THE *KIRKI* OIL SPILL: POLLUTION IN WESTERN AUSTRALIA

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The 15 000 tonne oil spill on 21 July 1991 by the *Kirki* off the coast of Western Australia was the largest that has ever threatened Australian shores.[1] It highlighted the importance of the Australian law of marine pollution, an area of the law which has been neglected in Australian academic writing to date. The administrative machinery for dealing with oil spills in Western Australia is part of the Australian National Plan ("the National Plan"), a standing administrative arrangement among the Commonwealth and the States, to provide equipment and personnel to combat oil spills. This was used to deal with the *Kirki* oil spill.

The combined skills of the National Plan personnel and those of the salvor, United Salvage Limited, saved the vessel from going aground and breaking up. During much of the week of the salvage tow a major storm enveloped the *Kirki* and the towing tugs. With the bows broken off and the rest of the vessel leaking in various parts, it was only with great courage and enterprise that the salvors saved the vessel from sinking. She was towed from near Fremantle to a safe area off the north-west coast of Western Australia where the balance of the oil cargo (some 64 000 tonnes) was pumped into another tanker and sent on to Kwinana. The damaged *Kirki* then set out on her tow to Singapore.

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1. The previous largest oil spill was in 1970 when the *Oceanic Grandeur* struck a projection from the sea bed in the Torres Strait. The matter was heard in the High Court on the amount of the salvage award: *Fisher v The Ship Oceanic Grandeur* (1972) 127 CLR 312. WA also holds the record for the greatest amount of non-oil pollution into its offshore waters due to the *Sanko Harvest* striking a reef near Cape Le Grand on 14 February 1991 and releasing some 30 000 tonnes of superphosphate, and 700 tonnes of bunker oil, into the water.

This article concentrates on the legal and insurance aspects of marine pollution from oil spilled off the Western Australian coast. There are three main areas of law which touch on the Western Australian situation, viz, public international law which comprises mainly the relevant international conventions; implementation of those conventions by Commonwealth and Western Australian legislation, and the legal rights and obligations arising from the cost of cleaning up the oil spill and claims for loss or damage. There are also some voluntary agreements among certain oil and shipping companies. All of the Commonwealth and most of Western Australia's legislation is based on the relevant international conventions, of which there are many. It is convenient to deal with those conventions first.[2]

Before turning to the conventions, however, the question of the constitutional basis for the Australian legislation needs to be addressed. The dispute as to whether the Commonwealth or the States had jurisdiction from the low water mark out to the three mile limit was decided in favour of the Commonwealth in *The Seas and Submerged Lands Act Case*[3] but the subsequent Offshore Constitutional Settlement[4] returned the jurisdiction to the States.[5] The Western Australian legislation giving effect to this settlement was the Commonwealth Constitutional Powers (Coastal Waters) Act 1979. Thus, for control over oil pollution from ships, the Western Australian legislature has jurisdiction out to three miles from the coast and thereafter the Commonwealth legislation prevails.[6]

2. This article touches on each of these areas but, in the limited space available, it is not possible to discuss any of these areas in depth. The conventions, legislation and the agreements have provisions other than those mentioned in this article.
3. *New South Wales v Commonwealth* (1975) 135 CLR 337.
4. The Standing Committee of the Attorneys - General met in Hobart on 5 March 1976, which meeting put in train steps for the eventual Agreement. Acts were subsequently passed by the Commonwealth and each of the States and the Northern Territory to give effect to it; see generally R Cullen *Federalism in Action. The Canadian and Australian Offshore Disputes* (Sydney: Federation Press, 1990) Section 4.3.
5. The 3 mile limit was fixed as it was then the outer limit of the territorial sea, but this is no longer the case as the Commonwealth has extended the territorial sea out to 12 miles.
6. The State has legislative power to make laws which touch and concern the peace, order and good government of WA which are operative beyond the margins of WA territory: *Pearce v Florenca* (1976) 135 CLR 507.

