
Refuge for Ships in Distress: International Developments and the Australian Position



Dione Maddern* & Stephen Knight**

1. Introduction

William O'Neil, Secretary General of the International Maritime Organisation ("the IMO") recently noted that, in relation to marine casualties, "[d]amage to the environment now commands the headlines and arouses public indignation to a far greater extent than does the loss of lives of seafarers".¹ The issue of when a coastal state should grant a place of refuge to a ship in distress is one that has grown in prominence in recent times in line with an increasing global appreciation of the need to protect the marine environment from the pollution that can be generated by a serious shipping accident at sea.

This article examines several of the marine casualties that have provided the impetus for places of refuge to become a major talking point at the IMO, details the current progress of IMO action on the issue, discusses what impact the results of the discussion at the IMO might have for an Australian policy on places of refuge and suggests reform of the present Australian position is necessary. To provide context for this discussion it is necessary to first define what constitutes a 'place of refuge' and illustrate how the decision as to whether or not to grant a place of refuge is often fraught with difficulty for the authority charged with reaching this decision.

1.1 Defining Places of Refuge

A 'place of refuge' is a sheltered area of coastline where a ship in distress may seek shelter from the wind and swell.² By sheltering in such a place it would be hoped that

* Dione Maddern is a Bachelor of Laws student at Queensland University of Technology. Dione was awarded a Bachelor of Arts in French and Russian Language by the University of Queensland in 2000 and has also studied Maritime Law at the University of Queensland. Dione will graduate her Bachelor of Laws degree in 2003, after which she hopes to practise in the area of Maritime Law.

** Stephen Knight is the Research Assistant at the Centre for Maritime Law, a centre of the T.C Beirne School of Law at the University of Queensland, during 2003. He is also currently studying for a Bachelor of Business (Management) and a Bachelor of Laws at the University of Queensland. He has been selected as a member of the team to represent the University in 2003 at the International Maritime Arbitration Moot Competition. He has a strong interest in international law in general and international maritime law in particular.

¹ O'Neil, W, "Keynote Address", *Fourth International Marine Salvage Conference*, London, 19 March 2003. The full text of the Secretary General's remarks can be found at http://www.imo.org/Newsroom/mainframe.asp?topic_id=762&doc_id=2875.

² *Report of the Marine Safety Committee in its Seventy-Fourth Session*. (2001) MSC 74/24, 2.23; Phillips, Barton. (2002) *The Question of Granting Safe Haven – Issues of Risk Management for Port Operators*. Retrieved 12th September 2002: <http://www.amsa.gov.au/amsa/haven/Phillips.pdf>; Julian, Mike. *Current*

there would be a better chance of saving the ship itself or at least contain any pollution that may result. It should be noted that *place* of refuge does not necessarily mean a *port* of refuge. It will not always be appropriate or necessary to allow a ship in distress entry into a port when all that is required are waters sheltered from heavy weather.

1.2 The Problem for Coastal State Authorities

Coastal state authorities face a basic dilemma when a ship in distress requests refuge. The relevant authority may accede to the request, allow the ship to take refuge and risk damage to the coastal environment, the possibility of legal action by those affected by any pollution generated and the responsibility of financing any required 'clean-up'. To avoid these problems the relevant authority could turn the ship away but in doing so run the risk of exposing the ship, crew, cargo and any salvors involved to increased danger with no guarantee that an environmental disaster will not take place offshore where it will be more difficult to contain and control. The inability of the international community to agree on the decision-making guidelines that should be applicable to the resolution of this dilemma has done little to resolve this coastal state quandary. As a consequence, coastal states have tended to resolve place of refuge requests in an ad hoc manner that fails to pay due regard to what is the best way to ensure the safety of a ship's crew and prevent the pollution of the marine environment.

