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Part 1. Executive Summary

(a) The Centre for Maritime Law (CML), Dr Michael White, was requested to make a submission to the House of Representatives Standing Committee on Transport and Regional Services (SCOTRS).[1] Dr White requested Mr Francis Burgess[2] to assist, so this submission is the subject of work by both authors.

(b) The thrust of the submission is that the question posed by SCOTRS for answer is only part of a much wider topic and cannot be answered to any degree of satisfaction in isolation. The wider question relates to the need for Australia to devote resources to developing an Australian Maritime Policy and, included in that, to revisit the Offshore Constitutional Settlement 1979.

(c) The salvage question itself, in the view of the authors, comes down to "On whom should the burden fall and how should the burden be implemented so that sufficient resources are available from port tugs to address the salvage needs of ports and offshore maritime casualties on the Australian coasts".

(d) There is no ready answer to such a question. The authors have addressed in the body of the paper the three main problems relating to the question. They are:

(i) the jurisdiction of the respective Commonwealth and States[3] in offshore Australian waters is confused and confusing in the present state of the Australian federation;

(ii) the neglect of all Australian governments since federation by failing to address the needs of the country for a national maritime policy has so damaged the maritime industry that only urgent and sustained action will revive it;[4] and

(iii) the complexities of (i) above have given rise to the present inefficient administration of maritime safety, training, laws, enforcement and administration.

(e)The authors recommend that resources be devoted to:

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[1] Letter from Mr Ian Dundas, Committee Secretary, dated 21.1.04.

[2] Master Class 1. Former experienced Mariner and staff of Maritime Safety Queensland. Currently studying Juris Doctor law degree, T.C. Beirne School of Law, UQ.

[3] In the present context 'States' includes the 'Territories', of which the Northern Territory is the most prominent.

[4] The present Government (Liberal Country Party) has a so-called policy that 'Australia is a shipper nation and not a shipping nation'. This is no policy at all. Further, this statement assumes that the two aspects of 'shipper' and 'shipping' are mutually exclusive, whereas the fact of the matter is quite the opposite. The present opposition party (ALP) has no comprehensive policy either.

(i) a suitable government inquiry into the Australian needs for a settled and simplified structure for offshore jurisdiction between the Commonwealth and State Parliamentary jurisdictions;
(ii) that serious consideration be given to revisiting the Offshore Constitutional Settlement 1979;
(iii) that, and only as an interim measure until (i) and (ii) above are addressed, the inquiry into an appropriate structure be addressed by taking steps to increase the attractiveness to salvors to devote increased resources to salvage. How this is best done relates to increasing profit to offset the high expenses of salvage.
(iv) Details on how best to increase the profitability of the salvage industry lie in expertise in the maritime industry whereas the present authors have addressed only issues of policy, jurisdiction and enforceability (not having salvage expertise).

Part 2. Importance of Salvage

When a marine catastrophe occurs which captures the interest of media, there is an increased level of public interest that becomes a concern for political parties. The specialist field of marine salvage on the Australian Coast is not well understood by the general public. Although, should a catastrophic event occur that gathers a large amount of media coverage and significant levels of public interest, the limited salvage capacity on the Australian coast will be a public concern which all level of government will have to confront.

The issue of marine salvage on the Australian coast is entangled in a net of governmental policy, legislation, and varied interpretations. Debate on marine salvage in Australia has previously occurred due to international marine incidents such as the Prestige off Spain in 2002, Braer off the Shetland Isles in 1993 and the Exxon Valdez in Alaska in 1989. However, recent domestic incidents have focused the concerns of the public and government administrations. Australian marine incidents that gained public interest are the Kirki[5], Iron Baron[6], Peacock[7], Bunga Teratai Satu[8], Doric Chariot[9]and the Karma[10].

Before looking at some of the difficulties faced by salvage operators, an insight into some of the legalities faced by salvage capacity on the Australian coast must first be undertaken. This the vexed issue of 'Offshore Jurisdiction.'

Part 3. Offshore Constitutional Issues

Because of the federal structure of the Australian national laws and because marine laws may affect all of the States and Territories, it is necessary for the Commonwealth, State and Territories to have their own legislation. As will be explained shortly, it is essentially for the States to cover the area of sea out to the three mile limit and for the Commonwealth to cover from that limit further out to sea, although there is concurrent jurisdiction. This has relevance for the control of the various seas surrounding Australia, a topic that is discussed later. It is not intended to embark upon a discussion of the extensive area of constitutional law but it is necessary to touch on some aspects of it to give a background to the Australian laws that regulate marine jurisdiction.

[5] Western Australian Coast (1991)
[6] Hebe Reef, Queensland (1995)
[7] Piper Reef, Queensland (1996)
[8] Sudbury Reef, Queensland (2000)
[9] Piper Reef, Queensland (2002)
[10] Agnes Waters, Queensland (2003)

International law attributed sovereignty over territorial seas to the coastal state, so, after European settlement of the Australian colonies, and after federation the Australian States, it was assumed that the States had sovereignty over the territorial seas (from the low water mark to the three nautical mile limit).[11] Thus, control over navigation, fisheries and other related activities was exercised by the States without question, as was the early control over oil and gas exploration over the sea bed and the subsoil. (Oil and gas exploration grew slowly from a single oil bore on the Coorong in South Australia in 1892 [12] to a major offshore industry at the present day[13])

3.1 Federal Constitutional Powers

The Australian constitution gave specific powers to the Commonwealth parliament to make laws. In s 51 (vii) power was given in respect "lighthouses, lightships, beacons and buoys", but which power is not exclusive to the Commonwealth, so it is shared with the States and the NT.[14] The constitution gave to the Commonwealth power "with respect to trade and commerce" - s 51(i), and it further provided that the power with respect to trade and commerce "extends to navigation and shipping" - s 98. In the *Australian Coastal shipping Commission v O'Reilly* (1962) 107 CLR 46, Dixon CJ, at p.54, said that these powers were very wide in relation to the whole subject matter of navigation and shipping. In *Union Steamship Co of NZ c Cth* (1925) 36 CLR 130 certain aspects of the *Navigation Act* 1912 were upheld, with certain other aspects not being so on grounds which are now irrelevant. It can be said that the Commonwealth parliament has wide powers with respect to the control of shipping and navigation under these powers[15] the constitution also gives powers to the Commonwealth parliament over external affairs, s 51(xxix), the importance of which is discussed under.