1. INTERNATIONAL CONVENTIONS

OILPOL 54[7] ("OILPOL") was the first of the international conventions to deal with oil pollution by ships. It made a brave start and attracted support from most of the relevant countries. It came into force on 26 July 1958 and for Australia on 29 November 1962.[8] It was amended subsequently to make the regime for the discharge of oil increasingly stringent.[9] It was eventually repealed by MARPOL 73/78[10] ("MARPOL"), the convention that replaced it.

MARPOL is the major international convention concerning maritime pollution. It came into force on 2 October 1983.[11] MARPOL was opened for signature in 1973[12] under the auspices of the International Maritime Consultative Organisation ("IMCO").[13] The 1973 Convention did not gain sufficient acceptances to come into force. At a further conference in 1978, a Protocol amended the Convention and brought the whole of the amended Convention forward for acceptance. Hence both years are reflected in the name "MARPOL 73/78".

MARPOL contains twenty articles, two protocols and five (technical) annexes, viz, Annex I - oil, Annex II - noxious liquid substances, Annex III - harmful packaged substances, Annex IV - sewage, and Annex V - garbage. The Convention came into force on 2 October 1983. Annex I controls the shipping and oil industries in regulating, for example, how and when ships may discharge their oil and how they should be built.[14]

The limited power of coastal states under international law to deal with ships beyond their territorial seas had been a real impediment to their ability

7. *International Convention for the Prevention of the Pollution of the Sea by Oil* 1954, Volume 786 *United Nations Treaty Series* 259.
8. M N Singh *International Maritime Law Conventions: British Shipping Law Series* (London: Stevens & Sons, 1983) 2235.
9. Amendments were made in 1967 and 1969; Singh supra n 8, 2234-2235.
10. *The International Convention for the Prevention of Pollution by Ships* done at London on 2 November 1973.The text is reproduced in (1973) 12 ILM 1319 and by Singh supra n 8, 2272. The 1978 Protocol is reproduced in (1978) 17 ILM 546.
11. E Gold *Handbook on Marine Pollution* (Norway: Assuranceforeningen Gard, 1985) 58; see also Department of Foreign Affairs and Trade *Treaty Series* 1988 (Canberra: AGPS, 1988).
12. The first conference was held in London from 8 October to 2 November 1973 at which 78 States, including Australia, were represented.
13. Since renamed the International Maritime Organisation ("IMO").
14. For an authoritative recitation of Australia's position on the implementation of the marine environment conventions see K W Ryan (ed) *International Law of Australia* 2nd edn (Sydney: Law Book Co, 1984); H Burmester *Australia and the Law of the Sea in The Protection and Preservation of the Marine Environment* ch 18.

to control marine oil pollution. When the *Torrey Canyon* went aground off Lands End, England, in 1967, the crude oil spill was estimated at some 100 000 tonnes, much of which caused damage to the English coast. However, the wreck lay outside the United Kingdom territorial sea and so beyond the jurisdiction. This and other major oil spills stimulated the international community to do something about similar disasters occurring near their shores. The resulting convention was the Intervention Convention[15] which enabled a country to intervene beyond its territorial seas if its shores were threatened by a marine accident. At the same time the Civil Liability Convention[16] established strict but limited liability for oil pollution damage from tankers. An insurance structure was created with a fund established in London. Under this structure, the owner of a ship carrying over 2 000 tonnes of persistent oil as cargo was required to maintain insurance (or other financial security) to cover its liability for pollution damage under the Convention.

In 1971, a supplementary convention to the Civil Liability Convention was concluded by the Fund Convention,[17] again under the auspices of IMCO. This convention extended considerably the limits of liability for oil pollution (from US$20 million to US$80 million). The concept behind the Fund Convention is that the burden of pollution costs be shared between owners of the oil cargo (the oil companies) and shipowners.[18] The Convention achieves this by imposing a levy on the oil companies, as opposed to the shipowners, who were levied under the Civil Liability Convention. The Convention provides that compensation will be paid to the claimant from the International Oil Pollution Compensation Fund (established by the Convention) where the shipowner is not liable under the Civil Liability Convention, or is liable but is unable to meet that liability, or if the pollution damage exceeds the limits of that liability. The limit of payment for any one incident was raised in the 1979 Protocol. The Fund Convention relieves the shipowner (or more usually its insurer) of some of the liability under the Civil Liability Convention, but not where there is wilful misconduct by the shipowner or failure by the shipowner to observe aspects of the Convention which leads to

