protection from pollution other than by oil cargoes. The other obvious sources of pollution were chemical and other hazardous cargoes, and the fuel oil (bunkers) carried in practically all ships.¹⁴⁵

When the CLC and Fund Convention were revised in 1984, following the *Amoco Cadiz* sinking off France in 1978, a number of delegations tried to include bunker pollution generally (i.e. from non-tankers) within the CLC regime. This was resisted, mainly by shipowners, but also by oil importing interests who did not see why they should contribute to pollution incidents caused, e.g. by the operation of large dry bulk carriers. In retrospect this was perhaps unfortunate. Even so, it was agreed to include within the CLC/Fund regime the bunkers carried *in* oil tankers (even when the tanker was in ballast).¹⁴⁶

It was recognised that the decision not to include bunker spills (from all ships generally) in the CLC/Fund regime left a gap in environmental protection, but after 1992 the more serious need was to cover the possibility of a major disaster from a ship carrying hazardous and noxious cargoes other than oil. This was addressed in the HNS Convention 1996.¹⁴⁷ In effect, the HNS Convention will provide CLC and Fund type protection (but in a single convention) for pollution incidents involving hazardous and noxious substances *other* than oil: in other words, pollution from the cargoes of chemical carriers, LPG and LNG carriers, and dangerous cargo on container ships. Unfortunately, there have been huge practical difficulties in finding a way to implement the second tier HNS Fund contribution system, largely because

¹⁴⁴ Unlike the TOVALOP and CRISTAL voluntary agreements, which ceased to operate in 1997 (see, IOPC, *Brief History* <<http://www.iopcfund.org/history.htm>> at 6 October 2008).

¹⁴⁵ Heavy Fuel Oil (HFO) is amongst the most damaging and persistent of bunker fuels. According to ITOPF heavy fuel oil is in Category 4 (of 4) for specific gravity, and lacks volatility and viscosity, which precludes evaporation and dispersion: see *ITOPF Handbook 2008/09*, 12, and <<http://www.itopf.com/uploads/itopfhandbook2007.pdf>> at 30 September 2008. As a relatively low value refined product HFO may well be carried as cargo in cheaper and older ships eg, the *Erika*. See also below Part III(C)(1).

¹⁴⁶ See, art I (5) CLC 1992.

¹⁴⁷ *The Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996* (the HNS Convention) (adopted 3 May 1996, not yet in force).

of the number and variety of the potential contributors.¹⁴⁸ A majority of states has apparently concluded that these difficulties cannot be resolved with the present text of the HNS Convention 1996. The Assembly of the IOPC Fund 1992 established an HNS Focus Group which produced a Draft Protocol to the Convention. This was put before the 94th Session of the IMO Legal Committee in October 2008.¹⁴⁹ There it was agreed that packaged HNS should not contribute to the HNS Fund, but that *liability* caused by such cargo would still be covered, albeit with “moderate” increases in shipowners’ limits of liability in such cases. The draft Protocol will be finalised at a diplomatic conference in 2010. This will fix the new packaged HNS limits, although the existing HNS 1996 limits of liability (Table 6, below), will not be altered, even though they now seem low by comparison with the Supplementary Fund.

Table 6: HNS Convention 1996 limits

<u>Hazardous and Noxious Substances Convention 1996</u>
Shipowner 1 st tier maximum liability: 100 million sdr [about A\$ 178 million] HNS Fund 2 nd tier maximum liability: 250 million sdr [about A\$ 444 million]

In the negotiations which led to the HNS Convention, there were proposals to include bunker spills within that regime, but the Legal Committee was divided from the earliest discussions.¹⁵⁰ One fear was that if bunkers were to be included within the scope of the HNS Convention, *all* ships would need HNS certificates even though they would never carry hazardous and noxious substances. This was a fear related more to practicality than substance, as many were concerned about the need to bring an HNS Convention into force as soon as possible and any widening of its scope might have created even more delay. The 65th Session of the Legal Committee in September 1991 established a small Working Group of Technical Experts on Bunker Fuel Oils (for non-tankers), but it was not able to reach a consensus.¹⁵¹ Most delegations favoured the inclusion of bunker fuels within an HNS regime.¹⁵² The Legal Committee noted the differences of opinion, but there was support for the view that there should be no contribution to a second tier HNS Fund by such cargoes in any event. At the 67th Session of the Legal Committee in September 1992 an indicative vote was held as to whether bunker fuel oil should be included in the HNS Convention. 20 delegations were against and 11 in favour of

¹⁴⁸ The IOPC secretariat has identified three key issues inhibiting entry into force: contributions to the separate LNG account (the HNS Fund is unfortunately divided into contribution sectors for different pollutants); the concept of ‘receiver’ (i.e. who will contribute); and the non-submission by States of reports of cargo which could potentially contribute to the HNS Fund (especially packaged HNS): see the Report of the 93rd Session of the Legal Committee (LEG 93/13, 2 November 2007, 8, et seq.). For draft text, see, ITOPC Fund Doc. 92FUND/A/ES.13/5/3, 24 June 2008 (IOPC, <<http://docs.iopcfund.org/ds/engframeset.html>> at 17 July 2008).

¹⁴⁹ LEG 93/13, 2 November 2007, paras. 6.4, 6.5. See also the Report of the 94th Session, LEG 94/12, 31 October 2008, para 4.1-4.71 and Annex 2; and <<http://www.hnsconvention.org>> at 22 July 2008.

¹⁵⁰ Nicholas Gaskell, ‘The Draft Convention on Liability and Compensation for Damage Resulting from the Carriage of Hazardous and Noxious Substances’ in P. Wetterstein, and A. Beijer, (eds.) *Essays in Honour of Hugo Tiberg* (1996) 225, 251.

¹⁵¹ LEG 65/8, 11 October 1991.

¹⁵² *Ibid*, para 13.

inclusion (with four abstentions). The Committee decided, therefore, to leave bunker fuel oils outside its further work on hazardous and noxious substances, and the HNS Convention 1996 does not therefore cover bunker pollution.¹⁵³ However, it was agreed that separate consideration was needed to deal with bunkers.

Many delegations at the IMO Legal Committee debates in the late 1990s recognised that bunker spills were a great source of pollution and there was an assumption that they accounted for a significant number of pollution incidents. Statistics on *oil tankers* provided by ITOPF¹⁵⁴ show that the number of large spills has declined considerably in the previous 36 years. Bunkering spills (i.e. during loading of bunkers) were only 2% of causes of spills of up to 700t, with accidents of various kinds being the largest cause (these could include bunker loss), but the biggest cause of large tanker spills was groundings (34%) and collisions (28%) – both of which could equally apply to ordinary cargo ships carrying bunkers. An ITOPF paper in 1996 noted that although comprehensive data on *bunker* spills did not exist, the available evidence pointed to the number of bunker spills, government responses and claims sometimes coming close to or exceeding those for tankers. AMSA figures then showed that oil tankers were responsible for only 22% of significant spills requiring some form of response and that the Government's average response costs for the 12 largest spills was five times as much for *non-tankers* (mostly for HFO), than for tankers.¹⁵⁵ It was for these reasons that, in the 1990s, states like Australia and the UK pressed for action on bunker pollution, particularly as they were concerned with the problem of uninsured vessels.¹⁵⁶ While the spills might be relatively small, recovery of damages was potentially expensive, difficult or impossible – especially where the ship was owned by a single ship company.¹⁵⁷

B Bunker Oil Convention Negotiations 1995-2001

Once it was decided that the bunker question needed dealing with in an instrument separate from the CLC 1992 and HNS Convention, the question arose as to how this was to be done. One indirect way of achieving international agreement had been suggested by Australia back at the 72nd Session of the Legal Committee in April 1995, namely by the introduction of a requirement for compulsory insurance for ships calling at its ports.¹⁵⁸ The issue of compulsory insurance (generally) then

¹⁵³ LEG 67/9, 13 October 1992, para 45. An attempt to reintroduce bunker oils was rejected at the 72nd Session in 1995.

¹⁵⁴ The International Tanker Owners Pollution Federation Ltd (ITOPF) is one of the main consultancies used by the 1992 Fund to assess the technical and environmental effects of spills and is recognised internationally as being highly authoritative (and independent, despite its title). See, ITOPF Handbook 2008/09, 10-12 <<http://www.itopf.com/uploads/itopfhandbook2007.pdf>> at 30 September 2008. See also above, Part I(C).

¹⁵⁵ See LEG 74/4/2, 9 August 1996, Annex.

¹⁵⁶ Recommendation 13 of 'Ships of Shame' (1992) called for compulsory insurance for ships visiting Australia. The UK suffered an increasing number of small bunker spills off its coasts, eg. from the *Borodinskoye Polye*, off Shetland in 1993, an uninsured fish factory ship. Another spill involved the small container ship *Cita* off the Scilly Isles in 1997. In both instances there were expensive clean up operations (of over £100,000).

¹⁵⁷ For further details of the experience of individual states, see, LEG 75/5/1, 17 February 1997.

¹⁵⁸ See, LEG 72/8/3, 27 February 1995, reiterating an earlier paper MEPC 36/21/6, 8 August 1994. At a national level compulsory insurance was introduced as Part III of the *Protection of the Sea (Civil Liability) Act 1981* (Cth) by the 2000 Act, see below Part III(D).

became firmly on the agenda of the Legal Committee after the agreement of the HNS Convention 1996.

At the 73rd Session of the IMO Legal Committee in October 1995 it was agreed that liability for bunkers was to be the top priority in future work,¹⁵⁹ and by 1996 Australia took a leading role in presenting a draft free-standing convention.¹⁶⁰ By 1997, there were still states that did not see the need for a new convention¹⁶¹ but all agreed that work was to continue. By the 76th Session in October 1997 the agenda still included consideration of bunkers, but there was also parallel consideration of the question of compulsory insurance for ships' liabilities generally. This involved the possibility of creating a general instrument to provide for compulsory insurance and direct action. Later this became more focussed on the need to provide 'evidence of financial security'¹⁶² for particular types of victim. A paper was put forward by five states, led by Australia, which included the text of a free standing Bunker Oil Convention and an alternative text in the form of a Protocol to the CLC 1992.¹⁶³

At the 77th Session of the Legal Committee in April 1998 the Australian proposal was presented in more detail.¹⁶⁴ Most delegations were in favour of a free-standing Convention and it was agreed to proceed on that basis, with the CLC Protocol solution being a 'reserve' if the Convention alternative was found to be unworkable.¹⁶⁵ It was agreed that the draft should be based on a strict liability regime for pollution damage from bunkers (and not for other damage such as explosions). In general it was agreed that the limits of liability should be tied in some way to those under the LLMC 1996.¹⁶⁶ There was support for a US proposal (based upon its experience under its *Oil Pollution Act 1990*) that liability be channelled to a limited number of persons, rather than to the registered shipowner alone. There was less agreement as to whom the responsible person or persons should be and whether to include owners and operators (such as bareboat charterers). There was discussion as to the form of any compulsory insurance provision, with the P & I Clubs pointing to certificates of entry as satisfactory evidence.

The question of compulsory insurance cut across many areas, including bunker, passenger and wreck liabilities. In particular, it seemed anomalous that there were compulsory insurance requirements for some pollution liabilities at sea (under the CLC 1992 and the HNS Convention), but not others. The debates centred on whether to have a single free-standing convention on compulsory insurance generally, or (for bunkers, sea passengers and wreck) by separate liability conventions or protocols.

¹⁵⁹ Following submissions by Australia on the need for compulsory insurance, and the tabling of the earliest draft of a free-standing convention put forward by five other states in LEG 73/12/1, 12 September 1995.

¹⁶⁰ LEG 74/4/1, 9 August 1996.

¹⁶¹ LEG 75/5/1, 17 February 1997.

¹⁶² The wider expression was meant to indicate that there may be other types of acceptable security, such as bank guarantees, although there is little evidence that these are used in practice. A Correspondence Group on Provision of Financial Security had been established which had produced a general report on claims covered by P & I Clubs: see, LEG/76/3/1, 9 September 1997.

¹⁶³ See, LEG 76/4/1, 8 August 1997.

¹⁶⁴ See, LEG 77/6/1, 13 February 1998.

¹⁶⁵ See, LEG 77/11, 28 April 1998, 16-20.

¹⁶⁶ This was a crucial decision, see below Part III(E).

For those opposed to any new *general* convention on compulsory insurance (especially shipowners and the P & I Clubs), it made sense to dilute such an attack by resolving *particular* problems, presented by the absence of insurance, through separate legal instruments. The work of the Legal Committee became fragmented because of the continuing juggling for priority of the bunkers, passenger and wreck proposals. Priority was ultimately given to the work on bunkers, probably because work on that was considered simpler and more advanced. This was in no small measure due to the lead taken by Australia in the drafting work. That work continued from 1998-2000¹⁶⁷ and culminated in the Bunker Oil Convention 2001.¹⁶⁸

This article will first analyse the key liability provisions of the Bunker Oil Convention, and then consider the Australian implementation legislation, including some of the particular ancillary provisions introduced in that legislation.

C *The Regime of the Bunker Oil Convention*

The Bunker Oil Convention was eventually adopted in London on 23 March 2001. The diplomatic conference had very little time available to make any substantive changes to the draft that had emerged from the Legal Committee,¹⁶⁹ and the Chairman of the Committee of the Whole of the diplomatic conference was able to achieve a compromise package on the three main outstanding political issues.¹⁷⁰ The shipowner states fought a rearguard action by proposing relatively high entry into force requirements in art 14, probably in the hope that this might delay entry into force (maybe indefinitely).¹⁷¹ The attitude of the EU states individually and as a block was always going to be highly significant both in negotiations¹⁷² and in

¹⁶⁷ See eg, LEG 78/5/2, 14 August 1998; LEG 78/11, 2 November 1998, 15-19; LEG 79/6/1, 12 February 1999; LEG 79/11, 12 April 1999; 14-18; LEG 80/4/1, 13 August 1999; LEG 80/11, 25 October 1999, .12-17; LEG 81/4, 21 January 2000; LEG 81/11, 12 April 2000, 4-15. The final draft agreed in April 2000 was issued as LEG/CONF.12/3, 14 August 2000.

¹⁶⁸ Other financial security issues, concerning passengers and wreck removal, were resolved by the Athens Convention 2002 and the Wreck Removal Convention 2007.

¹⁶⁹ LEG/CONF.12/3, 14 August 2000.

¹⁷⁰ Namely the minimum tonnage threshold for compulsory insurance, the conditions for entry into force and the possibility of excluding ships on purely domestic voyages: see LEG/CONF.12/CW/WP.2, 21 March 2001 and below Part III(C)(9), Part III(C)(2).

¹⁷¹ Under art 14, the Convention was to enter into force one year following the date on which 18 states including 5 whose combined gross tonnage is not less than 1 million gt, had ratified it. The tonnage requirement is one more usually found in the IMO public law Conventions and is justified on the basis of trying to achieve compliance by a large part of the world fleet. This argument has some force where it is sought to have insurance certificates issued for a large number of ships, but it might be thought that the Bunker Oil Convention 2001 was driven by the needs of *coastal* states, rather than flag states. By comparison with other IMO liability conventions the figure of 18 states was also high; the later Wreck Removal Convention 2007 art 18 reverted to a more normal 10 states requirement with no tonnage factor.