3.2 Offshore Petroleum Settlement 1976

In 1962 the Commonwealth Minister for National Development and the State Ministers for Mines decided to refer the matter of a co-operative approach among them on the subject of offshore mining to the Standing Committee of Commonwealth and State Attorneys-General. No government was confident as to the outcome of any litigation on the vexed question of jurisdiction over the territorial sea and the continental shelf and advisory opinions from the High Court are not available. In the result the 1967 Australian Offshore Petroleum Settlement was arrived at which provided that the Commonwealth and the States would each introduce legislation that would establish a regime within which offshore mineral exploration and exploitation could be undertaken and the royalties there from would be shared. The primary part of the agreed legislation was the *Petroleum (Submerged Lands) Act* 1967.[16]

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[11] See the argument set out and the cases collected by Lumb R D, *The Law of the Sea and Australian Off-Shore Areas* (2nd ed. University of Queensland Press, 1978.) pp. 57-60; and see also the judgment of Gibbs J, as he then was, in his decision (dissenting) in *New South Wales vThe Commonwealth (The Seas and Submerged Lands Act Case)* (1975) 135 CLR 337, 391 and following.

[12] Booklet entitled "Off-Shore Oil and Natural Gas: Exploration and Legislation", Victorian Government Printer 1968.

[13] As to the offshore oil exploration and drilling see further in section 9.3.

[14] Lumb RD *The Constitution of the Commonwealth of Australia Annotated,* 4th ed, Law Book Co, para 262.

[15] See generally Lumb RD, supra, para 660.

[16] Discussed in section 9.3, "Offshore Oil Exploration, Pipelines and Rigs".

3.3 The Challenge for Jurisdiction out to the Three Mile Limit

Judicial challenge did eventuate from the States after the Commonwealth Government insisted on passing the *Seas and Submerged Lands Act* 1973[17] that asserted sovereignty over the very areas that were in controversy with the States, as exemplified by the preamble to that Act:

> "WHEREAS a belt of sea adjacent to the coast of Australia, known as the territorial sea, and the airspace over the territorial sea and the bed and subsoil of the territorial sea, are within the sovereignty of Australia: AND WHEREAS Australia is a party to the *Convention on the Territorial Sea and the Contiguous Zone* a copy of which in the English language is set out in Schedule 1: AND WHEREAS Australia as a coastal state has sovereign rights in respect of the continental shelf (that is to say, the sea-bed and the subsoil of certain submarine areas adjacent to its coast but outside the area of the territorial sea) for the purpose of exploring it and exploiting its natural resources: AND **WHEREAS** Australia is a party to the *Convention on the Continental Shelf a copy* of which in the English language is set out in Schedule 2: BE IT THEREFORE ENACTED ... ."

The result of the High Court challenge was that the claims of the Commonwealth were upheld in *New South Wales v The Commonwealth (The Seas and Submerged Lands Act Case)*[18] and this gave the Commonwealth full power over the sea from low water mark. The whole court held that the provisions of the Act relating to the continental shelf were within the legislative power of the Commonwealth under s 51(xxix) of the Constitution (the external affairs power); and a majority held that the provisions relating to the matters other than the continental shelf were within s 51(xxix) on the ground that they gave effect to the *Convention on the Territorial Sea and the Contiguous Zone* and, by three justices, on the further ground that the external affairs power was not limited to authorizing laws with respect to Australia's relationships with foreign countries but extended to any matter, thing, person or activity external to Australia. A majority also held that the boundaries of the former Australian colonies ended at the low-water mark and that they had no sovereign or proprietary rights in respect of the territorial sea or the sub adjacent soil or super adjacent airspace. Thus was settled the major point for present purposes, which was that the Commonwealth had jurisdiction to the seaward from the low water mark and not from the outer edge of the territorial sea (three miles from the coast, as it then stood).

3.4 Importance of the External Affairs Power in Commonwealth Jurisdiction

Since that time the jurisdiction of the Commonwealth over the States has been further extended by a series of cases, such as *Robinson v Western Australia*[19]*; Bistricic v Rokov*[20]*; Raptis v South Australia;*[21] *Koowarta v Bjelke-Petersen;*[22] *Commonwealth v Tasmania (The Tasmanian Dam*

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[17] Act No. 161 of 1973, assented to on 4 December 1973.

[18] (1975) 135 CLR 337.

[19] (1977) 138 CLR 283. The finder of the remains of a Dutch vessel, which had foundered 2.87 miles off the WA coast in 1656, resisted a WA Act that claimed proprietary and possessory rights for the WA government in all such "historic wrecks". The court held that the WA legislation was invalid as purporting to extend beyond the low water mark without there being any sufficient nexus for the peace, order and good government of the State.

[20] (1976) 135 CLR 552. The court held that the *Merchant Shipping (Liability of Shipowners and Others) Act 1958 (UK)* did not apply in Australia as it was not expressed so to apply.

[21] (1977) 138 CLR 346. A fisherman held a Commonwealth license but not one from the SA government while fishing outside the three mule limit off the coast of SA, and had his fish seized by the SA fisheries inspectors for failing to have a SA licence. The court held that the SA legislation was invalid as it purported to extend beyond the three mile limit and, further, that it was inconsistent with the Commonwealth legislation (in contravention of s 109 of the Constitution).