1.3 The Need for this Problem to be Resolved

That the problem posed by the lack of international action on this issue is a continuing one was demonstrated in stark terms in late 2002 with the incident involving the tanker *Prestige*.³ The single-hulled, Bahamas-registered tanker broke up and sank off the coast of the Spanish province of Galicia on 20 November 2002 after unsuccessfully seeking a place of refuge for several days while Spanish and Portuguese authorities argued over whose responsibility the incident was. A large quantity of oil was discharged as the ship went down. It was felt by many in Galicia that if the Spanish authorities had granted the *Prestige* a place of refuge in a small cove or bay then the pollution caused by the ship's break-up, an oil slick covering 200 kilometres of coastline, could have been contained in a much smaller area.

A joint press release issued on 22 November 2002 by Intertanko⁴ and BIMCO⁵ provided an apt summary of the incident in terms of places of refuge by stating, "[The

IMO Position of Safe Havens, Salvage & Wreck Removal. (2002) Retrieved 12th September 2002: <http://www.amsa.gov.au/amsa/haven/Julian.pdf>.

³ The following facts are drawn from Reyes, Brian. *Not Again*. (20th November 2002). Lloyds List. Retrieved 20th November 2002: http://www.lloydslist.com/NASApp/cs/ContentServer?GXHC_gx_session_id=5fedfa23fa25efee&pagename=LLPortal/Home&var_element=LLPortal/content/dynamic/generic/render_article&display_channel=maritime&article_id=1034682787159; *Prestige Sparks Déjà Vu*. (19th November 2002). Retrieved 20th November 2002:

http://www.lloydslist.com/NASApp/cs/ContentServer?pagename=LLPortal/Home&var_element=LLPortal/content/dynamic/generic/render_article&display_channel=maritime&article_id=1034682784960&view=localsubject&subject_code=prestige; Reyes, Brian. *Spain Rules Out Shoreline Refuge for Stricken Prestige*. (18th November 2002) Retrieved 20th November 2002: http://www.lloydslist.com/NASApp/cs/ContentServer?pagename=LLPortal/Home&var_element=LLPortal/content/dynamic/generic/render_article&display_channel=maritime&article_id=1034682780961&view=localsubject&subject_code=prestige.

⁴ The International Association of Independent Tanker Owners. The website of the association is located at <http://www.intertanko.com/>.

⁵ Baltic and International Maritime Council. BIMCO is the world's largest private shipping organization with 2720 members world-wide. The website of the council is located at <http://www.bimco.org/>.

Prestige] incident highlights [the concerns of shipowners] surrounding coastal states' continued reluctance to admit ships into ports of refuge. When ships are not granted such refuge, the potential for a serious incident is frequently increased and the safety of the crew jeopardised. The emergency transfer of cargo and other measures to aid the stricken vessel may be similarly hindered with a consequent increased threat to the environment."⁶ The *Prestige* is not the only recent incident to highlight this problem.

2. Other Recent Incidents Concerning Ships in Distress

The year 2000 alone saw three incidents involving ships in distress that highlighted flaws in existing procedures used around the world for granting places of refuge. The incidents involving the *Erica*, *Castor* and *Treasure* all demonstrate the continuing importance of the place of refuge issue and the environmental risk posed by not being able to handle a place of refuge request promptly.

2.1 The Erika

The *Erika* was a Maltese registered tanker, carrying 28,000 tons of heavy fuel oil, which ran into heavy weather while en route from Dunkirk (France) to Livorno (Italy). On 11th December, the Master of the *Erika* reported cracks in the deck plating but indicated that the situation was under control. However, the following day the Master sent a distress signal to the *Centre Régional de Surveillance et de Sauvetage* (CROSS) reporting serious structural problems and requesting evacuation of the tanker's 26 crewmembers, all of whom were evacuated safely. At 8:00am the same day, the *Erika* broke in two, spilling 10 000 tons of oil into the Bay of Biscay and causing extensive pollution to the surrounding area. The wreck eventually washed up along the French coast with the front half located near Penmarch and the rear half on Belle-Ile.⁷