¹⁷² There had been problems in the negotiations owing to the ever-widening competence of the EU as an institution. Under Council Regulation 44/2001, the EU now has exclusive competence on matters of jurisdiction and the recognition and enforcement of judgments (now in art 9 and 10 of the Bunker Oil Convention 2001). A very late attempt to introduce a provision preserving the EU Commission's competence over jurisdictional issues (see, LEG/CONF.12/CW/Wp.3, 22 March 2001) failed at the 2001 diplomatic conference, although similar text later found its way into the Athens Protocol 2002 (on passenger liabilities).

achieving ratification. In September 2002 a European Council decision¹⁷³ was agreed to authorise EU member states to ratify or accede with a deadline, if possible, of 30 June 2006. In fact, it took Sierra Leone's ratification in November 2007 for the necessary number of ratifications to be achieved, so that the Bunker Oil Convention entered into force on 21 November 2008.¹⁷⁴

In many ways the Bunker Oil Convention follows the CLC regime.¹⁷⁵ It provides for the strict liability of shipowners, *and* some others, for pollution caused by bunker oils, requires the registered shipowners of ships over 1,000 gt to maintain insurance, and allows claimants to sue the insurer directly.

The Bunker Oil Convention is different from the CLC/Fund model as:

- it has a different definition of oil;
- there is no second tier 'Fund';
- claims are not channelled only to the registered shipowner;
- there is no civil responder immunity;
- it sets out no limits of liability of its own;
- the compulsory insurance requirement is set at 1,001 gt and not to ships carrying a minimum of 2,000 tonnes of oil cargo.

1 Scope of 'Bunker oil'

'Bunker oil' is defined in art 1(5)¹⁷⁶ to mean:

[a]ny hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil.

The definition therefore goes beyond the normal meaning of bunkers as fuel, in order to cover lube oil, and unlike the CLC there is no reference to 'persistent', so it covers HFO and lighter fuels such as marine diesels. The term 'residues' is not further defined, and does not appear in the CLC definition of 'oil', but when used in the CLC art I(1), it seems to refer to cargo remaining in a tank after discharge (e.g. the unpumpable cargo which solidifies in a hold or clings to a tank's walls). Transposed to the Bunker Oil Convention, that could cover HFO in a nearly empty fuel tank. There seems no reason why it should also not apply to the remains of such bunker oils in other contexts, e.g. after sea action has caused them to become a mousse, or they have dried out into tar-like remains on a beach.¹⁷⁷ It would also seem that the definition would cover cases such as the *Pacific Quest*,¹⁷⁸ where a

¹⁷³ 2002/762/EC (at the Environmental Council).

¹⁷⁴ As at 31 October 2008, there were 22 States Party, having 28% of the world tonnage.

¹⁷⁵ See above Part I(D) and M. Tsimplis, 'The Bunker Pollution Convention 2001: Completing and Harmonising the Liability Regime for Oil Pollution from Ships?' (2005) *Lloyd's Maritime and Commercial Law Quarterly* 83.

¹⁷⁶ The definitions section (s 3) of the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) does not include this specific definition of 'bunker oil', even though it reproduces other definitions in art 1 (see below Part III(D)). As a matter of construction of the Act it is necessary to use the Convention definition when interpreting the expression when it is found in other provisions of the Convention applied by s 11.

¹⁷⁷ In fact, the CLC practice treats such remains and wastes as being within the CLC definition of 'oil', even without mention of residues.

¹⁷⁸ See, above n 50.

cargo ship makes an operational discharge of a fuel oil/water mixture, e.g. from bilges or tank cleaning, even when there is no casualty.

Article 4(1) addresses the question of overlap with the CLC 1992.¹⁷⁹

This Convention shall not apply to pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention.

The effect of this is to exclude claims which are within the CLC¹⁸⁰ – even if compensation is not payable under the CLC.¹⁸¹ Bunker pollution from oil tankers is therefore still covered by the CLC.¹⁸²

Both the CLC 1992 (art IV) and the Bunker Oil Convention (art 5) have a provision for joint and several liability (unless damage is severable) where two ships cause pollution.¹⁸³ These provisions are designed for circumstances where the same Convention applies to both ships (i.e. two tankers, or two container ships), but do not apply directly where there is an incident involving a ‘hybrid spill’, e.g. an oil cargo spillage from an oil tanker and also bunkers from, say, a container ship. Here there may be difficult questions as to which Convention will apply.¹⁸⁴ There seems to be no reason in principle why damage which is clearly separable should not be apportioned to the specific Convention,¹⁸⁵ but this possibility is highly unlikely in most spillages where the oils will be mixed. Courts will be aware that, for claimants, it will generally be better for the CLC to apply, as there are higher limits of liability and the Funds exist as a second and third tier. The premise of art 4(1) of the Bunker Oil Convention is that one looks first to the CLC and the better solution in practice would be for this Convention to apply *unless* it can clearly be said that some part of the damages is separable and applicable to the Bunker Oil Convention. The Bunker

¹⁷⁹ States also need to ensure there is no overlap with national legislation. For the Australian position, see below Part III(D).

¹⁸⁰ The wording of art 4.1 does not refer to ‘claims’ within the CLC, but to ‘pollution damage as defined’ in the CLC. However, the CLC definition refers to pollution damage by contamination ‘resulting from the escape or discharge of *oil from the ship*’, which in turn refers back to the CLC definitions of the ship (i.e. a tanker within art I(1)) and oil (which under art I(1) is that carried as *cargo* or bunkers *in* such a ship).

¹⁸¹ This example would not be relevant to Australia but might apply to a state which was party to the 2001 Convention but not the CLC.

¹⁸² Provided the tankers fall within the CLC art I definition, which covers tankers (i.e. ships ‘constructed or adapted for the carriage of oil in bulk as cargo’) even when in ballast and not carrying cargo. The CLC definition has a proviso dealing with circumstances where a tanker carries oil and *other* cargoes, eg, an OBO (Oil/Bulk/Ore carrier), which might carry oil and ore, or a products carrier which carries oil and chemicals. It is clear that the CLC will only apply to clean-up of the oil, not eg the chemicals (for which the HNS Convention 1996 will be needed). The wording of the proviso is notoriously difficult to understand, but it probably means that even after an oil carrying voyage is completed the CLC may still apply if there are oil cargo residues on board (and the CLC would apply to bunker spills from that ship). Thus, it must not automatically be assumed that the Bunker Oil Convention will apply where bunkers are spilled from a ship that is not at that moment carrying a cargo of oil. If it has carried oil cargo previously, and there are residues left, the CLC will apply.

¹⁸³ See also art 8 of the HNS Convention.

¹⁸⁴ For an earlier analysis, see N. Gaskell ‘Lessons of the Mont Louis: Part Two: Compensation for Hybrid Accidents’, (1986) 1 *International Journal of Estuarine and Coastal Law* 269.

¹⁸⁵ With its own limits of liability.

Oil Convention art 3(6)¹⁸⁶ preserves a shipowner's rights of recourse and the policy ought to be to let the commercial parties fight it out between themselves, after the pollution claimants have been paid.

2 Ships covered

There were major debates at and before the 2001 diplomatic conference about whether the Convention should apply to all craft, including those that were very small. In the end, a distinction was made between the liability rules and those concerning compulsory insurance. The Convention definition of 'ship' is very wide and, under art 1(1),¹⁸⁷ means 'any seagoing vessel and seaborne craft, of any type whatsoever'.

The effect of this definition is highly significant as, unlike the CLC, it applies the liability regime to *any* ship (e.g. bulk carrier, passenger ship, container ship, tug, fishing vessel, launch etc), whatever its size provided that it is seagoing.¹⁸⁸ There is extensive case law on the meaning of the word 'ship' in national maritime laws,¹⁸⁹ but some care needs to be taken with this as the word has to be interpreted in the context of the international convention and its object (as set out, for instance, in the preamble). Thus a liberal (or wide) interpretation should be given taking into account the need to 'prevent, reduce and control pollution'.¹⁹⁰ There is no particular need to require, for example, that it be applied only to commercial craft. Some international liability conventions (e.g. the Athens Convention 1974/2002) apply themselves only to international voyages, leaving it to national law to regulate ships on domestic voyages, but the pollution conventions are more widely drafted, partly because the effects of pollution may be felt in neighbouring states, but also because the parties want to ensure that the international compulsory insurance provisions can also apply in their waters.

The main restriction built into the Bunker Oil Convention definition is the reference to 'seagoing'. The expression is perhaps the least helpful of those used by the IMO and might have a number of meanings.¹⁹¹ Courts have been unwilling to accept a wholly theoretical interpretation,¹⁹² but although it would probably not cover a vessel which never in practice left a port or harbour (whatever the vessel's physical or legal abilities),¹⁹³ it ought to extend to recreational craft which leave the shelter of harbours and inland waters.¹⁹⁴

¹⁸⁶ Like the CLC 1992 art III(5).

¹⁸⁷ As applied by s 3 of the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth). See below Part III(D).

¹⁸⁸ Under art 4(2) the Bunker Oil Convention does not apply to warships, and see s 9 of the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) and s 3 defining 'Government ships', in effect to apply the Convention to state-owned ships used for commercial purposes.

¹⁸⁹ See eg, *Steedman v Scofield* [1992] 2 Lloyd's Rep 163; *R v Goodwin* [2006] 1 Lloyd's Rep 432; *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* (2003) 199 ALR 497. See further Davies and Dickey, above n 83, 1-12.

¹⁹⁰ Convention Preamble, Recital No.1.

¹⁹¹ For example, it might mean a vessel that is physically capable of going to sea, or one that is legally entitled to go to sea, or one that in practice goes to sea (and if so whether a period is required), or a combination of these.

¹⁹² *R v Goodwin* [2006] 1 Lloyd's Rep 432.

¹⁹³ *The Salt Union v Wood* [1893] 1 QB 370. If there are craft in this category which do have bunker fuel, eg, those operating solely in Sydney Harbour, or on the Brisbane River, then it would seem that any liability could fall under Parts IV and IVA of the *Protection of the Sea (Civil Liability) Act 1981* (Cth), or may be caught by state legislation. See *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* (2003) 199 ALR

Even if the liability rules apply widely, the compulsory insurance provisions only apply to ships over 1,000 gt,¹⁹⁵ but in practice all commercial shipowners will probably need insurance.¹⁹⁶

3 Strict liability

Under art 3, there is strict liability of the shipowner¹⁹⁷ for pollution damage caused by anyone on board the ship. The normal liability will arise from spillages resulting from groundings,¹⁹⁸ collisions,¹⁹⁹ or operational discharges.²⁰⁰ The absence of a need to prove fault was one of the key innovations of the CLC 1969 but, by 2001, its extension to bunkers hardly raised a murmur.²⁰¹ The consequence is that, for instance, a bulk carrier may be damaged in a collision with a tug, entirely caused by the tug, but it is the bulk carrier which will be liable for bunker pollution under the Convention.²⁰² The liability extends to pollution damage from bunkers 'originating from the ship'. The latter might be relevant if barrels of fuel oil or lube oil are washed overboard, but where the ship is unharmed. However, the Convention would not apply to cases where a ship damaged an undersea pipeline and, say, heavy fuel oil leaked from that.²⁰³

4 Defences

The liability under art 3 is not absolute, as there are standard defences (in art 3(3) and (4)) based on the CLC. Under art 3(3), the shipowner must prove that:

¹⁹⁷ See further M. Ashford, 'A Jet-Ski: Vessel, Boar or Ship: *R v Goodwin* [2006] 1 Lloyd's Rep 432' (2006) 20 *Australian and New Zealand Journal of Maritime Law* 64, 67. See below Part III(D).

¹⁹⁸ Note that once a vessel is a 'ship' under the Convention, the liability extends to damage anywhere in the territory, including the territorial sea of the state: see art 2.

¹⁹⁹ See art 7(1), and below Part III(C)(9).

²⁰⁰ States may, under art 7(15), declare that they will not apply the compulsory insurance provisions of art 7 to ships operating exclusively within their own territorial sea. This option is designed for ships engaged on wholly domestic voyages. A last minute attempt at the diplomatic conference to extend the option to the EEZ failed, partly because of the fears of neighbouring states, but also because of the desire to create uniformity. Australia decided not to exercise the option: see, national interest analysis [2006] ATNIA 9, para 24.

²⁰¹ For issues as to channelling and the person liable, see below Part III(C)(7).

²⁰² Australian examples include the *Korean Star*, *Nella Dan*, *Sanko Harvest*, *Iron Baron* and *Pasha Bulker*: see above Part I(C).

²⁰³ Australian examples include the *Al Qurain* and *Global Peace*: see above Part I(C).

²⁰⁴ Australian examples include *Pacific Quest* and *Pax Phoenix*: see above Part I(C).

²⁰⁵ At one stage Australia had doubts about whether strict liability was needed (see LEG 73/12, 12 July 1995) but it was inevitable that, once it was decided to opt for a free-standing convention, such an instrument would use the same liability principles as the CLC.

²⁰⁶ The bulk carrier may then make a recourse claim against the tug, but the latter will be able to limit its liability based on its size under the LLMC 1996 (see below Part III(E)).

²⁰⁷ Cf the *Torungen* incident, above n 46.

- (a) The damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (b) The damage was wholly caused by an act or omission done with intent to cause damage by a third party; or
- (c) The damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

These defences are largely self-explanatory, but were intended to be very limited in scope. Thus, the 'natural phenomenon' defence in the final phrase of art 3(3)(a) is much more tightly drawn than a traditional common law 'act of God', or 'perils of the sea' defence. A shipowner would need very compelling evidence if it wanted to show that heavy seas, short of events such as a tsunami, were within the defence.²⁰⁴ Article 3(3)(c) would cover state faults, e.g. in respect of charts or other navigational aids.²⁰⁵

There is no specific reference to terrorism as the Convention was agreed before the '9/11' events in 2001. There have been many debates since, particularly in the context of the Athens Convention 2002 on the carriage of passengers, about whether terrorism is in fact covered by art 3(3)(a) or (b). The 'war' part of art 3(3)(a) is not entirely apt to cover the modern acts of terrorism which do not involve conflicts between states. Article 3(3)(b) would cover sabotage and most acts of terrorism, but the words 'wholly caused' have given rise to shipowner fears that minor security lapses on their part might preclude the defence. In the passenger context, the entry into force of the Athens Convention 2002 (with identical defences) has been delayed as the P & I Clubs threatened not to issue insurance certificates over doubts about whether reinsurance was available for terrorism risks.²⁰⁶ There does not appear yet to have been a problem with the CLC and none have specifically been raised in respect of the Bunker Oil Convention (where the applicable exposure is likely to be much less than after the sinking of a large passenger ship).

There is a further defence (under art 3(4)), where the shipowner proves that the pollution damage was caused intentionally, or by fault of the victim. This is not likely in most bunker pollution incidents, although it might be relevant where (i) there is contributory fault of an oil terminal while bunkering a ship which results in bunkers overflowing from the bunker tanks;²⁰⁷ and (ii) the actions of a Government in not maintaining navigational aids was not a complete defence under art 3(3)(c) in circumstances where there was also navigational error on the part of the ship.

²⁰⁴ The shipowner in the *Nakhodka* sinking in 1997 sought to bring evidence that exceptional and unexpected wave heights had been experienced in the Sea of Japan, but the case was settled without any final determination of the matter.

²⁰⁵ As happened in the *Antonio Gramsci* case in Sweden's highly sensitive Stockholm archipelago in 1979.

²⁰⁶ Somewhat delicate negotiations took place at the IMO, embarrassingly after the 2002 Protocol was agreed and a face saving solution was adopted through a set of 'Guidelines for Implementation' adopted by the IMO Legal Committee in 2006 (see IMO Circular Letter 2758, 20 November 2006). In effect, this is an amendment to the 2002 Protocol dressed up as guidelines whereby states can ratify the 2002 Protocol but make reservations as to the insurance cover acceptable for certain war and terrorist risks.

²⁰⁷ Cf *The Mobil Refinery* incident, above n 46.