[22] (1982) 53 CLR 168. A purchase of a large area of land by the Aboriginal Land Fund Commission was refused its transfer by the Queensland (State) Minister, which refusal was claimed to be in contravention of the terms of the *Racial Discrimination Act 1975* (Cth). It was submitted that the terms of the Act were beyond the legislative powers

case)[23] and *Richardson v Forestry Commission (The Lemonthyme and Southern Forests Case).*[24] The result of these later cases is that the extent of the external foreign affairs power, granted to the Commonwealth under s 51(xxix) of the constitution, has been much extended.

In *Polyukovich v The Commonwealth*[25] the extent of the external affairs power was raised once again. The accused, who had emigrated to Australia from Europe, had been charged with a serious war crime in Europe during World War II under the new, and controversial, amendment to the *War Crimes Act* 1945 (Cth). Declarations were sought on his behalf in the High Court to strike down certain provisions of the Act as being beyond the legislative power of the Commonwealth. The Commonwealth relied upon the defence power and the external affairs power under the Constitution. The interesting aspect of the case was that, while Australia was a party to the various Geneva Conventions, Australia had not entered into any convention expressly requiring the parties to it to bring such persons to trial. Thus it was the extended jurisdiction under the external affairs (and defence) powers which came in for consideration by the Court.

> In his judgment in the case Mason CJ said:
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> "Discussion of the scope of the external affairs power has naturally concentrated upon its operation in the context of Australia's relationships with other countries and the implementation of Australia's treaty obligations. However, it is clear that the scope of the power is not confined to these matters and that it extends to matters external to Australia. I have previously expressed the view that the grant of legislative power with respect to external affairs should be construed with all the generality that the words admit and that, so construed, the power extends to matters and things, as well as relationships, outside Australia ... ."[26]
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> To like effect Brennan J, who was one of the dissenting judges in that particular case, said:
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> "The recent cases relating to s 51(xxix) show that the power thereby conferred enables the Commonwealth to legislate for the purpose of discharging the responsibilities and asserting to the full interests of Australia as an independent member of the community of nations ... It is a plenary power exercisable as well in protection of Australia's international interests as in performance of its international obligations."[27]

The Court held, by a majority, that the legislation was valid and similar views to those of Mason CJ and Brennan J were expressed by the other members of the Court as to the wide powers under the external affairs power and that jurisdiction for the exercise of such powers did not necessarily have to be based on an international treaty. Further, the Commonwealth is not restricted to the external affairs power in relation to control of the marine environment as it has all of the other powers as well which are set out under the constitution.[28]

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of the C'th Parliament. The court held that the relevant terms of the Act were valid as they were passed in support of the *International Convention on the Elimination of All Forms of Racial Discrimination,* to which Australia was a party. Once again the decision was based on the ambit of the external powers under the Constitution (s 51(xxix)).

[23] (1983) 158 CLR 1. In this case the court, once again, upheld the power of the C'th legislation in support of an international convention.

[24] (1988) 164 CLR 261. The court here applied the *Tasmanian Dam* case in holding that it was within the legislative competence of the C'th to pass domestic legislation to enforce the terms of the *Convention for the Protection for the World Cultural and Natural Heritage.*

[25] (1991) 172 CLR 501

[26] At 528.

[27] At 551-552

[28] The "suite of powers" available to the Commonwealth are discussed by Professor James Crawford in 1991 *Sydney Law Review Vol 13 No 1 pp. 11-30;* see also the discussion of the cases on the point by Campbell W M, Senior

The effect is that, for the purposes of enacting domestic legislation to prohibit or control marine matters, the Commonwealth does not have to rely expressly on an international convention. Such jurisdiction is attracted if there is some discernible connection between Australia's interests, as perceived by the Parliament, and the proposed legislation. To date, as will be seen,[29] Australia has relied only on international conventions for all its legislation on marine pollution. The time may come, however, when the Commonwealth legislators will extend the legislation further and there is presently a need in the area of marine pollution for that to be done.

There are limitations in international law on the jurisdiction of a coastal State beyond the territorial sea, but the jurisdiction is still extensive. It clearly extends over its own territory, its internal waters (ports, bays, etc), and its territorial sea. It also extends over its own ships wherever they may operate and over foreign flag ships using its ports. Australia has claimed powers over a fishing zone some 200 miles from its coasts, and, as will be seen in the Commonwealth legislation, it is now claiming powers out to 200 miles over and exclusive economic zone. All in all, it is a very wide jurisdiction.

The outer limits of the external affairs power have yet to be set by the High Court but there is now no doubt that the present powers uphold the jurisdiction of the Commonwealth to incorporate the provisions of international treaties into domestic legislation. As most of the regime concerning marine pollution has been imposed by international convention this gives great flexibility to the Commonwealth in this area.[30] The result of these decisions is that the Commonwealth has wide jurisdiction under the external affairs power of the Constitution (s 51(xxix)), which has important ramifications for marine pollution as most of the innovations for its regulation and prevention come from international conferences and treaties. Thus the groundwork is laid for the Commonwealth to legislate widely, even in areas where no actual treaty has been included, to control marine pollution provided there is some sufficient relevant aspect of external affairs to attract jurisdiction.

3.5 Residual State and NT Powers

Despite the decision in the *Seas and Submerged Lands Act* case, each State and the NT retained some legislative jurisdiction beyond the low water mark provided there was demonstrated some nexus with their power to regulate for the peace, order and good government of the State. The High Court cases which decided this were *Pearce v Florenca*[31] *(lobster* fisheries legislation valid); by obiter dicta in *Raptis v South Australia*[32]*; Union Steamship Company of Australia Ltd v King*[33] (State workers' compensation provisions extending to an interstate ship); *Wacando v The Commonwealth*[34] (Queensland and Commonwealth Legislation, including that the *Petroleum*

Advisor, Office of International Law, Commonwealth Attorney-General's Department, in his paper entitled "Implementation of International Environmental Law in Australia", delivered in Brisbane on 27 November 1991 as part of the seminar on International Environmental Law, organised by the International Law Section of the Law Council of Australia. The place and extent of customary international law, as opposed to international law as settled by convention, is still a question to be settled in the ambit of the foreign affairs power. (For a note on its place in international law see (1991) *Harvard Law Review Vol* 104:1484, pp.1496-1504.)