15. *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* 1969, 9 ILM 25 (1970).
16. *International Convention on Civil Liability for Oil Pollution Damage* 1969, 9 ILM 45 (1970).
17. *The International Convention on the Establishment of an International Fund for Oil Pollution Damage* 1971, 11 ILM 285 (1972).
18. R R Churchill and A V Lowe *The Law of the Sea* (Manchester: Manchester University Press, 1988) 266.

damage. Similar procedural provisions are contained to those set out in the Civil Liability Convention.[19] The 1984 Protocols to both of these Conventions, which raised the maximum limits of payouts, have not attracted sufficient ratifications for them to be adopted.

The oil industry showed great initiative and responsibility in erecting a voluntary insurance agreement in 1968 to indemnify and pay for the costs of control of oil spills from tankers and to recompense those who suffer damage from them. The agreement is known by its acronym, TOVALOP.[20] Under this agreement the parties to it pay such levies as are needed to meet claims and the TOVALOP administration becomes liable to indemnify tanker owners for costs incurred and payments made for compensation arising from oil spills.[21] The initial limit was US$16.8 million and this was later raised in a supplementary agreement to US$70 million.

As a further commendable initiative, the oil industry, realising that some years would pass before the new upper limits of liability would come into force under the two conventions, introduced a voluntary scheme known as CRISTAL,[22] which commenced in 1971. CRISTAL greatly extended the ceiling of the cover for oil pollution. The scheme is administered by Cristal Limited (a Bermudan company) with the day to day administrative services being handled from London by its subsidiary, Cristal Services Limited.[23] Its purpose is to supplement the amount of the indemnity payable under TOVALOP to the tanker owner. The distinguishing feature of CRISTAL is that it is the owner of the oil which provides the compensation rather than, as in TOVALOP, the owner or demise charterer of the vessel. In the first instance the claimant must seek compensation from the owner of the tanker involved in the incident up to the limit of the Supplement to TOVALOP, and then pursue its claim under the Fund Convention. Beyond this, claims may be made against any other party which may be liable. For such pursuit CRISTAL may advance funds for prosecution of the claim. It is only after these avenues have been exhausted that the claim may be pursued against CRISTAL.[24] It is for this reason that the CRISTAL fund is often described

19. Arts 6-8.
20. The Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution.
21. Booklet entitled Tovalop, produced by The International Tanker Owners' Pollution Federation Limited (London).
22. Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution.
23. *CRISTAL Memorandum of Explanation Cristal Contract. Cristal Limited* (London: Cristal Ltd, 1992).
24. Ibid, 7-8.

as a "top-up" fund. The current limit of payment is US$36 million for tankers up to 5 000 gross tonnes and for tankers above that tonnage an additional $733 for each tonne up to a limit of US$135 million. Notice of a claim must be given to Cristal Limited within two years of the alleged incident giving rise to the claim.[25] However, like the two conventions, these agreements are limited to cover for oil spills from laden tankers. Spills of oil other than from laden tankers and spills of other pollutants do not attract strict liability, limitation of liability or the insurance and indemnification regime to cover the costs they occasion.

These conventions and agreements, then, establish the international framework under which the Australian legislation was promulgated. However, it should be noted that Australia has not yet become a party to the Fund Convention.[26]

2. COMMONWEALTH LEGISLATION

There are four major Commonwealth Acts[27] which establish a regime for the control of oil pollution from ships. Their effect is to give power over Australian ships, and foreign ships which wish to enter Australian ports. The regime includes prescribing details of ship construction so that ships are built, or altered, to make proper provision to prevent or reduce oil pollution. It also regulates the circumstances in which oil or oily mixtures may be discharged into the sea.

One of these Acts, the Commonwealth Protection of the Sea (Powers of Intervention) Act 1981,[28] gives the Commonwealth powers to intervene to take measures against a marine casualty where there is "a grave and imminent danger to the coastline of Australia". It was pursuant to these powers that orders were given to the salvors of the *Kirki* to take the vessel back out to sea and away from the coast. This was a questionable decision as the ship nearly sank in the extremely heavy seas to which it was exposed.