5 Bunker pollution damage

Article 1(9) defines the pollution damage recoverable under art 3 in a substantially similar way to the CLC 1992 and the HNS Convention (but with the substitution of ‘bunker oil’ in art 1(9)(a)). It provides that:

‘Pollution damage’ means:

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

Article 1(9) will apply to claims by both public and private claimants. It certainly covers basic clean up costs caused by contamination; it allows for reasonable measures of reinstatement of the environment (actual not hypothetical); and it recognises that there may be recovery of economic losses in the form of loss of profit from impairment of the environment. Unlike the HNS Convention, the Convention only covers pollution damage; it does not specifically cover death and personal injury, although it is accepted that injury actually caused by contamination would be covered.²⁰⁸ Like the CLC, so-called ‘threat removal costs’ are also covered within the expression ‘preventive measures’ in para (b).²⁰⁹ Thus, in a case such as the *Bunga Teratai Satu*²¹⁰ there would be compensation for pro-active mobilisation of equipment, even though no oil actually leaked from the ship. However, the Bunker Oil Convention would not have provided compensation for reinstatement of the Great Barrier Reef caused by physical contact only, or for environmental impact assessments of damage caused by anti-fouling paint. Nor would it cover incidents where a ship damaged a shore loading pipeline and the leakage came from the pipeline, rather than the ship.

The definition in art 1(9) was developed as the result of a series of compromises concerning the CLC. It is not entirely clear in its wording, but in the context of environmental claims generally is rather conservative. This is in part because the origins of the CLC were in simple clean up operations and

²⁰⁸ The IOPC Fund Executive Committee accepted the advice of its Director, in the light of discussion at the 1969 conference, that inhalation of oil vapour and skin complaints caused by contact with oil could be covered as ‘damage’ within the CLC/Fund: see eg, Fund/Exc.37/3, para 4.2.11, *Annual Report 1995*, 65. In the *Braer* case, the Fund rejected claims for psychological damage (eg, for stress at the destruction of livelihood) and these were ultimately withdrawn before trial: see *Annual Report 1999*, 61. The Bunker Oil Convention was intended to replicate Fund practice: see eg, LEG 78/5/2, 14 August 1998, LEG 77/11, 28 April 1998.

²⁰⁹ This is because that expression means (under art 1(7)) reasonable measures to prevent or minimise [bunker] pollution damage taken after an ‘incident’. The latter as defined in art 1(8) refers to an occurrence which causes pollution damage ‘or creates a grave and imminent threat of causing such damage’. This was one of the amendments introduced by the 1992 CLC to the 1969 CLC, as a result of the experience of states being uncompensated for efficiently mobilising equipment after a casualty, before any oil leaked and where none in fact leaked. See also Part IVA of the *Protection of the Sea (Civil Liability) Act 1981* (Cth) and above Part I(C).

²¹⁰ See above n 56.

environmental recovery and reinstatement practices and policies have developed much in the last 40 years.²¹¹ The narrow definition has long been defended by the shipowner and insurer interests, obviously to reduce their exposure, but also because of fears that open-ended definitions might be incapable of objective control and possibly uninsurable.

Attempts in the last 10 years have been made to amend the definition, which looks dated by comparison with other instruments, e.g. the 1999 Basel Protocol²¹² and the EU Environmental Liability Directive 2004,²¹³ and that under US *Oil Pollution Act 1990*.²¹⁴ The latter provides a much more satisfactory enunciation of natural resource damage, although its principles on quantification of theoretical contingent valuations of environmental loss have been criticised. There is no doubt that there could be more appropriate legal definitions and one was proposed for the CLC in 1999,²¹⁵ but states preferred to keep the vagueness and perhaps the flexibility of the existing system. This has allowed for incremental changes and adjustments in the IOPC Fund practice as the cases are thrown up by experience – a pragmatic approach similar to common law techniques. Both the wording and the practice of CLC claims handling have emphasised commercial interests, where the available funds have been swamped by economic loss claims in a system that was designed originally for environmental protection.²¹⁶ This has meant that far more attention has been paid to compensating the tourist industry than in developing principles of environmental reinstatement.

The *IOPC Claims Manual* has become a statement of international practice and should be directly relevant to the Bunker Oil Convention. While states were less keen in 1999 to amend the formal definition, there was scope to make the Manual more specific in some of the greyer areas, including reinstatement costs and the costs of undertaking scientific studies.²¹⁷ Japan and South Korea proposed some clarifications which now appear in the April 2005 Edition, approved by the IOPC Assembly in 2004. In effect this is soft law, but it is immensely useful and highly influential. For example it states that:²¹⁸

Compensation is payable for the costs of reasonable reinstatement measures aimed at accelerating natural recovery of environmental damage. Contributions may be made to the costs of post-spill studies provided that they relate to damage which falls within the definition of pollution damage under the Conventions, including studies to establish the nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible.

²¹¹ Louise De La Fayette 'New Approaches for assessing damage' (2005) 20 *International Journal of Marine and Coastal Law* 167.

²¹² Protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989. Its definition is more specific on 'measures of reinstatement'; De La Fayette, *ibid*, 191.

²¹³ EC Directive on Environmental Liability 2004/35/CE, art 2(1) of which has the emphasis on environmental issues such as the need to protect habitats and species.

²¹⁴ De La Fayette, above n 211, 172.

²¹⁵ *Ibid* 186; LEG 79/6/3, 18 March 1999 and see above Part II(D).

²¹⁶ See above Parts II(A) and III(A).

²¹⁷ De La Fayette, above n 211, 208.

²¹⁸ *IOPC Claims Manual* (2005), 11.

Later sections spell out in much greater detail the type of claims that are allowed (admissible) and Section III gives guidelines on environmental damage and post-spill studies.²¹⁹

In addition to satisfying the general criteria for the acceptance of claims for compensation set out in Section II, claims for the costs of measures of reinstatement of the environment will qualify for compensation only if the following criteria are fulfilled:

- The measures should be likely to accelerate significantly the natural process of recovery.
- The measures should seek to prevent further damage as a result of the incident.
- The measures should, as far as possible, not result in the degradation of other habitats or in adverse consequences for other natural or economic resources.
- The measures should be technically feasible.
- The costs of the measures should not be out of proportion to the extent and duration of the damage and the benefits likely to be achieved.

The choice of the CLC definition of ‘pollution damage’ in the Bunker Oil Convention was therefore somewhat inevitable, given that the majority of delegates had taken part in debates on the revision of the CLC and indeed on the operation of the IOPC Fund’s governing bodies. Had the Bunker Oil Convention been drafted in another forum it is likely that other principles would have been agreed, so the significance of the practices of the IOPC Executive Committee and the IMO Legal Committee is in the continuity of their membership.²²⁰

6 Place of damage

The Bunker Oil Convention art 2 has the same geographical scope as the CLC, so as to apply to pollution damage both within the territorial sea (12 nm) and that in the exclusive economic zone (EEZ) or equivalent area up to 200 nm. The damage has to have occurred in a State Party for the Convention rules to apply.²²¹

7 Channelling: who is liable?

The CLC 1992 channelled liability to the registered shipowner,²²² and this model was followed in the HNS Convention. Thus, bareboat charterers and other ‘operators’ are not liable under the CLC. There are two essential justifications for this channelling. First, it simplifies claims handling and reduces costs to have one clearly defined defendant who has compulsory insurance cover. Secondly, oil pollution claimants under the CLC are given the additional protection of the second tier of liability provided by the IOPC Fund, and now the third tier Supplementary Fund.²²³ The Bunker Oil Convention is a one-tier convention; this is a necessary consequence of it being a stand-alone convention, not allied with the CLC or HNS Convention, and where there is no recognisable industry body which could finance a second tier. For this reason, most states were in favour of allowing claims against a wider category of defendant, including charterers or operators²²⁴ and this view

²¹⁹ Ibid, 30 et seq.

²²⁰ Gaskell, above n 34, 155.

²²¹ See below Part III(D)(2). Note also above n 196, art 7(15).

²²² See above Part I(D).

²²³ The same is broadly true of the HNS Fund, and it can be seen that the difficulties in starting that Fund are fundamental to the whole scheme of protection (see above Part III(A)).

²²⁴ At one stage there had been four options for the definition of shipowner (see LEG 78/5/2, 14 August 1998) although this was reduced to two, with the final single

prevailed at the diplomatic conference. Article 1(3) therefore defines 'shipowner' to mean:

The owner, including the registered owner, bareboat charterer, manager and operator of the ship.²²⁵

These categories of person could all expect to have an interest in how the ship is run (as opposed, usually, to a time or voyage charterer). A 'ship manager' does not refer to an individual employed as a manager by the registered shipowner; it is usually either an associated company to the single ship-owning company to which all the operational management functions are devolved, or a separate professional ship management company which operates for many owners. Either category could now be liable for pollution damage caused entirely by the negligent navigation of the master employed by the shipowner.²²⁶ There is no separate definition of 'operator' in the Bunker Oil Convention. The concept is apparently more familiar in the civil law systems than in the common law,²²⁷ but it is submitted that it is permissible to refer for guidance to art 1(9) of the Wreck Removal Convention 2007 which was drafted in effect by the same Legal Committee and which attempted to clarify the meaning of the word in a comparable environmental liability convention.²²⁸

It is assumed that independent managers and operators would want to cover the new liability through contractual undertakings from the shipowner and this right of contractual recourse is preserved by art 3(6).²²⁹ Article 7(1) only obliges the *registered shipowner* to take out insurance under the Convention, but in practice any bareboat charterer, manager and operator would probably want some form of insurance cover in case of insolvency of the registered shipowner. It may be that

selection being made in 1999 prior to the diplomatic conference (see, LEG 80/11, 25 October 1999, 13).

²²⁵ Again, *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) s 3, gives no separate definition of 'shipowner' and it is necessary to look to the Convention definition directly: see below Part III(D). Note also that ss 28 and 29 deal with the treatment of partnerships and unincorporated associations in Australian law.

²²⁶ It might be necessary to examine quite closely the commercial relationships between the various entities in a corporate structure, eg, for managers to see if there is a ship management contract. This may not be easy to do.

²²⁷ It was used in art. 1(2) of the LLMC 1976/1996, which is also relevant here (see below Part III(E), Part III(F)). See also, above n 61 about the chain of management of the *Pasha Bulker*.

²²⁸ It provides that 'operator of the ship' means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, *who has assumed the responsibility for operation of the ship from the owner of the ship* and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended (see the International Management Code for the Safe Operation of Ships and for Pollution Prevention, adopted by the Assembly of the IMO by resolution A.741(18), as amended). The key words are, it is submitted, those which have been emphasised. It is arguable whether in the context of the Bunker Oil Convention it is legitimate to regard the additional reference to the ISM Code as an essential part of the definition, but there seems no doubt that a person which *also* had the ISM functions would certainly be an 'operator'.

²²⁹ Noting that although this provision has the same wording as art III(5) of the CLC, the wider definition of 'shipowner' in the Bunker Oil Convention would allow all those within that definition to have rights of recourse.

some form of joint cover (or P & I Club entry) could be arranged, or for cover to be expressly extended to these others.

The departure from the CLC pattern is understandable up to a point, but in our opinion was probably unnecessary. Although under art 3(2) the liability of each is joint and several, the fact is that the registered shipowner is liable and must have insurance, so what is the point of adding other defendants?²³⁰ In the Australian context, all these other persons would be entitled to limit in the same manner as the shipowner to an aggregated amount, so there would be no question of recovering the same losses several times over from each defendant. The additional liability might conceivably be relevant where the registered shipowner and its insurer are insolvent, or where there is intentional or reckless conduct by one defendant, but not another.²³¹

The CLC channelling system also aims to ensure that claims can only be made against the registered shipowner *under* the CLC. Article III(4) of the CLC 1992 achieved this by precluding a suit for pollution damage outside of the CLC (e.g. in tort, or for criminal compensation) and this provision is repeated in art 3(5) of the Bunker Oil Convention.²³² This should stop most attempts by claimants to avoid the art 3 defences, or the art 8 time bar. The protection applies equally to all the persons within the category of shipowner as defined above (e.g. managers and operators). However, the bar to actions outside the Convention only applies if these are claims for 'pollution damage', as defined in the Convention. If there is a category of loss which falls outside this fairly narrowly defined concept²³³ but which is recognised by national law, then there is no bar. An obvious example is where a person suffers psychological injury after contamination, but it might also apply to the extent that Australia tort law recognised a wider category of environmental reinstatement or economic loss claims than normally accepted in the IOPC Fund practice under the equivalent CLC provision.²³⁴

8 Channelling defences

Another fundamental aspect of the CLC art III(4) channelling system is to provide specific exceptions from liability for persons *other* than the registered shipowner, both 'under the Convention or otherwise' (e.g. in tort). The justification was the same as that explained in Part III(C)(7) above, i.e. such claims were unnecessary and channelling to one person makes the obtaining of insurance coverage clearer.

The CLC 1992 actually tightened up the protection so that it extended expressly to servants or agents of the owner or the members of the crew, pilots, any charterer (however described, including a bareboat charterer), manager or operator, persons performing salvage operations with the consent of the owner or on the

²³⁰ Claims settlement could be delayed as the defendants may all have different insurers: see, LEG 80/4/2, 8 September 1999, 3.

²³¹ The additional defendants cannot take the place of the Fund when, in oil tanker cases, its liability extends down to cover all of a claim where there is a defence under art 3 for the registered shipowner. But see below, Part III(E)(5).

²³² It is for this reason that Sch 1 item 5 of the *Protection of the Sea (Civil Liability For Bunker Oil Pollution Damage) (Consequential Amendments) Act 2008* (Cth) ensures that there is no overlap with Part III of the *Protection of the Sea (Civil Liability) Act 1981* (Cth) (See below Part III(D)).

²³³ See above Part III(C)(5).

²³⁴ An attempt to close this loophole was rejected: see, LEG 80/4/2, 8 September 1999; LEG 80/11, 22 October 1999, 15.

instructions of a competent public authority; any person taking preventive measures, and all servants or agents of persons in the last three categories.

The debates about whether to follow the CLC were highly contentious during the drafting of the Bunker Oil Convention. Early drafts copied the CLC provision into art 3(5)²³⁵ but the bulk of it was deleted at the 79th Session of the Legal Committee in 1999. The reason was that exclusion for liabilities was not justified as there was no second tier fund available to claimants. The result is that the final text of art 3(5) of the Bunker Oil Convention only contains the shipowner provision cited in Part III(C)(7) above. There is no equivalent of the remainder of the CLC art III(4) and so there are no specific exceptions of liability for crew members, pilots charterers and salvors. They are not liable *under* the Bunker Oil Convention as they are not within the term 'shipowner',²³⁶ but they could be sued outside of the Convention e.g. in tort. The only concession for those in these categories (e.g. if a time charterer were sued in tort for ordering a ship to an unsafe port), was that decision to simplify the direct action and compulsory insurance provisions by making it *only* the registered shipowner who would be required to maintain the compulsory insurance.

One consequence of the decision not to follow the CLC was that the principle of 'responder immunity' was undermined, as there is no protection from civil suit for persons such as salvors and those performing clean-up operations. But it has long been recognised²³⁷ that salvors and other responders should not be hesitant to take action because of the threat of civil claims or criminal prosecution. This is a very real possibility, as is shown by the arrest of salvage tugs in the *Tasman Spirit* case in Pakistan in 2003.²³⁸ Although the introduction of a limited form of responder immunity was strongly pressed for at the 2001 diplomatic conference,²³⁹ art 3(5) remained un-extended even for this category of defendant. This was a serious mistake.

9 Compulsory insurance

Article 7 sets out the provisions on 'evidence of financial security', which are borrowed largely from the CLC 1992 and HNS Convention. There are two essential aspects: first, the compulsory nature of the cover as demonstrated by a convention insurance certificate,²⁴⁰ and secondly, the ability of a claimant to sue the insurer directly.

²³⁵ See, LEG 79/6/1, 12 February 1999.

²³⁶ See above, Part III(C)(7).

²³⁷ See eg, 'Safer Ships, Cleaner Seas': the report of Lord Donaldson's Inquiry into the prevent of Pollution from merchant Shipping, 17 May 1994, CM. 2560.