[29] Set out in the various parts of section 7.2.

[30] For completeness, it is noted that the issue as to how the base line of the low water mark is established, to establish the limits of the territorial sea, the fishing zone etc, was decided by the High Court in *Li Chia Hsing v Rankin* (1978) 141 CLR 182, where a fisherman charged with offending Commonwealth fishing laws challenged whether it could be established from a chart. The court held that it was a question of fact and could be established by a chart or by evidence of the actual position of the low water mark on the coast itself.

[31] (1976) 135 CLR 507.

[32] (1977) 138 CLR 346.

[33] (1968) 166 CLR 1.

[34] (1981-1982) 148 CLR 1.

(Submerged Lands) Acts 1982 was held applicable to Darnley Island off the Queensland coast); and *Port MacDonnell P.F.A. Inc v South Australia*[35] (State fisheries legislation valid). Some of these decisions also held that the State had jurisdiction out to the three mile limit, rather than the low water mark, and this was because of an agreement between the Commonwealth and the States to grant back jurisdiction over the then coastal waters area of three miles, which will now be discussed.

2.6 The Offshore Constitutional Settlement, 1979

Having established the point that the Commonwealth's jurisdiction ran from the low water mark, the Commonwealth Government decided that it was more convenient for the States to have this jurisdiction back. In the result the Commonwealth and the States negotiated an agreement for the control of the offshore waters in 1979, known as the "Offshore Constitutional Settlement". The Standing Committee of the Attorneys-General had met in Hobart on 5 March 1976, formed three sub-committees and, after much negotiation, "Agreed Arrangements" were published.[36] The agreement covered quite a long list of matters, but the major ones that touch on the marine environment are:

(a) The Commonwealth was to give each State the same powers with respect to the adjacent territorial sea (including the sea bed) as it would have if the waters were within the limits of the State;

(b) The Commonwealth would pass legislation to vest in each State proprietary rights and title in respect of the seabed of the adjacent territorial sea, with reservations for national purposes such as defence etc.;

(c) All of these powers were limited to three miles. (This was the then territorial sea but the agreement stayed at three miles when the Commonwealth proclaimed the territorial sea to be 12 miles);

(d) The offshore petroleum agreement was that the States would regulate it within three miles and the Commonwealth outside that area, but with a statutory Joint Authority for each adjacent area;

(e) Offshore mining was to be a similar arrangement to that for offshore petroleum;

(f) Offshore fisheries would give legislative responsibilities to the States out to three miles and to the Commonwealth beyond that;

(g) In relation to ship-sourced marine pollution it was agreed that the arrangements that existed before the High Court decision in the *Seas and Submerged Lands* case should be continued, with the Commonwealth legislation having a savings clause to allow the States to legislate to implement certain aspects of marine pollution conventions if they should wish to do so;

(h) Other areas agreed upon were shipping and navigation, crimes at sea legislation, the Great Barrier Reef Marine Park, other marine parks, historic shipwrecks, and that there

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[35] (1989) 168 CLR 340.

[36] See the pamphlet entitled "Offshore Constitutional Settlement. A Milestone in Co-operative Federalism, published by AGPS Press, 1980. For discussion and greater detail see Cullen R, *Federalism in Action. The Australian and Canadian Offshore Disputes,* supra, section 4.3.

should be continuing discussions on land based marine pollution and marine pollution through dumping.

3.7 The Present State and Commonwealth Jurisdiction Offshore

The agreement was encompassed in a number of Acts passed by the Commonwealth Parliament.[37] By the *Coastal Waters (States Powers) Act* 1980 (Cth) the States were given legislative powers as if the coastal waters were within the limits of the State and beyond the coastal waters for certain limited purposes.[38] By the *Coastal Waters (State Title) Act* 1980 the title in the property to the sea-bed beneath the coastal waters and the space above it were given to the States, subject to excepted areas such as that in the Great Barrier Reef Marine Park.[39]

In relation to offshore mining the Commonwealth Parliament passed a different group of Acts,[40] which was to establish regulation of offshore mining, mainly oil exploration and production.[41]

Pursuant to an arrangement between the Commonwealth and South Australia the rock lobster industry was controlled off the shores of South Australia and this lead to an attack on the *Fisheries Act* 1952 (Cth), the *Fisheries Act* 1982 (SA), the *Petroleum (Submerged Lands) Act* 1967(Cth) and the *Coastal Waters (State Powers) Act* 1980 (Cth) in the High Court in *Port Mac Donnell Professional Fishermens Association Inc v South Australia*[42] The High Court upheld the validity of the legislation and the arrangements made. The other Acts in the legislative package have not been challenged. The powers of the States in this area were probably strengthened when the last colonial legislative links with the Imperial parliament were removed with the *Australia Act* 1986 (Cth)[43] and the *Australia Act* 1986 (U.K.)[44]. By s 2 the States were given full power to make laws having extraterritorial effect for their own peace, order and good government, a power they had always had but which was now expressly provided for in the legislation.

A somewhat leisurely approach has marked the Commonwealth's extensions of claims to the offshore seas. In 1967 it established a twelve nautical mile fishing zone and it was 1979 before it claimed an extension of that zone to 200 nautical miles. It was 1990 before Australia extended its territorial sea to twelve nautical miles and 1991 before it announced the move to establish an exclusive economic zone (EEZ) around its coast and to adopt the *1982 Convention on the Continental Shelf* provisions in this regard.[45] The recent Australian claim to a twenty-four

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[37] These Acts were the *Crimes at Sea Act* 1979; *Coastal Waters (State Powers) Act* 1980; *Coastal Waters (Northern Territory Powers) Act* 1980; *Coastal Waters (State Title) Act* 1980; *Coastal Waters (Northern Territory Title) Act* 1980; *Seas and Submerged Lands Amendment Act,* 1980; *Petroleum (Submerged Lands)Amendment Act* 1980; *Petroleum (Submerged Lands) (Royalty) Amendment Act* 1980; *Petroleum (Submerged Lands) (Exploration Permit Fees) Amendment Act* 1980; *Petroleum (Submerged Lands) (Pipeline Licence Fees) Amendment Act,* 1980; *Fisheries Amendment Act* 1980; *Navigation Amendment Act* 1980 and the *Historic Shipwrecks Amendment Act* 1980.