25. Ibid, 9.
26. It has had observer status but the Commonwealth is only now taking steps to become a party. As Australia is not a party to the convention no claim arising from the *Kirki* spill can be made under its provisions.
27. (Cth) Navigation Act 1912; (Cth) Protection of the Sea (Powers of Intervention) Act 1981; (Cth) Protection of the Sea (Civil Liability) Act 1981; (Cth) Protection of the Sea (Prevention of Pollution from Ships) Act 1983.
28. Act No 33 of 1981, assented to 14 April 1981.

The second major Act, the Commonwealth Protection of the Sea (Civil Liability) Act 1981,[29] establishes a regime of strict liability. In conformity with the Civil Liability Convention, liability is limited and insurance for that liability is required. The Act applies, basically, to all Australian ships, and to all foreign ships which enter or leave an Australian port, carrying more than 2 000 tonnes of oil in bulk as cargo. The *Kirki* was a foreign ship planning to enter an Australian port and so was obliged to have insurance cover to the amount required by the Convention and the Act. The owner is liable for any pollution damage caused by oil which has escaped or been discharged;[30] and this includes "the cost of preventive measures".[31] Thus the Commonwealth and Western Australian Governments, and any other person or company which has suffered loss or been put to expense in cleaning up the oil, may calculate their damages and costs and claim reimbursement from the owner. The owner is entitled to limit its liability[32] to an amount dependent on the tonnage of the ship but with an upper limit of about A$21.5 million.[33] The limitation provision is lost if the escape or discharge occurred through the "actual fault or privity" of the owner.[34] As the Department of Transport and Communications departmental investigation[35] found that the *Kirki* was very poorly maintained, heavily rusted and that there was a "deliberate attempt to mislead" the marine surveyors by some patching with canvas,[36] it is arguable that this amounts to "actual fault or privity" by the owner.

The Commonwealth Navigation Act (Protection of the Sea) Amendment Act 1983[37] regulates the requirements for ship construction and the alteration of oil tankers. The Act inserted a new Division 12 into Part IV of the Commonwealth Navigation Act 1912.[38] Under Division 12 of the Act, Australian ships are obliged to be built in compliance with the provisions of Annex I of MARPOL, and are then issued with the appropriate ship

29. Act No 31 of 1982, also assented to 14 April 1981.
30. *International Convention on the Civil Liability for Oil Pollution Damage* supra n 16, art III.
31. Ibid, art I.
32. Ibid, arts V, VII.
33. The *Kirki* was about 82 660 tonnes so its upper limit of liability is about A$20 million.
34. Supra n 16 art V; (Cth) Protection of Sea (Civil Liability) Act 1981 s 20(3).
35. Report No 33.
36. Ibid, 86.
37. Act No 40 of 1983, assented to on 20 June 1983.
38. (Cth) Navigation Act (Protection of the Sea) Amendment Act 1983 s 6.

Construction Certificate or International Oil Pollution Prevention Certificate.[39]

Foreign ships in Australian waters should carry these certificates from their own country and, where they do not, the Minister has power to direct them not to use any Australian port or facility.[40]

In 1983, the Commonwealth Protection of the Sea (Prevention of Pollution from Ships) Act 1983 came into force.[41] Part II of the Act gives effect to Annex I of MARPOL by making it an offence for the master or owner to discharge oil or an oily mixture from an Australian ship in the Sea. Exceptions to such liability exist.[42]

3. WESTERN AUSTRALIAN LEGISLATION

Turning from the Commonwealth to the Western Australian legislation, it is to be noted that in the case of the *Kirki* oil spill, the Western Australian legislation did not directly come into play, as the spill occurred outside the three mile limit. However the spill threatened the coast. The Western Australian government and its agencies acted most vigorously and effectively under the National Plan and were major players in the *Kirki* drama. The Western Australian laws on prevention and control of oil spills are important and thus an outline of them will be given to complete the legislative picture.