²³⁸ See, *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd's Rep. 517 for some of the legal consequences for the salvor. The Pakistani authorities arrested salvage vessels after the *Tasman Spirit* casualty as part of a mechanism to put pressure on insurers to provide large financial guarantees (Pakistan was not a party to the 1992 CLC and Fund until 2005). It can be assumed that professional salvors will hesitate long before working again in Pakistani waters.

²³⁹ See eg, LEG/CONF.12/8, 12 January 2001.

²⁴⁰ Alternative financial security is possible, such as a bank guarantee, but it seems unlikely that these will be used except perhaps for state commercial vessels.

State Parties are obliged to ensure that ships flying their flags carry a convention certificate of insurance for bunker pollution damage.²⁴¹ Experience has shown that port state control is more reliable than flag state control. So the more important power is that provided in art 7(12) which requires a State Party to ensure that ships over 1,000 gt shall have a convention certificate in force whenever entering or leaving a port in its territory, or arriving at or leaving an off-shore facility²⁴² in its territorial sea. As a matter of international law, a coastal state cannot stop a foreign flagged ship to inspect certificates if she is merely exercising the right of innocent passage to transit national waters. This poses a risk for Australia, e.g. where ships pass through the Torres Strait, or past the Great Barrier Reef, en route to another state. The hope is that the Bunker Oil Convention will become sufficiently widely ratified that a ship will in practice need a certificate wherever it travels. Australia may need to provide considerable political encouragement to get the developing states to its north to ratify; for there may well be ships such as fishing vessels which have only a limited regional trading pattern, and if the home port is not a State Party then such ships would not need insurance if they never called into an Australian port.

It is the registered shipowner alone who must have the insurance cover, and only for ships of over 1,000 gt. There was extensive debate about this threshold at the diplomatic conference as some states wanted the threshold to be very low, such as Australia (400 gt)²⁴³ and the UK (300 gt). China and India wanted it at over 10,000 gt (and for ships actually carrying 1,000 tonnes of bunkers).²⁴⁴ States like Indonesia and the Philippines wanted the threshold at 5,000 gt, as they were worried that with lower figures many of their smaller inter-island craft might have been obliged to pay for cover.²⁴⁵ Japan wanted it at between 500-1,000 gt. The diplomatic conference eventually agreed to compromise on 1,000 gt as part of a larger final package bound up with the relatively high entry into force requirements of art 14.

The amount of the financial cover is supposed to be an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the LLMC 1996.²⁴⁶

A fundamental protection for the claimant is that it may bring a direct action claim against the insurer under art 7(10).²⁴⁷ The insurer can rely on the defences

²⁴¹ In the form set out in the Annex to the Convention, issued in accordance with the provisions of art 7.

²⁴² For example an off-shore terminal. These are normally places where oil tankers pick up cargoes via pipelines to subsea storage facilities, and it is the CLC that would apply to such craft. The Bunker Oil Convention could apply to supply vessels that visit, eg, for maintenance or to offload equipment.

²⁴³ See, LEG/CONF.12/6, 18 January 2001. This was in line with existing national legislation: see, Part III(D)(1).

²⁴⁴ In LEG/CONF.12/7, 18 January 2001 these states presented a study showing that many ships of under 2,000 gt used diesel oil, not HFO, and that ships of 6,000 gt, 10,000 gt and 20,000 gt had average bunker capacities respectively of 530 tonnes, 1,000 tonnes and 2,000 tonnes. The data was, however, for limited types of ships, excluding fishing vessels.

²⁴⁵ The Philippines also wanted to extend the insurance opt-out for domestic craft in art 7(15): see above, n 196.

²⁴⁶ The calculation of those limits will be dealt with in Part III(E)(1); see also below Part III(E)(2) *et seq.*

²⁴⁷ The extent to which direct actions are possible and enforceable varies between states. Even where there is a national statute (eg, the *Insurance Contracts Act 1984* (Cth) s 54) its effectiveness in practice may be limited when it is sought to be enforced against an international insurer.

(under art 3) and limits of liability (as allowed in art 7) which were open to the shipowner itself – even in the event of intentional or reckless conduct by the shipowner.²⁴⁸ However, in the latter case there may well also be a complete defence under the insurance policy of ‘wilful misconduct’.²⁴⁹ This is the only policy defence allowed to an insurer sued on the basis of the certificate.²⁵⁰

A key practical issue for states is that there may be an increased administrative burden in issuing and checking certificates. The effect of the Convention will be that virtually all ships trading internationally will now require an official state-issued certificate, whereas previously this was confined to tankers.²⁵¹ The Convention system relies on the State Party which is a flag state to issue certificates, but recognises that ships registered in non-State Parties will need to obtain certificates. Registries with a reputation for efficient administration may find that they are swamped by applications from shipowners flagged in non-State Parties. Most Convention states were apparently willing to issue certificates to ships visiting that state, but by August 2008, there were apparently only three states (UK, Liberia and Cyprus) willing to issue certificates to ships irrespective of their port of call.²⁵² Yet there were reportedly something like 40,000 ships which might need certificates by 21 November 2008, the date of entry into force. By the end of September 2008, the UK had processed over 1,000 applications, was receiving 100 emails a day and was anticipating that it would not be able to process all the expected last minute applications by the deadline.²⁵³

The administration of a State Party is bound under art 7(9) to recognise certificates issued in other State Parties, even if the insurer is completely unknown and not a member of the International Group of P & I Clubs.²⁵⁴ The unspoken fear has always been of undercapitalised insurers entering the market and attaching

²⁴⁸ See below Part III(E)(2).

²⁴⁹ See the *Marine Insurance Act 1909* (Cth) s 61(2)(a) and note *The Eurysthenes* [1977] QB 49.

²⁵⁰ The bankruptcy or winding up of the shipowner is not a defence.

²⁵¹ Australia has required relevant insurance certificates to be carried by ships of 400 gt or over since the 2000 amendments to the *Protection of the Sea (Civil Liability) Act 1981* (Cth) Part III, but this obligation could *presumably* have been satisfied by the production of a satisfactory P & I Club certificate issued by the insurer. Now, AMSA and equivalent authorities in other states will have to issue certificates themselves, or under art 7(3) authorise another institution or organisation to do so. See below Part III(D)(2).

²⁵² Clubs have been alive to the practical certification problems for shipowners hastily seeking certificates, and a series of circulars has addressed this, as well as the problems posed by mobile offshore units. See eg, the Gard circulars at <http://www.gard.no/pages/GardNO/Publications/Circulars/CircularsPI?MainMenuID=10&SubMenuID=74&p_d_i=203&p_d_c=&p_d_v=13&p_rowcount=1> at 30 September 2008.

²⁵³ Information from UK Maritime and Coastguard Agency, 3 October 2008. During negotiations, proponents of the Convention, such as Australia, played down the administrative impact: see, LEG 77/6, 13 February 1998: see also, [2006] ATNIA 9. Additional problems might be caused by the existence of bareboat registries, separate from those for the registered shipowner, where there are uncertainties as to which administration is to issue certificates: see LEG 94/12 31 October 2008, para 11(c).

²⁵⁴ The best that the worried state can do is to ‘request consultation’ with the flag state; this may have the incidental sanction of delaying the issue of the certificate.

themselves to flag of convenience (open registry) states which exercise little or no administrative control. The risk of rogue insurers has been fairly small in the experience with the CLC, where it is said that about 95% of the world's tanker fleet is entered with a member of the International Group.²⁵⁵ The Club cover will be for a whole range of risks and not simply for pollution so, for most commercial shipowners, cover for bunker pollution will be a simple automatic addition to the normal cover. A P & I Club certificate is a reliable guarantee for states, but it remains to be seen whether other insurers arise to meet the demand of a market that may really want the certificate as a passport to enter foreign ports rather than for its insurance protection. If this practice develops, it could undermine the whole system underlying the IMO maritime liability conventions.

10 Time Bar

Like the CLC 1992, there is a time bar in art 8 for claims within the Convention. Claims must be brought within three years from the date of damage. It is possible that after a ship sinks oil escapes many years later.²⁵⁶ There is therefore a backstop time bar of six years from the date of the incident causing the damage. 'Incident' is defined in art 1(8) to mean an occurrence or series of occurrences having the same origin. This would typically refer to a grounding or collision. If there is a series of occurrences, e.g. an engine failure leading a day later to a grounding, followed some weeks later by a sinking, and then leakage many years after that, the time bar clock starts from the date of the 'first such occurrence'. This would presumably be the engine failure, certainly if it had threatened pollution damage.²⁵⁷

D Australian Implementation of the Bunker Oil Convention

1 The existing legislative regime

While bunker spills (from non-tankers) were excluded from the CLC/Fund regime, and also outside the HNS Convention, existing Australian legislation did

²⁵⁵ In LEG 80/4/2, 8 September 1999 the Clubs pointed out the problems which occurred with the insolvency of Ocean Marine Mutual, a Club which was not a member of the International Group. For competition reasons it was unlikely that there would have been agreement to recognise only International Group certificates.

²⁵⁶ This is not fanciful. The battleship *Royal Oak*, sunk in Scapa Flow in 1940 is still leaking bunker oil (although note that the Bunker Oil Convention could never apply to warships: see above Part III(C)(2)). It is partly because of the time bar problem that so much time and effort was expended after the *Prestige* casualty to remove oil that was physically remaining in the ship, on the basis that it constituted a 'threat' and ought to be removed. The practice of the IOPC Fund is that such costs could only be recovered if reasonable and proportionate to the risk (see, IOPC *Annual Report 2007*, above n 3, 24, 98, 106), and this should be the approach under the Bunker Oil Convention.

²⁵⁷ Courts should be reluctant to accept that there was a causative 'incident' more remote from the immediate danger to the ship, with the effect that the time limit expires earlier. Eg, a shipowner might (paradoxically) seek to say that the cause of the engine failure was an earlier management decision taken months before not to effect repairs. The better approach would be to take the proximate cause of loss, eg, the engine failure or grounding.

provide AMSA with a range of measures to prevent marine pollution, including that from bunkers, and to recover costs for clean up or prevention operations.²⁵⁸

AMSA has wide powers to do anything necessary to combat pollution of the marine environment in Australia's territorial waters and exclusive economic zone.²⁵⁹ Beyond that, the powers are more limited. Under the *Protection of the Sea (Powers of Intervention) Act 1981* (Cth) (Intervention Act)²⁶⁰ AMSA is able to take action in respect of marine casualties on the high seas where there is a grave and imminent threat of pollution to the Australian coastline or its related interests.²⁶¹ Intervention for lesser threats can only occur if the vessel concerned is an Australian vessel.²⁶² The intervention, in either case, is those measures necessary to prevent, mitigate or eliminate the threat.²⁶³ Furthermore, under the *Protection of the Sea (Civil Liability) Act 1981* (Cth) (Civil Liability Act 1981), AMSA may recover, as a debt due to the Commonwealth, all expenses and liabilities arising from the exercise of these powers from the owner of the ship concerned.²⁶⁴ The section operates only where the CLC does not apply.²⁶⁵ However, not only is the shipowner's liability limited by reference to the ship's tonnage, but it can also raise the defences in art 3(2) of the CLC.²⁶⁶

Whereas Part IV of the Civil Liability Act 1981 provides a mechanism for AMSA to recover all expenses and liabilities arising from the exercise of the powers conferred by the Intervention Act, Part IVA of the Civil Liability Act 1981 provides AMSA with more general powers to recover any loss, damage, costs or expenses incurred in preventing or mitigating or in attempting to prevent or mitigate any pollution damage, or threats of it.²⁶⁷ These are potentially important provisions

²⁵⁸ Similarly, the UK Government introduced strict liability for bunker oil pollution in what is now the *Merchant Shipping Act 1995* (UK) s 154, and in s 192A (introduced by the *Merchant Shipping and Maritime Security Act 1997* (UK) s 16) produced enabling powers to make insurance compulsory for ships visiting UK waters (see, N Gaskell annotations in, *Current Law Statutes 1995*, 1997). The only Regulations that have been issued (S.I. 1998 No. 209) were for fish factory ships, which had been a problem. There were no new powers for direct action against the insurer (cf above Part III(C)(9)).

²⁵⁹ *Australian Marine Safety Authority Act 1990* (Cth) ss 6(1)(a), 10(1). See, Davies and Dickey, above n 83, 595.

²⁶⁰ The Intervention Act gave national effect to the *International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969* (the Intervention Convention) and its 1973 Protocol, which were agreed, like the CLC, as part of the reaction to the *Torrey Canyon* sinking.

²⁶¹ Intervention Act ss 8-9.

²⁶² Intervention Act s 10(8).

²⁶³ Intervention Act ss 8-10.

²⁶⁴ Civil Liability Act 1981 (Cth) Part IV, s 20(1). The provision is really an add-on to the intervention powers and is not entirely apt as a mechanism for compensation for environmental damage. It is not clear if there is some restriction on the powers if there is no formal intervention, or if pollution occurs before the state intervenes, or whether it can actually cover clean up after an intervention (ie whether this is removing or destroying cargo).

²⁶⁵ Civil Liability Act 1981 (Cth) Part IV, s 20(5).

²⁶⁶ Civil Liability Act 1981 (Cth) Part IV, s 20(2). See above Part III(C)(4).

²⁶⁷ Civil Liability Act 1981 (Cth) Part IVA, s 22A. It may have been assumed that s 22A was necessary because of the doubts about the scope of s 20, and s 22A would clearly cover clean up; but the un-amended s 22A might not have been appropriate to cover threat removal costs, such as the hiring to tugs to assist in a casualty before a ship sinks; this is not a theoretical possibility, as demonstrated by incidents such as the groundings of the *Peacock*, and the *Bunga Teratai Satu*, above Part I(E). See Glover, above n 56.

which give protection to the Australian state in the event of, e.g. bunker pollution, but do not give rights to individual claimants.

There were also two potential problems with the legislation. The first was that it did not require compulsory insurance for vessels entering Australia. To confront that problem, the *Protection of the Sea (Civil Liability) Amendment Act 2000* (Cth) created a new Part IIIA of the Civil Liability Act 1981, which required all ships (not covered by the CLC) of 400 gt or more and which are carrying oil as cargo or as bunkers to carry evidence of liability insurance when entering or leaving Australian ports.²⁶⁸ The provision applied irrespective of the flag of the ship. There were no specific provisions allowing for direct action against the insurer.²⁶⁹

The second problem with liability under the Civil Liability Act 1981 Part IV (and Part IVA) relates to limits of liability. There are similar liability defences under Part IV to the CLC,²⁷⁰ but s 20(3) allows a shipowner to limit liability. That provision does not itself set out what the limit is, but refers to the limit that is in force under 'one or more international limitation conventions, being provisions in force in Australia'.²⁷¹ The convention which currently applies in Australia is the LLMC 1996,²⁷² which does set out limits of liability. However, the application of the s 20 liability to the limits is not without difficulty.²⁷³ Moreover, s 22A makes no specific reference to defences or limits. At first sight it might be thought that this means that there are no limits of liability at all under Part IVA, as opposed to Part IV, but the better explanation is that no reference to limitation is necessary in either Part, as the LLMC will apply by law anyway on its own terms.²⁷⁴

²⁶⁸ A 'relevant insurance certificate' is defined in s 19A, in general terms by reference to 'prescribed information', which is defined in the *Protection of the Sea (Civil Liability) Amendment Regulations 2001* (NO. 1) 2001 No. 56 (Cth) reg 11. In practice this will usually be a certificate of P & I Club entry. The Consequential Amendments Act 2008 Sch 1 item 5 amended this provision so as to exclude its application where the Bunker Act applies.

²⁶⁹ But see the *Insurance Contracts Act 1984* (Cth) s 54.

²⁷⁰ *Civil Liability Act 1981* (Cth), Part IV, s 20(2).