[38] S 5.

[39] S 4. Similar provision was made for the Northern Territory in the *Coastal Waters (Northern Territory Powers) Act 1980* and the *Coastal Waters (Northern Territory Title) Act 1980*.

[40] These were the *Minerals (Submerged Lands) Act 1981, Minerals (Submerged Lands) Exploration Fees Act 1981, Minerals (Submerged Lands) (Production Licence Fees) Act 1981, Minerals (Submerged Lands) (Registration Fees) Act 1981, Minerals (Submerged Lands) (Royalty) Act 1981* and the *Minerals (Submerged Lands) (Works Authority Fees) Act 1981*.

[41] Offshore oil exploration is discussed in section 9.3.

[42] (1989) 168 CLR 340, mentioned above.

[43] Act No. 142 of 1985, assented to on 4 December 1985.

[44] The Commonwealth Act requesting and consenting to the U.K. parliament passing the *Australia Act 1986* was the *Australia (Request and Consent) Act 1985;* Act No. 143 of 1985, assented to on 4 December 1985.

[45] Burmester H, "Australian Policy and the Law of the Sea", paper given to a seminar in Sydney on 12 October 1991 organised by the University of Sydney and the University of Wollongong. Also see generally Ryan K W (Ed) *International Law in Australia* (2nd Ed.) Australia's base lines are defined by reference to the lowest astronomical

nautical mile contiguous zone, pursuant to Article 33 of UNCLOS III, will be particularly important to make the powers over customs and excise clear for the region beyond the territorial sea.[46] Domestic legislation to give effect to these claims is contained in the *maritime Legislation Amendment Act*1993 (Cth). The vexed question of extension to the exploration and exploitation of the deep seabed and subsoil, that was a bone of contention at UNCLOS III, is a question that Australia at present shows present no sign of addressing but it is, of course, a dynamic situation and so it will develop in time.

A discussion of the constitutional issues needs also to mention the "roll-back" provisions concerning the Commonwealth legislation. As has been mentioned under the provisions of the Offshore Constitutional Settlement the States were handed back the jurisdiction out to the three mile limit, but this was not exclusive so the Commonwealth still had jurisdiction that it could exercise if one or more of the States did not. Because of the "roll-back" provisions in some of its marine legislation the Commonwealth jurisdiction initially applies from the low water mark but rolls back to the three mile limit on the State or the NT passing similar legislation.

> An example of this "roll-back" provision is in the *Environment Protection (Sea Dumping) Act* 1981 (Cth), which provides:
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> " 9. (1) Where the Minister is satisfied that the law of a State or of the Northern Territory will, on and after a particular date, make provision for giving effect to the Convention in relation to coastal waters of that State or of the Northern Territory (whether or not the Convention extends to the whole of those coastal waters), the Minister shall, by notice published in the *Gazette*, declare that, on and after that date, this Act does not apply in relation to the coastal waters of that State or of the Northern Territory, as the case may be." [47]

The relevant Commonwealth Acts provide that they "shall be read and construed as being in addition to, and not in derogation of or in substitution for, any other law of the Commonwealth or any law of a State or Territory". And they also provide that the Acts apply "both within and outside Australia and extend to every external Territory." [48] Where the States and the NT have similar legislation to that of the Commonwealth legislation there are two legislative schemes covering the same area. This raises, of course, the operation of s 109 of the Constitution,[49] and it may be argued that some or all of the State legislation is thereby invalid. However, the better view seems to be that the "roll-back" provisions are quite valid and no inconsistency arises between the Commonwealth and the State legislation.

3.8 Summary of the Constitutional Position

The Commonwealth parliament has been granted wide powers under the constitution to enact laws in relation the maritime matters and these powers cover almost every maritime activity that occur to the seaward of the low water mark. The Commonwealth and the States and the NT agreed in 1979, in the "Offshore Constitutional Settlement", that the States and the NT should have jurisdiction out to the three mile limit, but the Commonwealth also has jurisdiction. As a result much of the Commonwealth maritime legislation has a "roll back" provision, under which

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tide - Attorney-General's Department, Australia's Territorial Department *Australia's Territorial Sea Baseline* (AGPS 1988.)

[46] Burmester H, supra.

[47] S 9. The section then goes on to provide that the declaration shall have the effect that the Act shall be read as not including a reference to coastal waters, with certain exceptions which need not be explored here.

[48] The "Savings of Other Laws" section, usually s 5; and the "Operation of the Act" section, usually s 6.

[49] The "inconsistency of laws" provision in s 109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

the Commonwealth power rolls back if the State or the NT passes identical legislation that applies in that area. The States and the NT also have some jurisdiction beyond the three mile limit where it is shown sufficient connection (nexus) with the State and NT requirement to legislate for the "peace good order and government" of that State. The Commonwealth and the States also agreed to an Offshore Petroleum Settlement, as a result of which there is a cooperative approach to offshore activities in relation to oil and gas exploration and exploitation.

To the seaward of the three mile limit there is almost exclusive Commonwealth jurisdiction to control marine matters, subject to the limits placed by international law and the 'nexus' between the State and the activity offshore.

Part 4. Salvage Issues

4.0 The Three Tiers of Government Responsibility to Provide Salvage Infrastructure

It is generally accepted that the public expect governments to provide delivery of competent efficient and cost effective outcomes through the use of public expenditure. However, in the maritime industry it is the years of governmental strategic policy that is directly related to the current difficulties faced by Australian mariners and marine operators such as those engaged in the salvage industry. These difficulties are now only likely to be overcome if government adopts a commitment to significant financial resources towards capital expenditure in the short term, or a strategic investment with a prolonged period of moderate to high risk of environmental and life threatening events occurring.