This incident demonstrated the risks posed by the exceedingly high level of trust that tends to be placed in the Master of a ship by coastal authorities to know precisely what condition that ship is in at any particular point in time. Given the speed at which events unfolded and the condition of the vessel deteriorated, there is perhaps room for doubt as to whether any decision on the grant of a place of refuge could have led to a different outcome. The Master's first report however had warned that there was at least a substantial possibility that the ship could become distressed. One lesson to take out of what eventuated might be that any policy on places of refuge should also make provision for preventative action by coastal authorities. The possession of the power to order vessels to put into port and take immediate remedial action to remove a substantial risk by coastal authorities could perhaps lessen the risk to the lives of ship's crews and forestall more serious environmental consequences.

⁶ Intertanko and BIMCO joint statement issued on 22 November 2002 quoted in Hailey, Roger. *Shipowners demand global action on places of refuge* (23 November 2002). Lloyds List. Retrieved 26 April 2003: http://www.lloydslist.com/NASApp/cs/ContentServer?pagename=LLPortal/Home&var_element=LLPortal/content/dynamic/generic/render_article&article_id=1034682793089&display_channel=maritime&pass_pubcode=

⁷ *Naufnage de l'Erika*. (2002). Retrieved 15th October 2002: <http://www.defense.gov.fr/marine/actu/erika/erika.htm>; *Chronologie d'un naufrage*. (2002) Retrieved 15th October 2002: <http://www.france-ouest.com/naufrage-erika/chronologie.htm>; Timms, Roger. (2002). *Erika (France): Implications for Asia-Pacific*. Retrieved 19th September 2002: www.amsa.gov.au/amsa/APEC/amsa_rt.pdf.

2.2 The *Castor*

The *Castor* was a 30,577 ton Greek-owned tanker.⁸ The *Castor* developed severe structural problems while carrying 23 000 tons of unleaded fuel from Constanza (Romania) to Lagos (Nigeria). The ship initially sought refuge in the port of Nador (Morocco), but the request was refused. A request to bring the *Castor* into sheltered waters off the coast of Spain in order to transfer the ship's cargo was also refused. Several other Mediterranean states also refused requests for refuge, mainly because of concerns that the ship's cargo would ignite. The *Castor* unsuccessfully sought refuge for more than 30 days while most of its cargo was transferred to other ships on the high seas. The majority of the ship's cargo was safely removed and the vessel ended up being able to be towed safely back to Greece, but as has been noted, the actions of Spain and the other western Mediterranean coastal states could have resulted in loss of the vessel and possibly long-term environmental damage.⁹

During the time the *Castor* was searching in vain for a place of refuge it was subjected to heavy weather, including seas of more than 8 metres and Force 12 winds. In its report on the incident, the American Bureau of Shipping noted that transferring the ship's cargo in such conditions increased the risk of both pollution and further damage to the hull.¹⁰ The incident highlights the problems caused when there is no recognised objective standard for determining, first, which coastal state is responsible for dealing with a particular incident and, second, what procedure should be followed by the coastal state that is responsible. Internationally agreed upon guidelines could be a useful means of solving this problem.

2.3 The *Treasure*

In June of 2000 the MV *Treasure*, a Panamanian registered bulk ore carrier suffered a breach of its hull during heavy weather off the coast of Western Africa.¹¹ The ship limped on to Table Bay in South African waters, where the South African Maritime Safety Authority (SAMSA) inspected the ship. Having found a 170 meters squared hole in the ship's hull, SAMSA ordered the *Treasure* to leave Table Bay or unload its fuel and cargo in Cape Town and begin repairs.