²⁷¹ This wording was introduced by the *Protection of the Sea (Civil Liability) Amendment Act 2000* (Cth) so as replace an unusual 'stand alone' limitation provision that was in s 20(3) of the original 1981 Act (but which also had a fall back position which preserved any system of limitation within the *Navigation Act 1912* (Cth) Part VIII). The replacement wording reference to multiple conventions was presumably necessary because, at the time of the 2000 amendments, Australia was a party to the LLMC 1976, but not yet a party to the LLMC 1996. See below Part III(E).

²⁷² See the *Limitation of Liability for Maritime Claims Act 1989* (Cth), which entered into force on 13 May 2004.

²⁷³ See below Part III(E). Section 20(3) strangely sets a test for breaking limits which is different to that in the LLMC and which is based on the test in the *International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships* (1957 Limitation Convention) which applied in Australia prior to the LLMC. The 'actual fault or privity' test was itself derived from the UK *Merchant Shipping Act 1894* and upon which there has been much litigation (and see Davies and Dickey, above n 83, Chap 16 generally). Arguably, if the LLMC applies it ought to apply with its own limitation breaking test (art 4), which is much tougher (and Australia might be obliged in international law to apply the LLMC to a foreign flag ship). For other limitation difficulties, which also arise under the Bunker Oil Convention, see below Part III(E)(3).

²⁷⁴ Under the *Limitation of Liability for Maritime Claims Act 1989* (Cth). Cf the EC Directive on Environmental Liability 2004/35/CE which requires 'operators' to prevent imminent threats of environmental damage and to restore the environment. Authorities can recover costs, and these would be subject to limits, but where the shipowner (as operator) restores the environment itself it is not clear how, if at all, it can limit liability. There appears to be no obligation in Australian law for a shipowner to engage in clean

While the existing legislation does provide a prevention and compensation regime for bunker pollution, the main advantage of implementing the Bunker Oil Convention is that there would be a package which would be accepted internationally and, in particular, by shipowner interests and their P & I Clubs. This means that there ought not to be any difficulties in enforcing an internationally recognised insurance certificate, and there would be inbuilt mechanisms for recognising and enforcing judgments. Moreover, rights could be given to individuals who suffer damage or economic loss, in addition to the state. The existing legislation does, however, leave a number of gaps in the prevention and compensation regime. For example, with respect to compensation for damage or cost caused by an incident involving the spill from a ship of hazardous or noxious substances (other than oil), while AMSA might be able to rely on the national measures contained in Parts IV and IVA of the Civil Liability Act 1981 to recover costs, individual claimants might have to resort to the inadequate common law remedies which existed at the time of the *Torrey Canyon* in 1967.²⁷⁵

2 The 2008 legislative regime

Australia gives effect to the Bunker Oil Convention primarily under the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) (the Bunker Act).²⁷⁶ Entry into force for Australia will depend on its date of ratification, which is expected in early 2009.²⁷⁷ As a matter of drafting technique, Australia has again taken the sensible course of, in effect, incorporating by reference as many of the original articles of the Convention as possible.²⁷⁸ As such, those articles of the Convention which deal with the liability of the shipowner for pollution damage and the making of claims directly against the insurer are incorporated directly into the Bunker Act.²⁷⁹ That is, s 11 of the Bunker Act simply gives the force of law of the Commonwealth to: the strict liability regime established in art 3, including defences;²⁸⁰ the joint and several liability of shipowners in an incident involving two vessel established in art 5;²⁸¹ the right of the shipowner to limit

up operations itself, although under the intervention powers (Intervention Act 1981 (Cth) s 11) it could be directed to take limited steps to reduce pollution, eg, by off-loading cargo or bunkers.

²⁷⁵ See below Part III(E). The remedies could involve claims in negligence, nuisance or trespass (eg, *Esso Petroleum Co. Ltd. v Southport Corporation* [1956] AC 218) and low LLMC limits of liabilities.

²⁷⁶ See also, the *Protection of the Sea (Civil Liability For Bunker Oil Pollution Damage) (Consequential Amendments) Act 2008* (Cth).

²⁷⁷ Marine Order 16/2008, 3 September 2008. The Bunker Oil Convention will come into force for Australia three months after the date of ratification. See Explanatory Memorandum, *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) s 3.

²⁷⁸ This can be compared very favourably with the UK *Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006* (S.I. No.1244), which are an example of statutory redrafting of otherwise clear convention provisions in which the product is more difficult to understand than the original.

²⁷⁹ No part of the Convention is in fact reproduced in the Act itself, which unfortunately means that reference to the text must be made elsewhere (eg, online at www.austlii.edu.au).

²⁸⁰ See above Part III(C)(3) and (4).

²⁸¹ See above Part III(C)(1).

liability established in art 6;²⁸² the imposition of a time bar established in art 8;²⁸³ and the right to take claim directly against the insurer established in art 7(10).²⁸⁴ Similarly, the definition of terms found in those articles, and which are not found in the Bunker Act itself, are not included in the definition section of the Act,²⁸⁵ but incorporated directly from the definition section of the Convention. Important definitions, such as the definition of 'shipowner' or 'bunker oil' have therefore not been included in the Bunker Act.²⁸⁶ While perfectly logical, this does detract from the general user-friendliness of the legislation.²⁸⁷

The remaining articles of the Convention are dealt with in the Bunker Act in a manner which allows them to operate in Australia. For example, the scope of application of the Bunker Oil Convention as set out in art 2 is not incorporated directly into the Bunker Act, but rather given effect in a manner which relates directly to Australia.²⁸⁸ As such, s 7 of the Bunker Act provides that liability under the Convention applies to pollution damage occurring in Australia or its EEZ and preventive measures, wherever they are taken, to prevent or minimise damage occurring in Australia or its EEZ.²⁸⁹ The same applies with regard to ensuring that the Bunker Oil Convention (and the Bunker Act) do not overlap with the CLC (and its implementation in the Civil Liability Act 1981), as well as to the inclusion of government ships used for commercial purposes.²⁹⁰ The greater part of the Bunker Act is devoted to art 7 of the Bunker Oil Convention, governing the insurance certificate relating to liability for pollution damage, in a manner appropriate to Australia. In particular, the administrative detail concerning the issuing and checking of certificates by AMSA²⁹¹ is set out, as well as the creation of certain offences in relation to a failure to carry an appropriate certificate, and the powers of AMSA to detain ships in contravention of the Bunker Act.

The administrative duties for issuing and checking certificates created in the Bunker Act, are set out largely by incorporating the detail of art 7 of the Bunker Oil Convention in an Australian context, and substantially replicate those duties already established by the Civil Liability Act 1981 (implementing the CLC).²⁹² AMSA is

²⁸² See above Part III(C)(9) and below Part III(E).

²⁸³ See above Part III(C)(10).

²⁸⁴ See above Part III(C)(9).

²⁸⁵ Bunker Act s 3.

²⁸⁶ Definitions of terms found in the Act which are consistent with those in the Convention, are not repeated in the Bunker Act but incorporated directly from the Convention. For example, the term 'incident' is defined in the Bunker Act s 3 as having 'the same meaning as in the Bunker Oil Convention'.

²⁸⁷ It might have been more helpful for a reader to have the relevant text of the Convention as a schedule (eg, as with the Civil Liability Act).

²⁸⁸ See above Part III(C)(6).

²⁸⁹ The Bunker Act s 3 defines Australia, when used in a geographical sense (as it is here), to include the external territories. This definition overrides that contained in the *Acts Interpretation Act 1901* (Cth) s 17(a) so as to include all external territories. Explanatory Memorandum, *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) s 3. Section 3 defines the EEZ as having the same meaning as in the *Seas and Submerged Lands Act 1973* (Cth). The Bunker Act s 5 also provides that '[t]his Act extends to every external territory'.

²⁹⁰ The Bunker Act ss 8, 9, 12(2) & 12(3) giving effect to art 4 Bunker Oil Convention. See above Part III(C)(1). It appears that the Act has left unaffected the powers under Part IVA Civil Liability Act (Cth) 1981, above n 267.

²⁹¹ As identified in the Bunker Act s 3.

²⁹² This includes the establishment of the application form and the detail required in the insurance certificate (sec 18(3), (8), (9), giving effect to art 7(2), (7)

granted the power to issue insurance certificates, in relation both to ships registered in Australia and ships registered in a foreign country that are not a party to the Bunker Oil Convention, if it is satisfied that appropriate insurance cover is maintained by the shipowner.²⁹³ The Act also sets out when the certificate can be cancelled or ceases to be in force.²⁹⁴

The Bunker Act makes a failure to have an appropriate insurance certificate on board an Australian ship during its operation an offence of strict liability for the registered owner or master.²⁹⁵ A similar offence is created for other ships entering or leaving a port or offshore facility in Australia.²⁹⁶ It is also an offence for the master of the ship to fail to comply with a request from an Australian enforcement officer to produce an insurance certificate.²⁹⁷ An enforcement officer also has the power to detain a vessel where the officer has reasonable grounds for believing that at the time the vessel attempts to leave port, no appropriate insurance certificate for the ship was in force.²⁹⁸ The detention may last until the certificate is produced or obtained.²⁹⁹ All these offence are indictable offences and prosecutions may be brought at any time.³⁰⁰

²⁹³ Bunker Act s 18(1),(6). The issuing (and cancellation) of certificates to government ships (whether federal or state or territory ships) is governed by s 19.

²⁹⁴ Bunker Act s 24. The corresponding power to cancel is contained in s 22 (giving effect to Bunker Oil Convention art 3(c)), while the conditions upon which the certificate automatically ceases to be in force is set out in s 23. Applications may be made to the Administrative Appeals Tribunal for review of decisions to refuse to issues a certificate under s 18(7) or to cancel a certificate under s 22(1).

²⁹⁵ Bunker Act s 17(1), (2). The maximum penalty for this offence (and that in s 16) is 500 penalty units (A\$55,000 for an individual and A\$275,000 for a body corporate). Explanatory Memorandum, *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) 11-12. Section 15 sets out, in a tabular form, what constitutes an appropriate certificate for a ship, effectively dividing vessels into those registered in Australia, those registered in a foreign state (both State Party and non-party to the Bunker Oil Convention) and state owned vessels (Commonwealth, State or Territory and foreign).

²⁹⁶ Bunker Act s 18. In both cases, the Bunker Act allows for the maintenance of electronic certificates rather than paper certificates on board the ship subject to the conditions laid down in art 7(13) of the Bunker Oil Convention. Bunker Act ss 16(3), 17(3), 20(4).

²⁹⁷ Bunker Act s 20. The maximum penalty for this offence is 20 penalty units (A\$2,200 for an individual and A\$11,000 for a body corporate): Explanatory Memorandum, *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) 14. See s 20(4) in relation to electronic certificates. Australia had pressed for a wide use of such certificates and achieved amendments in what is now art 7(13): see LEG/CONF.12/13, 12 February 2001.

²⁹⁸ Bunker Act s 21(1). An enforcement officer includes a Customs officer, a surveyor appointed under the *Navigation Act 1912* (Cth) or a person prescribed by the regulations that may be established to give effect to the Bunker Oil Convention: Bunker Act ss 3, 27. The latter will only occur where there is no Customs officer or surveyor available, and will usually be someone who holds the position of harbour master or similar position: Explanatory Memorandum, *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) 4.

²⁹⁹ Bunker Act s 21(2). It is an offence for a ship detained under s 21 to leave the port before being released. The registered owner and master of the ship are jointly liable for a strict liability offence to a maximum penalty of 2,000 penalty units (A\$220,000 for an individual and A\$1,100,000 for a body corporate): Explanatory Memorandum, *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) 14.

³⁰⁰ Bunker Act ss 16(4), 17(4), 21(5), 25.

The Bunker Act further addresses those issues peculiar to Australia as a federation, in particular the ability of the States to make law in relation to bunker oil pollution, as well as addressing the jurisdictional regime created in art 9 and 10 of the Bunker Oil Convention. By virtue of the external affairs power of the Australian Constitution, the Commonwealth has the power to give effect to international conventions, such as the Bunker Oil Convention, and has plenary powers to legislate in respect of the territorial sea.³⁰¹ Nevertheless, the Offshore Constitutional Settlement provided for the States to exercise jurisdiction over a 3nm sea adjacent to its coast. In relation to this division of powers to shipping, the *Navigation Act 1912* (Cth) sets out the jurisdictional competencies of the States and Commonwealth. Section 10 of the Bunker Act therefore gives effect to the ability of the States to legislate in relation to the Bunker Oil Convention if the State wishes to do so. Mirroring to a large extent the mechanism for differentiating between the Commonwealth's and State's powers in the *Navigation Act 1912* (Cth), s 10 provides that in relation to domestic voyage ships,³⁰² the Bunker Act will not apply where the State or Territory has given effect to those articles that would have been given effect to by way of s 11 of the Bunker Act in its own legislation.³⁰³ Similarly s 14 of the Bunker Act allows for the States and Territories to issues insurance certificates giving effect to art 7(1), (2) and (4) of the Bunker Oil Convention.

Furthermore, s 27 of the Bunker Act provides for the adoption of regulations to give effect to art 10 of the Bunker Oil Convention, which itself provides for the enforcement and recognition of judgments obtained in a State Party which has jurisdiction by way of art 9 of the Convention; that is, where an incident has caused pollution damage or required preventative measures in that state's territorial sea or EEZ. Where such a judgment is no longer subject to ordinary forms of review, was not obtained by fraud, and where the defendant was given reasonable notice and a fair opportunity to present his or her case, the Bunker Act provides for the adoption of regulations conferring jurisdiction on the Federal Court of Australia as well as the Supreme Courts of the States and Territories in relation to the recognition and enforcement of those judgments.³⁰⁴

In order to integrate the liability regime created in the Bunker Act with the existing liability regimes, the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) (Consequential Amendments) Act 2008* (Cth) (Consequential Amendments Act 2008) was adopted. To ensure that Part IIIA of the Civil Liability Act does not overlap with the liability regime created in the Bunker Act, it provides for an amendment of s 19B(1) of the Civil Liability Act 1981 which excludes the insurance requirements provided for in the Bunker Act from the Civil Liability Act 1981. In effect this means that ships of between 400-1,000 gt will require insurance under Part IIIA of the Civil Liability Act rather than under the Bunker Act.

The Consequential Amendments Act 2008 also provides for a similar exclusion of the liability created in the Bunker Act from the Intervention Act.³⁰⁵ Some difficulties arise, however, in this regard. Schedule 1 item 6 of the Consequential

³⁰¹ Constitution s 51(xxix). See generally Davies and Dickey above n 83, 13-36.

³⁰² This is defined 'as a ship that is (a) a trading ship proceeding on a voyage other than an overseas voyage or an inter-State voyage; or (b) an Australian fishing vessel proceeding on a voyage other than an overseas voyage', and mirrors *Navigation Act 1912* (Cth) s 2. Furthermore, the terms 'Australian fishing vessel', 'inter-State voyage' and 'trading ship' are defined by reference to the definitions contained in the *Navigation Act 1912* (Cth) in Bunker Act s10(4).

³⁰³ That is Bunker Oil Convention arts 3, 5, 6, 7(10), 8.

³⁰⁴ Bunker Act s 27.

³⁰⁵ Consequential Amendments Act 2008 Sch 1 item 6.