4.1 Confidence in Government Policies

Confidence in the existing federal governments polices to effect positive outcome decisions in the maritime industry is heavily influenced by the perceived lack of importance of the Australian Shipping Industry to the Australian Commonwealth Government. This has concerned many segments of the marine industry, some have even sought changes to political policies through inflaming public sentiment. One such example includes the concerted effort to raise public awareness of senior government office holders who phrased "Australia has been regarded as a user of shipping services rather than a provider of shipping."[50]

The minimal number of maritime related outcomes initiated and completed by the Australian Transport Council (ATC) further supports the perception that the Australian shipping industry is of limited importance. As the ATC is the principle intergovernmental body consisting of the Federal Minister for Transport and all State Ministers responsible for the strategic directions of all transport modes, it is somewhat disconcerting to see that the ATC has almost no discussion or resolutions in relation to the development, integration or growth strategies for the marine industry.[51] The most recent marine related topic present concerns the changes to the communications systems used national for marine safety communications.

Unfortunately this situation only compounds the view that the maritime mode of transportation is considered, by the highest levels of State, Territory and Federal Government, to be a low priority in comparison to other transport modes. The National Maritime Safety Committee (NMSC), itself a subgroup of the Australian Maritime Group (AMG), has concurred with industries concerns by publicly stating, "Marine transport has a low profile relative to other modes."[52] This

[50] The Honourable John Anderson MP, 'Deputy Prime Minister and Minister for Transport and Regional Services' (Speech delivered at the National Bulk Commodities Group Annual Dinner, Melbourne, 13 December 2001)
[51] ATC Website: www.atcouncil.gov.au 19/3/2004
[52] National Maritime Safety Committee, *2003-2008 Strategic Plan*, 2003, p 3

unsupportive attitude of government has had a significant role in the decline of salvage facilities in Australia, as well as declines in other maritime fields.

4.2 Economic Viability of Salvage Facilities

Due to the low priority of the marine transport segment, there is a continuing lack of clarity for industry in legislation. Industry is frequently confronted with the complex task of deciphering the intertwined federal and state marine jurisdiction and legislation. The resultant situation is that the maritime industry is becoming economically unviable as a business. Additionally, the economic viability of supplying salvage marine facilities, such as vessels, is a key fundamental question. Capital investment into specialist salvage facilities is a business with high initial cost, infrequent returns, with the added risk of potentially long periods of no income.

Australia has an excellent shipping safety reputation internationally. However, the infrequent marine incidents that occur on the Australian coast heavily influence the business returns of salvage operators. It is therefore not surprising that investors or financiers consider the salvage business to be unattractive.

4.3 Available Maritime skills

Federally, the Australia shipping industry has all but disappeared and its decline is further extenuated by the continuing decline in ships registered on the Australian ship register.[53] It is not surprising then that the political policies that affect the salvage segment of the marine industry are currently being reviewed. Particularly, when industry continues to place adverse political pressure on government to encourage action to stem the loss of maritime skills and marine infrastructure in Australia.

In fact the Commonwealth marine authority, Australian Maritime Safety Authority (AMSA), has confirmed that there is a serious lack of available mariners suitable for vital maritime related professions with the release of a recent maritime skills pool review. [54] One strategic proposal that may be considered by some marine industry segments to abate the decline in maritime skills is the use of State and Territory licensed mariners. However, the affects of international conventions that the Commonwealth has committed to apply to Australian State and Federal mariners must be viewed in their appropriate context, that is, with relevance to the State and Territory fleets.

One international convention that is causing enormous difficulties to State and Territory mariners is the application of the Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended in 1995 (STCW 95). This convention has established significant barriers for State and Territory mariners even though the NMSC recently completed the National Standard for Commercial Vessels (NSCV) – Part D ' Crew Competencies' that states that it has adopted the STCW 95 principles. In theory, this should have reduced the barriers but the Commonwealth marine administration refuses to accept any State and Territory based training on the basis that the State and Territory training does not meet STCW 95 code requirements.

Particularly, the Commonwealth's concern is in relation to the administrative control of the training institutions and training courses. At State and Territory levels both the Education and Maritime Departments of the State or Territory Government regulate the training providers and

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[53] Independent Review of Australian Shipping, *A Blueprint For Australian Shipping*, September 2003, Australian Shipowners Association, p 16

[54] Thompson Clarke Shipping Pty Ltd, *Maritime Skills Availability Study*, November 2002, Australian Maritime Safety Authority

the marine training courses provided. The Commonwealth therefore has established a controlling barrier to industry by enforcing the Commonwealth control of STCW 95 and not recognizing the State and Territory marine training system. The flow-on effect is that this places limits on the marine industries, such as those involved in providing salvage capacity, to access suitable marine license holders in the declining maritime skills pool.

4.4 Inclusion of a Defined Level of Salvage Capability in Harbour Towage Services Agreements

Inclusion of defined salvage capability into service agreements has been a favorite strategic approach by several levels of government. This legally enforceable contract is fraught with assumptions that may not be correct. For example, specifying certain tug sizes may result in that tug not being physically capable to operate in the port due to port operational constraints such as available depths of water surrounding port facilities.

Contracting capability assumes that a marine incident requiring salvage facility is going to be requiring that sort of capability. Generally, it will be the circumstance of the marine incident that will determine the level and types of salvage capacities sought. The available equipment that can be considered for a salvage operation is of course dependent on the vibrancy of the marine industry. A more vibrant marine industry will have a greater selection of equipment and salvage capacities available to select and utilize.