The OILPOL Convention was given effect in Western Australia by the Prevention of Pollution of Waters by Oil Act 1960.[43] That Act made it an offence to discharge oil, or any mixture containing oil, into waters within the jurisdiction from a ship, a place on land, or from any apparatus used for transferring oil from or to any ship.

This Act was repealed and replaced by the Western Australian Pollution of Waters By Oil and Noxious Substances Act 1987,[44] which gave statutory effect to Annexes I and II to MARPOL. The provisions of the Act are similar to the terms of the Convention and to the provisions of the relevant Commonwealth Act, except that it is limited to State waters.[45] In relation to

39. Ibid, ss 267B and 267C.
40. Ibid, s 267K.
41. Act No 41 of 1983, assented to on 20 June 1983.
42. See ss 1, 2 and 4.
43. Act No 33 of 1960, assented to on 1 November 1960.
44. Act No 14 of 1987, assented to 29 June 1987.
45. State Waters are defined, in effect, as the territorial sea and the waters to the landward side thereof; (WA) Pollution of Water by Oil and Noxious Substances Act 1987 s 3(1).

oil spills, the Act provides that a discharge into State waters from a ship, a place on land, or an apparatus used for transferring oil or an oily mixture is an offence punishable by fine.[46] It is to be noted that, subject to statutory defences,[47] a discharge from a ship attracts strict liability.

Part IV of the Western Australian Pollution of Waters by Oil and Noxious Substances Act 1987 enables the State governments to take steps to prevent or limit prohibited oil discharges and to disperse them, and entitles the State government to recover the costs and expenses of doing so. These costs may be "awarded in the course of proceedings for an offence ... whether or not the ... person is convicted."[48] Thus there is a very wide discretion in the court to order the polluter to pay for all of the costs and expenses of the clean-up and damage, without limitation of liability. To take an example, if the discharge occurs while saving life at sea, the polluter may still be liable for all of the costs and expenses incurred by the authorities, whether or not they were reasonably incurred. The polluter is only excused from criminal liability if there is a defence to the charge. In addition, there remains the common law liability for damages for a discharge (but not an escape), as the Act expressly provides that its provisions do not affect that aspect of the law.[49] Similar, but not identical, provisions to those relating to oil apply to a discharge of noxious liquid substances.[50] There is no time limit during which a prosecution may be brought[51] and inspectors are given wide powers.[52]

4. CONCLUSION

It can be seen from this brief survey that the international and national regimes relating to oil spills from laden tankers render the offending ship owner strictly liable, but the amount of its liability is limited. Underlying this scheme is the provision of insurance to meet the liability for an oil spill from a laden tanker up to the limit that the conventions and domestic legislation establish. The insurance for oil spills is underwritten by the Protection and Indemnity Clubs ("P & I Clubs"), which are based in Britain, Europe, USA and Japan. In the case of the *Kirki*, the P & I Club which carried the risk was Assuranceforeningen Gard of Norway.

46. Ss 8(1), (2) and (3).
47. Eg see ss 8(4)-(7) and (9).
48. S 27(3).
49. S 27(4).
50. S 28.
51. S 30.
52. S 29.

The *Kirki* oil spill was a major one. It was only due to the courage and skills of the salvors that it was not larger. Fortunately most of the spilled oil did not reach the coast so the costs and damage involved were not substantial. Had the vessel foundered on the coastline it is possible that all of the cargo of 80 000 tonnes of crude oil would have been spilled, making it a major oil spill disaster by any standards.

There is a great deal of international unrest about the ageing fleet of tankers, like the *Kirki* (built in 1969), and further moves against them are likely. That a whole bow section should just fall off is sufficient proof that something was seriously wrong with the ship. International steps to further confront the problem of marine pollution are in train. Apart from death and taxes one thing is certain: there will be further major oil spills off the Australian coasts from time to time. It would be fortunate indeed if our coasts were to be spared again as they were in the *Kirki* incident.[53]

53. In the case of the *Exxon Valdez*, which went aground in Prince William Sound, Alaska on 24 March 1989, the costs of the clean up and the payment of compensation to those who suffered from the spill are of the order of US$3 billion.