Amendments Act 2008 inserts a new s17A(5A) in the Intervention Act to ensure that claims can be made under the Bunker Oil Convention even if AMSA has given a direction to a shipowner (e.g. to sail away). The provision seems designed to avoid any argument under s 17A of Intervention Act that there is an *automatic* defence to civil proceedings following a direction. The Bunker Oil Convention provides its own grounds of liability which do not require fault, and which have limited defences, e.g. for circumstances caused partly as a result of state action.³⁰⁶ It should be noted that a direction under the Intervention Act is unlikely to be a defence under art 3(3), but there might be a defence under art 3(4), if the shipowner can prove that pollution was wholly or partially caused by the fault of the person suffering the damage. Where, e.g. AMSA is claiming clean up costs, the shipowner would have to show that it was negligent in giving a direction. That negligence would have to be judged in the context of the exercise of intervention powers. Thus, AMSA might order a grounded ship to be moved, knowing that some bunkers would leak, but with the aim of trying to avoid a bigger discharge. Under s 17A of the Intervention Act AMSA has a defence to civil action for actions authorised by the Act, but that presumably does not extend to actions not authorised by the Act, e.g. where the exercise of the powers was excessive or unnecessary. The point is not entirely clear as s 17A does refer to 'an act done or *omitted* to be done', but it does continue 'in the *exercise* of any power conferred' by the Act.³⁰⁷ In the case of an AMSA direction which in some way caused or contributed to pollution damage by third party claimants (e.g. fishing or tourism claimants), there would be no defence for the shipowner.³⁰⁸

E Limitation of liability

From the genesis of the Bunker Oil Convention it was recognised that there should not be strict liability without a corresponding financial limit to that liability, but the question was what form that limit should take. The problem was that when the general convention on limitation, the LLMC 1976, was revised in 1996, it made no allowance for a future bunker convention with its own separate limits.³⁰⁹ In order to avoid a conflict of conventions, there would need to have been yet another amendment to the LLMC, which would have been politically unacceptable so soon after its 1996 revision. For that reason, the earliest draft of a free standing bunker convention merely made a rather vague reference to a shipowner being allowed to limit 'in accordance with the applicable international convention or the national law' of the place of damage.³¹⁰ This formulation was liable to give rise to a great many uncertainties,³¹¹ partly because of the variety of regimes that might apply. By 1997,

³⁰⁶ See above Part III(C)(4).

³⁰⁷ And the interpretation that there could be liability is supported by the fact that under the Intervention Convention arts V and VI there is state liability if powers are exercised unreasonably, or disproportionately.

³⁰⁸ Although it might possibly have a recourse action against AMSA for exceeding its powers, as suggested above.

³⁰⁹ The LLMC 1996 allowed for the HNS Convention 1996 (which was agreed at the same diplomatic conference) to have free-standing limits.

³¹⁰ See e.g. LEG 73/12/1, 12 September 1995. Slight changes were proposed in LEG 74/4/1, 9 August 1996.

³¹¹ Many of which were highlighted by the CMI in LEG 74/4/2, 9 August 1996; some of these will be examined below in Part III(E)(3).

the suggestion was being made that it might be better to tie the bunker convention to a specific limitation regime.³¹²

The 77th Session of the IMO Legal Committee in 1998 decided that there should be no stand alone limits and that liability for bunker pollution should be subject to limitation of liability by reference to the LLMC 1996.³¹³ This reflected the idea that there should be some sort of limit, rather than unlimited liability, and based on the most recent instrument. But there was then the difficult question of 'linkage', as some states might want to be a party to the Bunker Oil Convention but not the LLMC 1996. Two options were suggested, one of which merely 'called up' (i.e. referred to) the LLMC 1996, and the other which reproduced the exact limits from the LLMC 1996 into the bunkers instrument.³¹⁴ There was no support for the second option but the complexities of these solutions were becoming apparent and Australia led a Working Group to consider them.³¹⁵ This acknowledged the need to avoid strict liability without limitation and suggested that the Preamble reflect this.³¹⁶ It also identified that there needed to be two references to limitation, one concerning liability and the other relating to the level of compulsory insurance. A new draft art 6 was introduced at the 79th Session in April 1999 which was in effect a simple statement preserving existing rights.³¹⁷ With one minor addition, this draft was eventually adopted in art 6;

Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, *such as* the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.³¹⁸

This is an unusual, and perhaps unfortunate, provision for a number of reasons. It allows a State Party, in effect, to choose which limitation regime to apply. For shipowners, they may face no limits at all in some states.³¹⁹ In Australia, art 6 has been enacted unamended, and therefore Australian law applies the amended version of the LLMC, namely the LLMC 1996.³²⁰

The decision to have linkage has the potential to create many problems of interpretation,³²¹ with the result that certain bunker pollution claims may not be subject to limitation at all, or that the precise extent of the insurer's direct liability is left in some doubt. However, we will first consider the level of limits of liability that might apply.

³¹² See LEG 76/4/1, 8 August 1997, which suggested using either the LLMC 1996, or some rewording of the CLC limitation provisions. These two options were then more formally proposed in LEG 77/6/1, 13 February 1998, and a third one was raised, namely of inserting stand alone limits.

³¹³ See LEG 77/11, 28 April 1998, 19.

³¹⁴ Thus seeking to avoid a conflict by having identical provisions: see LEG 78/5/2, 14 August 1998, 8-9.

³¹⁵ See LEG 78/11, 2 November 1998, 17-18, LEG 78/5/3, 18 September 1998.

³¹⁶ See LEG 78/WP.4, 21 October 1998. See now, Recital 5 of the Preamble.

³¹⁷ See LEG 79/6/1, 12 February 1999.

³¹⁸ Emphasis added.

³¹⁹ Although the diplomatic conference adopted Resolution 1 calling on states to accept the LLMC 1996, and to denounce the LLMC 1976 and the 1957 Limitation Convention.

³²⁰ See, *Limitation of Liability for Maritime Claims Act 1989* (Cth). For choice of forum issues, see below Part III(E)(5) and Part III(F).

³²¹ See below Part III(E)(3)-(5). The analysis which follows is often rather technical but, unfortunately, is necessary to unravel the complexities of linkage.

1 Level of LLMC limits for bunker pollution claims

The following two tables illustrate the limitation funds which might be available in respect of bunker pollution.³²² The limits are shown not only under the LLMC 1996 art 6, which applies in Australia, but also under the LLMC 1976, in order to show how low the limits might be in states such as Singapore, India, or Vanuatu.³²³

Table 7 considers the limits for four ships of different sizes. Table 8 shows limitation calculations for real ships which caused or threatened pollution damage in Australia and were discussed in Part I(C), above.³²⁴

Table 7: LLMC art 6: limits for ships of four different sizes

Ship name	Ship Size ³²⁵	LLMC Regime	SDR limit	A\$ limit ³²⁶
N/A	Any ship of up to 2,000 gt ³²⁷	LLMC 1996 LLMC 1976	1,000,000 sdr 417,500 sdr	A\$ 1,777,600 A\$ 742,148
N/A	5,000 gt	LLMC 1996 LLMC 1976	2,200,000 sdr 918,500 sdr	A\$ 3,910,720 A\$ 1,632,726
N/A	10,000 gt	LLMC 1996 LLMC 1976	4,200,000 sdr 1,713,500 sdr	A\$ 7,465,920 A\$ 3,117,022
N/A	80,000 gt	LLMC 1996 LLMC 1976	26,200,000 sdr 10,923,500 sdr	A\$ 46,573,120 A\$ 19,417,614

³²² For further explanations and examples of limitation of liability calculations, see generally, Nicholas Gaskell, 'Appendix 17: Limitation of Liability and Division of Loss' in Simon Gault (ed), *Marsden on Collisions at Sea* (13th ed, 2003) 828.

³²³ See also Part III(E)(5) and Part III(F) for possible attempts by shipowners to use the lower limits.

³²⁴ Again, the figures are meant to be illustrative, only, as the information on tonnages cannot be guaranteed: it has been compiled where possible from information in AMSA or ATSB reports, or verified as far as possible from the Equasis database, or from other websites. It was not possible to find gross tonnages for older ships which are not on the Equasis database, eg, *Anro Asia*, *Korean Star*, *Nella Dan*, *Syyna*. Many websites give only the deadweight tonnages and these are not the ones used for limitation purposes. The correct tonnages are the gross tonnages under the International Convention on Tonnage Measurement of Ships 1969: see LLMC 1996 art 6(5).

³²⁵ The limits are those under art 6(1)(b) of the LLMC. These are limits applicable for claims 'other than for loss of life or personal injury'. Into this category fall *all* the 'other' claims, including bunker pollution as well as all other property claims. See further, Gaskell, above n 322, 828 and the text following Tables 7 and 8 for explanations.

³²⁶ Calculations made on the basis of a conversion rate of 1 sdr =A\$1.7776: taken on a random conversion date of 14 January 2008 (see above n 70). At 6 October 2008 1 sdr was worth A\$1.9666.

³²⁷ Note that the LLMC allows states to set lower limits for ships of 0-299gt. Australia has not taken advantage of this provision, although the UK, for instance, has set the limits for such ships at half Convention rates (see the *Merchant Shipping Act 1995*, Sch 7, Part II, para 5).

Table 8: LLMC art 6: limits for particular incidents off the Australian coast³²⁸

Ship name	Ship Size	LLMC Regime	SDR limit	A\$ limit
<i>Iron Baron</i>	21,975 gt	LLMC 1996 LLMC 1976	8,990,000 sdr 3,753,325 sdr	A\$ 15,980,624 A\$ 6,671,911
<i>Sanko Harvest</i>	19,340 gt	LLMC 1996 LLMC 1976	7,936,000 sdr 3,313,280 sdr	A\$ 14,107,034 A\$ 5,889,687
<i>Pacific Quest</i>	31,403 gt	LLMC 1996 LLMC 1976	12,620,900 sdr 5,268,875 sdr	A\$ 22,434,912 A\$ 9,365,952
<i>Pax Phoenix</i>	28,021 gt	LLMC 1996 LLMC 1976	11,408,400 sdr 4,763,007 sdr	A\$ 20,279,572 A\$ 8,466,721
<i>Al Quran</i>	28,484 gt	LLMC 1996 LLMC 1976	11,593,600 sdr 4,840,328 sdr	A\$ 20,608,783 A\$ 8,604,167
<i>Bunga Teratai Satu</i>	21,339 gt	LLMC 1996 LLMC 1976	8,735,600 sdr 3,647,113 sdr	A\$ 15,528,403 A\$ 6,483,108
<i>Pasha Bulker</i>	40,042 gt	LLMC 1996 LLMC 1976	15,212,600 sdr 6,348,750 sdr	A\$ 27,041,918 A\$ 11,285,538
<i>Global Peace</i>	67,727 gt	LLMC 1996 LLMC 1976	23,518,100 sdr 9,809,375 sdr	A\$ 41,805,775 A\$ 17,437,145

The significance of the figures is that these are the funds available to cover *all* non-injury/death claims against the global fund in art 6(1)(b) of LLMC in respect of a distinct occasion (i.e. a particular incident).³²⁹ For convenience, the art 6(1)(b) limits can be described as ‘property’ limits (this is perhaps more comprehensible than ‘other’ limits). The application of these LLMC property limits could be quite unattractive to a state’s national interest if it was faced with a large clean-up operation, especially involving smaller ships. That is because, on the above calculations, not only may the property limits be rather low to cover some bunker pollution claims, but these sums also have to be shared with other property claimants.

Thus, a 5,000 gt ship will have a limit of about A\$3.9m and a 10,000 gt ship about A\$7.5m. At first sight, the limits available under Table 8 for particular incidents off Australia might seem to be perfectly adequate for clean-up. However, in the case of the *Iron Baron*, for example, she was carrying a cargo 24,000 tonnes of manganese ore and any cargo claim against the shipowner would also have competed for the art 6(1)(b) limits. The container ship *MSC Napoli* (53,409 gt) which sank in January 2007 off the south coast of the UK with 3,000 tonnes of bunkers reputedly on board would have a limit of about A\$34m. These figures would also have to cover any claims in respect of hazardous and noxious substances within the 158 containers reputed to have been on board. This is because the HNS

³²⁸ See above Part I(C). Note that these figures are not what the limits were on the date of the actual incidents, but merely examples of what they would have been on the day of calculation (14 January 2008). See also, above n 326, for the basis of the calculations.

³²⁹ The inclusion of bunker pollution claims within the LLMC ‘other’ category could also affect personal claimants if there were a large number of death claims under LLMC art 6(1), and these needed to spill over to share the pot of funds under LLMC art 6(2). In these circumstances the pot of funds, however small, would be relatively diminished by reason of the bunker pollution claims.

Convention, with its stand alone limits, is not yet in force.³³⁰ The cargo remaining on board (over 2,300 containers) had been estimated to have a value of over US\$100 million. Even assuming that cargo claims were also subject to limits under the Hague or Hague-Visby Rules,³³¹ it can be seen that such claims could swamp the limitation fund and reduce proportionately the amounts available for bunker claims. Moreover, if there had been a collision, there would also have been the claims from the other ship for hull and cargo damage.³³² Bunker and chemical spillage claims, it should be recalled, could cover both clean up *and* economic losses: it is the latter which have proved to be the most costly in recent oil tanker disasters.³³³

It is difficult to know what are likely to be the reasonable costs of bunker clean up in a more complex case, or what the potential economic losses might be for a major spill on the Great Barrier Reef. The costs of an incident will depend as much on circumstances and location as on quantities of fuel.³³⁴ The AMSA figures show, for example, that for the *Peacock* even a threat removal operation (with no spillage and clean up at all) cost some A\$800,000. It may be that the LLMC 1996 limits above are adequate to provide protection for most bunker incidents, especially for larger ships. It could also be that they are inadequate for small ships, or where there are sinkings of larger ships combined with complex property claims. The LLMC limits are unlikely to be increased for many years.

2 'Breaking' limitation

It is usual, where maritime liability is limited (under the LLMC or directly in the CLC 1992, or HNS Convention) for there to be a provision under which the shipowner can be deprived of the right to limit. The test for 'breaking' limits in art 4 of the LLMC states that:

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge: that such loss would probably result.

³³⁰ See above Part III(A). If and when the HNS Convention comes into force, LLMC 1996 states such as Australia will trigger a reservation under art 18(1)(b) (inserted by art 7 of the LLMC Protocol 1996), which gives the right to exclude claims for damage 'within the meaning' of the HNS Convention. It is arguable that this right could be exercised even now, prior to the entry into force of the Convention, because the quoted wording makes no reference to the HNS Convention being in force. If this is correct, a state could in effect remove any existing right to limit for hazardous and noxious substance claims falling within the 1996 Convention. The more obvious intention of the provision (which mirrors art 3(b) dealing with the CLC), is simply that the HNS Convention should deal with liability *and* limitation, when in force, but prior to that the LLMC would apply. However, it is submitted that the wording does not preclude the alternative interpretation given above.

³³¹ In Australia under the *Carriage of Goods by Sea Act 1991* (Cth).

³³² The MSC *Napoli* was itself said to be worth about US\$40 million. Further, if that collision also involved an innocent chemical tanker, it is likely that all the considerable claims relating to chemical pollution could also fall within the LLMC 1996 limits of the first ship (assuming that the claimants could show negligence and satisfy remoteness issues).

³³³ See above Part II(A).

³³⁴ An Australian submission to the diplomatic conference noted that one uninsured fishing vessel of 385 gt was carrying 400 tonnes of bunkers and required clean up costs of NZ\$1.4m; see LEG/CONF. 12/6, 18 January 2001.

The exact working of the breaking limitation test is beyond this article,³³⁵ but it can be said that the test is deliberately difficult to satisfy and requires, in the case of a corporate defendant, the relevant intentional or reckless behaviour to be at a relatively senior level in management. It is not enough to show intent or recklessness of, say, the master or crew. In the rare circumstance that a claimant can show an appropriate act or omission at the right corporate level, the person claiming limitation will not be entitled to limit.