Additionally, with the continually increasing size of ships plying world trade and entering into Australian trade routes, it is most probable that any salvage operation on the Australian coast will require several salvage vessels. This operational practicality was demonstrated in the Kirki[55], Iron Baron[56], Peacock[57] and Bunga Teratai Satu[58] cases. It is unlikely that a regional port in Australia is going to establish contractual arrangements for several salvage vessels to be used in its port operations fleet.

The use of non-specialized salvage capacity, such as a fishing vessel should be limited, if not avoided. While it is a tradition of the sea for any mariner to assist vessels in distress with whatever means is available, it should be realized that there are limitations to the capability of some vessels. Fishing vessels are not always fitted with devices suitable for securing to other ships for the purposes of stabilizing ships that have floundered.

If such a vessel attempts to use its trawl rigging to connect up to a distressed vessel, it is questionable as to whether the stability of the fishing vessel is sufficient to remain upright. This stability concern is potentially one reason why trawlers have recently capsized when their nets have either fouled on the seafloor or become filled with seaweed.

Additionally, problems with contracting salvage capacities in harbour towage requirements include the enormous array of other concurrent contractual issues stemming from normal marine operations. All of which may, if there is a breech of any of the contractual conditions, result in damages being sought. The question that really must be decided, if this practice is to be adopted, is who should pay for the accumulative losses that may arise?

4.5 The Provision of Relief Tugs When Salvage Tugs are Engaged in Salvage Operations

[55] Western Australian Coast (1991)
[56] Hebe Reef, Queensland (1995)
[57] Piper Reef, Queensland (1996)
[58] Sudbury Reef, Queensland (2000)

The concept of using relief tugs when appropriate port tugs are used for salvage operations is not an uncommon practice in Australian ports. Conceptually, this practice is not unsuitable for ports where there are either multiple tug companies in one port[59], or in geographical areas where several ports are within reasonable short steaming distances[60].

However, this concept assumes that tug companies are willing to set aside commercial competition to assist rival companies. Commercial realities tends to indicate that rival port tug operators are unlikely to assist competitors if they are aware that the company supplying the salvage capacities can not comply with the necessary tug facilities for a port operation. This is because the competitive port operator is more likely to obtain the full contract for the port operation if they have adequate resources available. Conversely, this same commercial reality is likely to heavily influence a company's decision when they have been requested to supply salvage tonnage. They will be reluctant to supply relief tugs due to commercial pressures.

Additionally, consideration must also be given to port harbour towage tasks when a salvage tug is requested. To maximize carrying capacity and financial returns, ships loading in ports will often be draft restricted. That is they will engaged in the principle of loading to meet the maximum draft possible, while maintaining sufficient under keel clearance within a window of the highest tide available the ship. Some Australian ports even further maximize ship tonnage capacity for loading by employing 'Dynamic Under Keel Clearance' programs[61]. The crucial factor of either system is the available depth of water for the ship to leave port.

In the current climate of world ship sizes continually increasing, it is quite possible that a loading ship may be delayed due to unavailability of tugs or relief tugs in port. The consequences of which, if sequencing with the loading ships situation is not considered, may result in charter party delays, missed liner-trade port entry time slots, grounding and structural damage to the ships while alongside berths. All of these consequences are likely to result in significant costs to the shipper and ship owner who would be expected to seek damages for their losses. It is therefore not too remote to predict that a circumstance will result where serious legal and financial repercussions occur due to a tug being obliged to comply with a government request to attend a salvage operation.

4.6 Minimum Standards of Salvage Tug Safety, Training and Operational Capability

It is interesting to note that the salvage discussion paper raises the Uniform Shipping Laws Code (USL) and the revised version called the National Standards for Commercial Vessels (NSCV). USL is an Order[62] of the *Navigation Act* 1912. However, almost all State and Territory marine administrations have adopted this Order through different legislative models. For example Queensland State legislation[63] does not adopt the USL code wholly, it specifically calls up individual sections of the USL code.

4.7 Marine License Mutual Recognition and the National Standard for Commercial Vessels

There is a well established problem with mutual recognition of interstate marine licenses in each jurisdiction. Principally, the only USL license types that will be openly accepted for use in State

[59] Such as the ports of Sydney, Melbourne, Brisbane and Port Headland
[60] An examples is the ports of Newcastle, Sydney & Port Kembla
[61] Iron Chronicle, *Ports Push to Meet Buoyant Market*, August 2003,Vol 38, BHP BILLITON,
[62] *Navigation Act 1912*, Section 427
[63] Transport Operations (Marine Safety) Act 1994 & Transport Operations (Marine Safety) Regulations 1996

and Territory jurisdictions, in areas other than were the license was issued, is an 'Open' Certificate of Competency. There are some exception to this rule in regards to 'Restricted' Certificates of Competency between Victoria and Tasmania.

However, the differing legislative modeling used to adopt the USL code has created an enormous range of State and Territory issued licenses that are either not fully compliant with USL due to missing competencies, sea time or other 'Open' license requirements. Additionally most states have, due to legislative changes, been forced to create classes of certificates for industry so that their existing industry members legally comply with legislation when the USL code was adopted. This is particularly evident in licenses titled 'Certificate of Recognition' or 'Certificates of Service.' It may be a question of law as to whether these licenses are legitimate licenses under State or Territory legislation.

The issue of licensing is inherently vital to salvage operators, as even though most State and Territory legislation has pieces of legislation that can make exception in special circumstances, unless appropriately licensed staff are onboard before salvage operators commence voyages to a salvage site, their own marine insurance may be invalidated. A mentioned earlier, the National Maritime Safety Committee (NMSC) has completed the NSCV - Part D 'Crew Competencies' component of the USL code revision that would be applicable to salvage vessel operators operating intrastate.[64]

Unfortunately, the NMSC has not concluded the development of an agreed legislative model to adopt the NSCV – Part D either, directly as an amendment to the Section 427 of the *Navigation Act* 1912 or as state legislative amendments to replace the USL code sections 2 and 3.[65] Consequentially, there continues to be no consistent approach to State and Territory marine legislation and there continues to be difficulties in mutual recognition of interstate marine licenses. It is unlikely that there will be any easing of the licensing impediments for salvage crews and tugs that move between Australian ports in the near future.