This may seem like a good, if difficult, tactic for a claimant, but there is a catch. It is possible that the same acts and omissions might also constitute 'wilful misconduct' under the insurance policy.³³⁶ As already noted,³³⁷ this is a defence which is allowed to the insurer under the direct action provision, art 7(10) of the Bunker Oil Convention. Unless the shipowner has independent assets, it may be that the claimant obtains nothing. Where the claimant has sued the bareboat charterer, manager or operator under the Bunker Oil Convention, it seems that it is necessary to look for the level of misconduct within the corporate structure of that particular defendant in order to break the LLMC limits.³³⁸

3 Are bunker pollution claims limitable within LLMC?

A preliminary question, however, is whether all categories of bunker pollution claim will fall within art 2(1) of LLMC 1976 and 1996.³³⁹ Article 2(1) gives a shipowner the right to limit liability in respect of certain listed claims: if a claim does not fall within these categories, it is not subject to limits. There are recognised difficulties in fitting all bunker pollution claims within the LLMC categories.³⁴⁰ Those categories potentially relevant to bunker pollution are as follows:

- (a) claims in respect of loss of life or personal injury or *loss of or damage to property* (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting there from;
- (c) claims in respect of other loss resulting from *infringement of rights* other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
- (d) claims in respect of the raising, removal, destruction or the *rendering harmless of* a ship which is sunk, wrecked, stranded or abandoned, including *anything that is or has been on board* such ship;

³³⁵ Cf Nicholas Gaskell, Regina Asariotis and Yvonne Baatz, *Bills of Lading: Law and Contracts* (2000), 519-522; Davies and Dickey, above n 83, 468.

³³⁶ See *Marine Insurance Act 1909* (Cth) s 66.

³³⁷ See above Part III(C)(9).

³³⁸ Cf *Sellers Fabrics Pty Ltd v Hapag-Lloyd AG (The Encounter Bay)* [1998] NSWSC 644.

³³⁹ This provision clarified and extended art 1 of the 1957 Limitation Convention, in particular by breaking up what were three long convoluted paragraphs into the six that are now present.

³⁴⁰ See LEG 74/4/2, 9 August 1996.

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.³⁴¹

(a) Property Damage

Where there is physical damage to property caused by bunkers, as well as any lost profits, the claim by its owners will clearly be limitable under art 2(1)(a).³⁴² This would extend, for instance, to actual damage to machinery, e.g. harbour facilities and desalination intakes. How far can the wording naturally extend to cleaning up bunker oil from property, where there is mere fouling, rather than separate physical damage? It would seem artificial to say that it is not property damage where a ship's hull (otherwise undamaged) has to be cleaned,³⁴³ and in the case of fouled fishing nets it is usually impossible or impractical to clean them. However, the position is less clear where there is bunker oil on the surface of the sea, or washed up on a beach or reef. It might be said that 'real property' has been damaged, but the context does not suggest that this is a natural reading. It is noticeable that the bracketed reference specifically includes 'basins and waterways', which are a form of real property in one sense, but the paragraph is more naturally considering events such as collisions with the physical structures themselves.

Where there are *clean up* operations by the state there are real doubts as to whether they fall within sub-paragraph (a). The problem had been recognised by the UK Government even prior to the enactment of the Bunker Oil Convention³⁴⁴ and it had been persuaded³⁴⁵ that it would be wrong to have unlimited strict liability, and so enacted s168 of the *Merchant Shipping Act 1995*.³⁴⁶ This is a rather curious 'deeming' provision which now states that for the purposes of UK law, any liability incurred for bunker pollution claims shall be deemed to be a liability to damages within the LLMC 1996 art 2(1)(a). This would seem to have put beyond doubt in UK law that all claims within the Bunker Oil Convention are subject to limitation of liability. The deeming provision has not been copied in Australia. The doubts therefore remain whether sub-paragraph (a) covers pure clean up claims and are to some extent reinforced by the existence of separate sub-paragraphs, (e) and (d), which more naturally cover clean up.³⁴⁷

³⁴¹ Emphasis added.

³⁴² Personal injury and death claims from contamination would also fall under this provision.

³⁴³ See eg, the clean up costs to ships caused by the *Global Peace* discharge in 2006, above n 49. A fouled ship might well be prevented from entering ports.

³⁴⁴ The issue only became apparent when the Government introduced the *Merchant Shipping Act 1995* (UK) s 154, in order to create strict liability for bunker pollution damage in national law.

³⁴⁵ After consultation with the shipping and insurance interests, including the British Maritime Law Association.

³⁴⁶ As amended by S.I. 2006 No.1244, reg 22.

³⁴⁷ Where there is doubt as to whether a claim falls into a limitable category, courts have generally taken a strict approach against allowing limitation: see eg: *Owners of the Motor Vessel v NV Bureau Wijsmuller; The Tojo Maru* [1972] AC 242; *Barameda Enterprises Pty. Ltd. v Ronald Patrick O'Conner and KFV Fisheries (Qld) Pty. Ltd. (The Tiruna)* [1987] 2 Lloyd's Rep. 666 (Full Court, Supreme Court Qld).

Economic loss claims by fishing and tourist industries (unrelated to damage to any owned property) are a normal category of recovery following pollution spills.³⁴⁸ It is possible that these economic loss claims might fall within art 2(1)(a) in so far as they are 'claims in respect of ...damage to property...and consequential loss resulting therefrom'. The difficulty is twofold. First, there may be no 'property' damaged apart from the sea itself, or beaches (which leads back to the 'real property' discussion above). Secondly, a more natural reading of the provision is that it refers to the consequential loss of the person whose property has been damaged. That would not usually apply to the hotelier, unless perhaps it owned a jetty or beach. In 1976, it might have been thought unlikely that economic losses were recoverable at all in law unless they were made by the property owner, and so it might be assumed that there was little need to draft a wide limitation provision to cover a liability that was not thought to exist.

(b) *Infringement of rights.*

The precise scope of art 2(1)(c), which also appeared in the Limitation Convention 1957 has never been entirely clear.³⁴⁹ There has to be 'other loss', presumably loss not within sub-paragraph (a).³⁵⁰ The exclusion of contractual claims indicates that the sub-paragraph can encompass tortious claims, or those arising in a quasi tortious way as a result of a statutory liability such as that under the Bunker Oil Convention. The chapeau to art 2(1) states that claims within the list are subject to limitation of liability 'whatever the basis of liability'. The omission of the word 'damage', appearing in paragraph (a), indicates that it is dealing with financial loss of some kind, rather than physical loss or damage. Financial loss could presumably extend to the costs of a clean-up operation. Moreover, it has been held in Australia that the expression can cover wreck removal expenses.³⁵¹ It is submitted that the sub-paragraph is probably sufficiently wide to cover pollution damage clean up claims within the Bunker Oil Convention if they are not covered elsewhere in art 2(1)(a). Although the expression 'consequential loss' is not used, it is also tentatively submitted that it can extend to economic losses in the tourist or fishing industries. In all these cases there is loss 'occurring in direct connection with the operation of the ship', as bunkers are by definition used to operate the ship. The difficulty in interpreting sub-paragraph (c) in this way is that it becomes so wide that it does almost operate as a catch all provision, which could arguably cover sub-paragraphs

³⁴⁸ These are regularly allowed by the IOPC Fund in oil tanker cases, see above Part I(D) and Part III(C)(5).

³⁴⁹ Patrick Griggs, Richard Williams and Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th ed. 2005) 22. Simon Gault (ed), *Marsden on Collisions at Sea* (13th ed, 2003) 594-6.

³⁵⁰ Or sub-paragraph (b) which deals with delay claims, and would not normally be relevant to bunker claims. Sub-paragraph (c)'s positioning as a paragraph in the middle of a longer list suggests that it is not meant to be an *ejusdem generis*, or a general sweeping up, provision for the *whole* of art 2(1), but the cross reference ('other loss') must be taken to refer to the preceding two sub-paragraphs. Perhaps too much should not be read into the positioning of sub-paragraph (c) as it is really derived from the breaking up of art 1(b) of the Limitation Convention 1957 and that is the order which appeared there.

³⁵¹ See, *The Tiruna* [1987] 2 Lloyd's Rep. 666 (Full Court, Supreme Court Qld), per McPherson J, 687.

(d) and (e) and make them irrelevant. This does not accord with the drafting history as the infringement of rights provision appeared in the Limitation Convention 1957, and yet the LLMC 1976 specifically added sub-paragraphs (d) and (e). This could only have been done if they were not already covered, or possibly for the avoidance of doubt. It may be that it is necessary to consider sub-paragraphs (d) and (e) as not overlapping with sub-paragraph (c), so that they are definitive in their own right; i.e. for matters which are specifically covered, or apparently excluded, they should not be supplemented by another provision such as sub-paragraph (c).

(c) *Rendering harmless of anything on board ships.*

The Limitation Convention 1957 dealt with wreck removal, but was less clear about the contents of a ship (e.g. cargo or bunkers). The LLMC provisions in sub-paragraphs (d) and (e) were deliberately extended to clarify the position and have generally been thought apt to cover most pollution claims not falling within the LLMC art 3 (the exception for oil pollution damage under the CLC).³⁵² Thus, where the claim is for clean-up costs, it would most naturally fall to be limited (if at all) under art 2(1)(d)³⁵³ as there would be a ‘rendering harmless’ of the contents (including bunkers) of a ship which has been involved in a casualty.

However, a close reading shows that there may well be circumstances where typical pollution damage claims are not covered by art 2(1)(d). Although the words ‘a ship which is sunk, wrecked, stranded or abandoned’ are apt to describe most casualties, they would not appear to cover operational discharges in which there is no physical disaster to the ship, e.g. while taking on bunkers.³⁵⁴ There may even be cases of casualties to the ship, in which it suffers physical damage, that do not fall within the quoted words, e.g. where there is not a total loss. Thus, a minor collision that does not lead to a sinking would not appear to be covered by art 2(1)(d). A minor grounding could result in the same sort of physical damage, with a spill, but it is not clear if it would fall within the expression ‘stranded’. The latter suggests something more drastic where a ship grounds and is stuck (at least for a considerable period of time), rather than a case of a ship which runs over a reef and then floats clear.³⁵⁵

In addition to those noted above, there is also the question of economic loss claims by the tourism and fishing industries; are these claims within art 2(1)(d), e.g. if there is bunker pollution from a wreck? The actual clean up costs (e.g. by AMSA) are claims in respect of the ‘rendering harmless’ of the bunkers on board the ship. But the lost income or profits do not easily connect with the rendering harmless, except e.g. where the loss of fishery results from contamination caused by the clean up measures, such as where chemical dispersants have been used. Lost profits of a hotel may result from tourists being put off by the original pollution rather than the efforts to render it harmless. Moreover, in this case, the claims are more of a ‘consequential loss resulting therefrom’ and yet these words do not appear in sub-paragraph (d) although they do in (a). *Claims to avert or minimise loss*

³⁵² Griggs et.al, above n 352, 22-4.

³⁵³ Art 2(1)(e) would not be relevant to bunkers as it refers to the rendering harmless of the ‘cargo’ of a ship, and bunkers are not considered as cargo.

³⁵⁴ For example cases such as *The Wagon Mound (No.1)* [1961] AC 388, and see above n 50. The ITOPF figures suggest that this form of operational error is a cause of some minor spills: see IOPC <<http://www.iopcfund.org/>>, at 28 September 2008.

³⁵⁵ And see the examples above n 49, above n 50.

Article 2(1)(f) might also seem, at first sight, to cover clean up costs if there is a doubt as to whether they fall within sub-paragraph (a), or (d). Assuming that a shipowner is the 'person liable' (under the Bunker Oil Convention), there could be claims by, say, AMSA, to avert or minimise loss (e.g. pollution damage). But the loss has to be one for which the shipowner 'may limit his liability in accordance with this Convention'. In other words, the shipowner must be able to limit its liability under a *different* sub-paragraph of art 2(1): sub-paragraph (f) does not allow limitation for mitigation claims *per se*, but only if there is a right to limit already under sub-paragraphs (a) to (e).

(d) Conclusion

The result of this analysis of art 2(1) is that it is not possible to state simply that all claims under the Bunker Oil Convention are, or are not, automatically subject to limitation of liability under the LLMC 1996.³⁵⁶ It is possible that there may be an element of overlap so that some claims might fall under one or more sub-paragraphs. It will be a matter of interpretation whether provisions are meant to be mutually exclusive; this may well be the case for coastal clean-up operations falling within sub-paragraph (d), but are not intended to fall under sub-paragraph (a). The approach of the courts has been, and ought to continue to be, for the shipowner to bring itself strictly within the terms of art 2.³⁵⁷ If there is any doubt, or if there is a claim which is clearly not within the provision, then the shipowner is unable to limit.³⁵⁸ Unless sub-paragraph (c) is given a wide meaning, some bunker claims may not fall within any of the paragraphs.

All this discussion must be read, however, in the context of the LLMC opt-out.

4 LLMC opt-out

If the discussion about the interpretation of art 2(1) of the LLMC, above, is correct, it may be that some bunker claims in some states may be unlimited in any event. Even though many pollution damage claims under the Bunker Oil Convention would be limitable under the LLMC art 2(1), art 18(1) of LLMC 1976/1996 gave states the right to opt-out of limitation under art 2(1)(d) and (e), but not art 2(a). The main reason for the power was to enable states to remove limits for wreck raising, largely as that has been thought to be an area of particular concern to governments and had been outside limitation for some time.³⁵⁹ In the present context, the effect of an opt-out will mean that claims within art 2(1)(d) are positively not capable of limitation. Thus, many bunker pollution clean-up claims could not be limited, although presumably property damage claims falling *solely* within art 2(1)(a) are limitable, as would be economic loss claims if they fall solely in art 2(1)(c). It seems impossible to argue that, if there is an overlap between the various sub-paragraphs, the effect of a reservation in respect of sub-paragraph (d) is to leave unaffected a right to limit for identical claims because they might happen to fall within one of the

³⁵⁶ Moreover, states not party to LLMC 1976 or 1996 might well have provisions which themselves do not cover bunker pollution damage at all.

³⁵⁷ See, *The Tiruna* [1987] 2 Lloyd's Rep. 666 (Full Court, Supreme Court Qld), per McPherson J, 683.

³⁵⁸ Although in bunker cases courts should take note of the Preamble and Conference Resolution 1: see above Part III(E).

³⁵⁹ For example under the 1957 Limitation Convention.

other sub-paragraphs. This would make a nonsense of the reservation; it also lends some support to the argument that the various sub-paragraphs are mutually exclusive.³⁶⁰

There is a real policy decision here for states when enacting the Bunker Oil Convention, as non-shipowning states with vulnerable coastlines will consider that it is in their interest to have unlimited liability for bunker claims. Yet, in principle, there has always been a good argument that unlimited liability is not appropriate (or is unfair) where there is an imposed regime of strict liability. Even prior to the Bunker Oil Convention, Australia had already exercised this right of reservation under both the LLMC 1976 and 1996, internationally³⁶¹ and in the *Limitation of Liability for Maritime Claims Act 1989* (Cth), s 6. This approach is entirely justifiable for a potential coastal state victim, and the consequence in Australian limitation law is that the ability of a shipowner to limit liability for bunker pollution claims may be more apparent than real.³⁶² While AMSA's clean up costs (e.g. after a major stranding) will usually not be subject to limits (because of the sub-paragraph (d) opt-out), it may be that other claims in Australia (e.g. for economic loss) would still be limited (e.g. under sub-paragraphs (a) or (c)). For states, this might be a satisfactory compromise.

5 Direct Action and Limitation

However, after all this, unlimited liability may still be a chimera in practice where the defendant registered shipowner is a single ship company. It may have a theoretical unlimited liability, but few assets after a sinking; however, its insurer (e.g. the P & I Club) will not itself have unlimited liability.

Because the Bunker Oil Convention does not have its own stand alone limits, the wording of the provisions on insurer liability are slightly different to those in the CLC, so care needs to be taken with their interpretation. The insurance certificate required under art 7(1) of the Bunker Oil Convention is up to 'an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims 1976, as amended' (i.e. the LLMC 1996).³⁶³ Article 7(10) is the direct action provision:

Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage. In such a case the defendant may invoke the defences (other than bankruptcy or winding up of the shipowner) which the shipowner would

³⁶⁰ See, *The Tiruna* [1987] 2 Lloyd's Rep. 666 (Full Court, Supreme Court Qld) per McPherson J, 687-8.

³⁶¹ The instrument of accession deposited for Australia 20 February 1991, declares that Australia would not be bound by Article 2.1(d) and (e): see also, Australian Treaty Series 1991 No. 12, n 3.

³⁶² This possibility was not hinted at in the debates or Explanatory Memorandum, *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) s 9, which merely refer deadpan to the applicable limits. It is assumed that the possibility of unlimited liability for bunker pollution clean-up costs within art 2(1)(d) was by design, despite Australia's support in the drafting of the convention for limitation (cf LEG 94/12 31 October 2008, para 11). This contrasts with the UK position where the legislative intent of the 'deeming' provision for sub-paragraph (a) would presumably be stronger than the reservation made to sub-paragraph (d): see above Part III(E)(3)(a).

³⁶³ Under CLC 1992 art VII(1), insurance has to be maintained 'in the sums fixed by applying the limits of liability prescribed in Article V (1)'.

have been entitled to invoke, *including limitation pursuant to article 6*. Furthermore, even if the shipowner is not entitled to limitation of liability according to article 6, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the pollution damage resulted from the wilful misconduct of the shipowner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the shipowner against the defendant. The defendant shall in any event have the right to require the shipowner to be joined in the proceedings.

It is the emphasised words in the second sentence which differ from the CLC 1992. Under the CLC, the insurer can establish a CLC limitation fund³⁶⁴ and can rely on that limit, even if the shipowner is deprived of the right to limit as a result of intentional or reckless conduct.³⁶⁵ It can be noted that the wording of the third sentence of the Bunker Oil Convention art 7(10) is phrased more widely, as it allows the insurer to limit even if the shipowner cannot limit 'according to art 6' generally. This is a necessary addition for insurers as, otherwise, they may have to face the argument that if the shipowner was not itself able to limit at all under art 6,³⁶⁶ then there was no way that the insurer itself could have limited. It is inconceivable, as a matter of drafting, that it was intended that the liability of the insurer under the insurance certificate was also to be unlimited on the basis that certain claims did not fall within art 2 of the LLMC.³⁶⁷ For that reason, the wider language in art 7(10) is one that makes the liability of the insurer subject to a maximum exposure of the limits shown in Tables 7 and 8, above.

There is one further ambiguity that arises from the linkage which art 6 of the Bunker Oil Convention makes between that Convention and the separate limitation regimes 'such as' the LLMC 1996. The second sentence of the Bunker Oil Convention art 7(10) allows the insurer the same right to limit as the shipowner 'pursuant to art 6'. It follows that it is one of those regimes which will govern that limitation, including the constitution and the distribution of funds. If there are other claims on the LLMC 1996 fund then the bunker pollution claimants will have to share rateably.³⁶⁸ By contrast, the third sentence of art 7(10) is a 'long stop' limitation provision of the Bunker Oil Convention *itself*, i.e. where for some reason the shipowner could not limit.³⁶⁹ It cannot give the insurer a specific right to limit under the LLMC 1996 (for instance), as that would not be possible in international

³⁶⁴ Under CLC 1992 art V(11), 'on the same conditions and having the same effect as if it were constituted by the owner...'.³⁶⁵

³⁶⁵ See CLC 1992 art VII(8). There is a specific reference to art V(2), explained below Part III(E)(5). The second sentence of art V(11) emphasises the point: 'Such a fund may be constituted even if, under the provisions of paragraph 2, the owner is not entitled to limit his liability, but its constitution shall in that case not prejudice the rights of any claimant against the owner.'

³⁶⁶ For example for the reasons explained above in Part III(E) (3) – (4) and not simply because of intentional or reckless conduct (as in Part III(E)(2) above).

³⁶⁷ The linkage of the insurer's liability to a fixed limitation amount goes back to the CLC 1969 and is repeated in the HNS Convention 1996, the Athens Convention 2002, and the Wreck Removal Convention 2007. It is part of the 'package deal' that the Clubs agreed to issue complying insurance certificates, provided that they knew exactly what their exposure was.

³⁶⁸ See the examples in Part III(E)(1) above.

³⁶⁹ For example, because there was no limitation regime applicable; or the claim did not fall exactly within the LLMC art 2(1); or there was an opt out from sub-paragraph 2(1)(d); or there was intent/recklessness within art 4.

law.³⁷⁰ If this is right, it seems that the effect of this provision is, in effect, to give a stand-alone right to limit for the insurer, albeit as a default position if there is no separate right to limit; it would be unlike a claim against a *shipowner* (whose LLMC limits would be shared with other property claimants). If so, it would also seem to mean that an insurer who needed to rely on the third sentence of art 7(10) must make available under the insurance certificate the whole amount of the LLMC limit – even if it is also facing (indirectly as insurer) other claims against the shipowner (e.g. for property damage).³⁷¹ Such complications of interpretation are a regrettable consequence of the way that art 7(10) was patched together, with the precise consequences of linkage not being fully appreciated. An Australian court which had to apply both the Bunker Oil Convention and the LLMC 1996 might take the pragmatic view that, as Australia has given the force of law to both, the two should be read together so that the insurer would limit under the LLMC 1996 in the ordinary way. Although this might come closer to the presumed intentions of the drafters, it could also reduce the funds available for compensation, and this ought to be a significant factor where there is doubt.

Finally, it should also be recalled that claims may also be made under the Bunker Oil Convention against persons other than the registered shipowner.³⁷² In principle they are also entitled to limit under the LLMC³⁷³ and, if the LLMC gives them the right to limit, their liability is aggregated with that of the registered shipowner (so the claimant cannot recover double the limitation amount). However, if, as explained above, there are claims not limitable under the LLMC, then these persons cannot limit; any more than could the shipowner. These persons are not obliged to carry insurance, however, but if they are solvent and/or insured their liability could be in addition to that of, say, the insurer liable under art 7(10) of the Bunker Oil Convention. To that extent, the absence of a second tier fund is to some extent remedied, and it may well be that limitation of liability is less of a problem than indicated by the discussion in Part III(E)(1).

F Liability and Limitation: Jurisdiction and Procedural Issues

Under the Bunker Oil Convention art 9, substantive claims can only be brought in a State Party where pollution damage (or preventive measures) occurred, and under art 10 other State Parties shall recognise a final judgment.³⁷⁴

It would be logical for liability and limitation proceedings to be brought together. But because the Bunker Oil Convention art 6 refers limitation of liability to another instrument (in Australia, the LLMC 1996), it is necessary to consider the position under each instrument. Although Australia is a party to the LLMC 1996, it

³⁷⁰ The LLMC 1996 has its own amendment procedures and differing State Parties. Parties to the Bunker Oil Convention could agree among themselves that they would limit rights under the LLMC in some way, but the difficulty would arise if an LLMC fund were constituted in another state party to LLMC where that state and other claimants were not party to the Bunker Oil Convention. The CLC 1992 is different because it has its own self contained limits and can give the insurer rights under those, independently of other limitation regimes.

³⁷¹ The aggregate amount of the insurer's liability for bunker pollution under art 7(10) could not exceed the LLMC limit, however (see LLMC 1996 arts 8, 9(3)).

³⁷² For example the bareboat charterer, manager or operator: see Part III(C)(7).

³⁷³ LLMC, art 1.

³⁷⁴ Bunker Act, ss 26, 27 and above Part III(D)(2).

does not automatically follow that all limitation proceedings may take place in Australia.

First, it is possible for a shipowner to claim to limit liability in another LLMC 1996 State Party and establish a Fund there under art 11 of the LLMC 1996. That state will, under art 14, constitute and distribute the fund according to its law. In theory this limitation forum state might be one which allows a shipowner to limit for bunker clean up claims which are not limitable in Australia, e.g. because that state has not made the reservations in respect of art 2(1)(d) of the LLMC 1996. Australian claimants would then have to decide whether to proceed against the limitation fund so established, in which case they would be barred, under art 13(1) of the LLMC 1996 from claiming against other assets of the shipowner. Under art 13(2) of the LLMC 1996, once a fund has been constituted in a State Party there are restrictions upon the arrest of other property of the shipowner.³⁷⁵

Secondly, where there is bunker pollution in Australia and Bunker Oil Convention liability proceedings are brought here, it is possible that the shipowner might seek to establish a limitation fund in a state *not* party to the LLMC 1996, e.g. an LLMC 1976 state. It will be recalled that art 6 of the Bunker Oil Convention leaves unaffected the rights of shipowners and insurers to limit liability ‘under *any* applicable national or international regime’.³⁷⁶ In this instance, the Australian courts would not be bound by any of the Convention obligations in the LLMC 1996 to that other state and would have to apply normal principles of private international law in deciding whether to grant a stay in favour of those limitation proceedings – which could have a major effect for any Australian claimants.³⁷⁷ It is extremely unlikely that any court faced with pollution damage in its territory would cede the limitation question to another court in circumstances where there was no international obligation to do so and where the limits available would be lower than those applicable in its own courts.³⁷⁸ Without being unduly nationalistic, it would not be unreasonable for Australian courts to lean in favour of having liability and jurisdictional issues relating to bunker pollution damage being heard together in Australia. There is a national and international interest in ensuring that pollution damage is properly remedied; the splitting of liability and limitation in the Bunker Oil Convention is something of an accident (or victim) of history; and this is not a usual battle between competing commercial parties and their insurers.

³⁷⁵ It is possible, but unlikely, that the registered shipowner has assets other than the ship in question which could be secured, partly because of the single ship company structure (and for arrest generally, see the Admiralty Act 1988 (Cth)). As the Bunker Oil Convention creates liabilities of the registered shipowner *and* bareboat charterers, managers and operators (see above Part III(C)(7)) it is possible that these persons may have assets in Australia that might be secured in some way. It would seem from art 13(2) that an Australian court would not be *bound* to order a release in a case in which pollution damage occurred in Australia and a limitation fund was established in another State Party, unless that was a state where the ship had been arrested (art 13(2)(d)), or it was the port of discharge in respect of cargo damaged in the ship (art 13(2)(c)).

³⁷⁶ Emphasis added. The LLMC 1996 is only given as an example in art 6, for the very reason that a state may be party to the Bunker Oil Convention, but not have ratified one of the other instruments.

³⁷⁷ See above Part III(E)(1) for the lower limits under the LLMC 1976. Note also that the limits could be even lower under the Limitation Convention 1957; for examples, see Gaskell, above n 324, 828.

³⁷⁸ For a more extensive discussion of *forum non conveniens* issues and the case law in England and elsewhere, see, Davies and Dickey, above n 83,477-9, and Griggs et al, above n 352, 457-8.

IV CONCLUSIONS

The IMO Legal Committee has spent the last 25 years or so on completing the suite of conventions (mainly environmental) of which the Supplementary Fund Protocol and Bunker Oil Convention form part. The Wreck Removal Convention 2007, which was agreed on 18 May 2007, is almost the last part of this long term agenda of the Committee to deal with the questions of financial security.³⁷⁹ It remains to be seen whether Australia will ratify it, or the HNS Convention (when the latter is finally ready for ratification).

Taken together, this suite of maritime liability conventions provides an internationally accepted set of rules based on compulsory insurance to give some protection for states and the victims of pollution. The claims handling practices developed by the IOPC Fund, in particular, are a model of how an international organisation can work in a pragmatic way. The experience gained there will be used directly under the Supplementary Fund Protocol. The latter will probably only have a limited membership and its upper limits will always be tested by new economic claims. Those administering the Funds should be challenged to concentrate more on response action and restoration measures, than economic losses.³⁸⁰

The mantra of the IMO Legal Committee when drafting the conventions has been that 'the perfect is the enemy of the good'. There are many conceptual problems with a system that has grown incrementally. The STOPIA and TOPIA compromise is an example of an awkward international solution; but a common law lawyer recognises the result more than the form, and there are sometimes advantages to a 'try it and see' approach, rather than one which aims for perfect drafting and conceptual consistency. International compromises are often frustrating, and the level of satisfaction may well be at the level of the lowest common denominator. It can be counted as a success that the IMO has been able to agree a Bunker Oil Convention after over 20 years of discussion.

There are conceptual defects with the Bunker Oil Convention, in particular the absence of a second tier fund which can be used for large claims. This is an incidental result of not locating bunker liability in the CLC 1992 or HNS Convention. Moreover, because the Bunker Oil Convention was agreed after the LLMC 1996, it was not possible either (i) to exempt it completely from the LLMC and, like the CLC, to provide its own separate limits, or (ii) to make specific stand-alone bunker limits in the LLMC.³⁸¹ It may well be that the level of many bunker claims does not warrant the need for a second tier, but it is equally clear that the effect of art 6, on limitation is problematic.³⁸² There might be unlimited liability in theory in some cases, but this in practice will be restricted by the maximum liability of the insurer under the direct action provisions. The linkage of limits to the LLMC may well mean that pollution claimants have to share in a rather limited fund with

³⁷⁹ It places obligations in respect of the reporting, location, marking and removal of wrecks. Some of those obligations are placed on states, but there are a significant new series of obligations on shipowners.

³⁸⁰ Louise De La Fayette, 'New Approaches for Addressing Damage' (2005) 20 *International Journal of Marine and Coastal Law* 167, 168

³⁸¹ As was done for passenger claims: see LLMC 1996, art 7.

³⁸² Developing states, in particular, will have to pay particular attention when ratifying the convention to check that their national limitation system is adequate to cover potential losses. If they are a party to the LLMC, they should consider making a reservation under art 18(1) of LLMC 1976 or 1996 so that they can have no limits, or set their own limits, for the majority of clean up claims.

other commercial claimants, and this will lead to earlier, rather than later, pressure to increase the LLMC limits themselves. The decision to drop the concept of channelling and to have a number of possible defendants, other than the registered shipowner, is partly explained by the uncertainty about whether the limits of liability will be sufficient. For most cases, there is no need to make others liable, even in the absence of a second tier, as there is the security of compulsory insurance of the registered shipowner. The undermining of the principle of 'responder immunity' for salvors is particularly unfortunate, and suits against charterers, managers and operators are likely to lead to complications and extra costs.

It might be said that the Bunker Oil Convention was largely unnecessary as the vast majority of its provisions could have been enacted in national law; and there was no second tier fund which needed international cooperation. Further, states such as Australia had already created national provisions for recovery of clean up costs, and for compulsory insurance; they can also apply existing rules on limitation of liability. The advantage of an international solution is that a convention allows for a standard, internationally accepted, compulsory insurance certificate. It seems likely that further work, incrementalism again, will result in the production of a single insurance certificate for all liability Conventions.³⁸³ The prospect of a single unified maritime liability regime seems to be a long way in the future, however. Despite this, the Bunker Oil Convention (together with the Wreck Removal Convention 2007) are highly significant, because they require compulsory insurance internationally – not simply for specialised ships such as oil tankers (CLC 1992) and chemical carriers (HNS Convention), but for most categories of commercial ships over 1000 gt (Bunker Oil Convention) or 300 gt (Wreck Removal Convention 2007). If a significant number of states accept these conventions, a majority of commercial ships (including larger fishing vessels) will be forced to carry international insurance certificates – whatever their flag. From the point of view of international uniformity this is a good idea, particularly if the coverage is by the International Group of P & I Clubs which can reasonably be assumed to provide a reliable form of financial security.

In the context of environmental protection as a whole, and the huge questions posed by climate change, the IMO maritime liability conventions are a side show, concentrating as they do on what happens after a casualty. Still, for Governments and others who suffer immediate harm, they perform a useful practical role.

³⁸³ A Resolution at the diplomatic conference for the Wreck Removal Convention 2007 recommended that the IMO Legal Committee work on such a certificate (but see LEG 94/12 31 October 2008, para 5.30 et seq for difficulties). A further Resolution called on States to further technical cooperation on dealing with bunker spills and implementing the Convention.