4.8 International Convention Barriers to Australian Shipping.

An alternative option often used to avoid State and Territory recognition problems is the use of Commonwealth issued marine licenses. Notwithstanding the marine jurisdiction discussion earlier, the *Navigation Act* 1912 applies Commonwealth marine jurisdiction over salvage vessels that transverse State and Territory borders or are engaged on overseas voyages.[66] However, an issue experienced by salvage crews who are required to travel by sea on an interstate voyage to reach a salvage operation, is the Commonwealth legislation[67] requirement trading ship staff, such as salvage crews, to hold STCW 95 endorsed state marine qualifications or a Commonwealth issued license in accordance with the STCW 95 code.[68]

Similarly, problems faced by Commonwealth license holders in this situation relate to how State and Territory marine legislation is written. In some circumstances it may be considered illegal to operate in State or Territory jurisdiction unless a State or Territory issued marine license is held. This is particularly important to the salvage company as the salvage vessels marine insurance

[64] Generally Salvage operations will be based out of a port within a state, strict catch all legislation at state level will require compliance with State marine legislation.
[65] NMSC website, www.nmsc.gov.au 19/3/04
[66] *Navigation Act 1912*, section 2
[67] Marine Orders Part 3 - Crew Competencies
[68] AMSA Marine Notice 2/2002, has reduced the need for STCW 95 endorsements on state issued certificates on interstate voyages. However, companies are still requiring state mariners to have ' Near-coastal STCW 95 endorsements.' Significant problems remains for state mariners who require 'Other than Near-Coastal STCW 95 endorsements.'

may be affected as an insurer may have sufficient concerns to challenge the appropriateness of the marine licenses held onboard as a question of seaworthiness of the vessel under its insurance obligations.

4.9 International Training Models Verses Australian National Training Authority Education Methods.

Additionally, it is also necessary to view the manner in which individuals obtain Commonwealth STCW 95 endorsed or issued marine licenses. To date the Commonwealth marine authority, Australian Maritime Safety Authority (AMSA), principally accepts and regulates only marine training that is undertaken through an AMSA approved institution. These marine training institutions and marine training courses are consistent with international training and course structures set by the International Maritime Organization (IMO). It appears that this training pedagogy is being further encouraged by the proposed changes to the Marine Orders Part 3 that are expected to greatly limit the acceptable training of state mariners.

In respect to the training of State and Territory mariners, their training is designed to meet USL/ NSCV requirements through Competency Based Training (CBT) packages. This training system is in accordance with the governance of the national educations COAG agreement on professional workplace training delivered by any State and Territory Registered Training Organization (RTO). Consequentially, commercial ship operators such as those used in salvage operations who utilize state issued marine licenses and state based training institutions experience difficulties in having that training accepted by AMSA. As AMSA does not accept training from State/Territory registered marine training organization, even if State or Territory Marine and Education Departments authorize them.

In affect Australia has two merchant fleets, the rapidly diminishing 'Blue Water Fleet'[69] trading internationally or on interstate voyages and the considerable 'domestic fleet' engaged in intrastate and some limited interstate voyages. The streamlining of training and licensing is not at present a simple process. In fact, personnel from the 'defense force fleet'[70] are finding it difficult to enter into the merchant fleets due to training and licensing issues.

4.10 The Need for Public Interest Obligations to Release Tugs for Marine Emergencies

Public interest in protecting the environment particularly after a marine emergency has increased. However, with the recent world events that have resulted in wars and large losses of life as a result of terrorist activities, it is firmly believed that the public interest to release tugs to attend marine emergencies or even to assist in port or national security protection measures will increase.

With respect to the latter, strategic security measures for the continent may actually be an opportunity for Australia to establish salvage capacity by incorporating those facilities into the National Oil Spill Response Plan and Port Security Plans while also providing support to the marine industry though skills development growth and increasing the capabilities of the Australian Royal Navy. The Independent Ship Review of Australian Shipping (IRAS) stated that a particular weakness in Australia's national security system is Australia's dependence on

[69] The term 'Blue Water fleet' is often used to indicate large commercial shipping that are solely regulated by AMSA.
[70] 'Defence force fleet' refers to maritime qualified personnel in the Navy, Army and Air Force.

foreign shipping.[71] Consequentially, it may be feasible to implement salvage capacity on the Australian coast through the Australian Defense Force.

Australian allies such as the United States implement unique strategies under their Military Sealift Command (MSC) fleet that Australia should consider adopting. The Military Sealift Command ships include ocean-going tugs that are US Government owned and crewed by civilian mariners.[72]

In practice, beyond the normal duties of naval operations, a fleet of salvage capacity operated in a manner similar to MSC should be made available to state marine training institutions to deliver competency based training and sea experience for marine licenses.

Established correctly, a MSC styled fleet would:

- Fulfill public interest obligations to have and utilize salvage capacity;
- Integrate state and federal marine training for marine licenses;
- Remove legislative impediment to salvage crews, as government vessels are likely to be exempt from state and Commonwealth legislation;
- Provide greater resources for Australia's defense and port/marine security protection;
- Greatly improve the military fleets capacity to access competent merchant mariners to support or be proactive in auxiliary naval fleets; and
- Minimizing the cost to port users by spreading the financial burden over the entire population of Australia which is the public interest which the system is to serve.

There are many possible solutions available to rectify the limited salvage capacity on the Australian coast. The question confronted, is whether Australia will be brave enough to adopt new strategic thinking and modern solutions to resolve a continuing problem in the maritime sector.

5. Recommendations

See the Executive Summary above, page 1.

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[71] Independent Review of Australian Shipping, *A Blueprint For Australian Shipping*, September 2003, Australian Shipowners Association, p22

[72] Naval fleet Auxiliary Force, www.msc.navy.mil/pm1/ 19/3/04