After a prolonged period of indecision, the owners and insurers of the *Treasure* eventually decided to have the ship depart from Table Bay. The condition of the ship deteriorated rapidly once it began to sail however, and it sank while still close to the coast, spilling about 1,300 tons of oil from its fuel tanks.¹² This oil spill had a massive impact on the immediate environment, particularly on the nearby colonies of African

⁸ The following facts are drawn from *American Bureau of Shipping Investigation into the Damage Sustained by The M.V. Castor On 30 December 2000: Final Report*. (2001). Retrieved 14th November 2002; <http://www.eagle.org/news/press/castorreport.pdf>; *Shipping Department prepares its own report on Castor scare* (January 10, 2002), Cyprus Mail. Retrieved 15th October, 2002: <http://www.cyprus-mail.com/2002/January/10/news6.htm>

⁹ Waite, John, *The Perils of Denying Refuge*. (2001). Retrieved 13th August, 2002: http://www.wreckage.org/salvage_lines/spring_2001/denying_refuge.htm

¹⁰ *American Bureau of Shipping Investigation into the Damage Sustained by The M.V. Castor On 30 December 2000: Final Report*. (2001). Retrieved 14th November 2002; <http://www.eagle.org/news/press/castorreport.pdf>.

¹¹ The following facts have been adopted in large part from the account in "South African Oil Spill", (2000) 4(1) *Oil Drop* at 1.

¹² Glazewski, J & Dingle E, "Treasure Oil Spill – Legal Lessons Learnt", *Proceedings: Treasure Oil Spill Conference on Wildlife Issues* (2000). Retrieved 26th April 2003; http://www.capenature.org.za/what_is_new/treasure/jan.html.

penguins. The operation mounted to capture and rehabilitate these penguins after their encounter with the spilled oil was the largest such operation on record.¹³

The incident involving the *Treasure* shows what can happen when a procedure for dealing with distressed ships becomes too open-ended. The decision to either enter port or leave Table Bay should never have been left up to the owners and insurers of the *Treasure* when there was the threat of a major environmental catastrophe if quick action was not taken. SAMSA, as the relevant coastal state authority, needed to act quickly and make its own decision on whether or not it was more desirable that, taking into account the possible danger to the environment, the *Treasure* should attempt to take refuge or steam for the open sea. The incident shows how important it is for a coastal state to have mechanisms in place that allow the problem posed by a ship in distress to be dealt with quickly and decisively.

3. An Australian Connection

The issue of when to grant a place of refuge to ships in distress is also an important issue for Australia, as the 1990 incident involving the tanker *Kirki* demonstrates. The MV *Kirki* was a 97,000 tonne Greek-owned tanker.¹⁴ While carrying a cargo of light crude oil from Jebel Dhanna in the Arabian Gulf to BP's refinery at Kwinana, Western Australia, the bow of the vessel broke away and sank off the coast of Western Australia. A fire broke out in the forward part of the ship. The situation was further complicated by rough weather, including strong winds, which blew the *Kirki* towards the Western Australian coast. There was a serious risk that the crude oil being carried by the vessel would spill into the ocean and wash up on the coast of Western Australia.

The *Kirki's* owners engaged a prominent Australian salvage company under Lloyds Open Form 1990. The Western Australian Government refused to allow the ship to take refuge near Perth. The salvors were forced to tow the *Kirki* to Dampier before being allowed into sheltered waters where the remaining cargo was safely transferred to another vessel. During the incident and the subsequent tow of the tanker to safety; more than 17,000 tonnes of light crude oil was discharged into the sea.

The *Kirki* incident demonstrates that a stronger arrangement, perhaps backed by legislation, is needed to ensure that governments and other Australian decision-making authorities are obliged to do what is best in the long term for the safety of the ship and the environment. The Western Australian government did not follow Australia's *National Plan to Combat Pollution of the Sea by Oil and other Noxious and Hazardous Substances* ("the National Plan") during the incident, a decision that probably resulted in the inefficient use of available resources.¹⁵ Dividing responsibility for the operation between State and Federal authorities resulted in a lack of firm direction during the handling of the incident. As will be seen later in this article, there has been little concrete change in the Australian approach to places of refuge since this incident occurred.

¹³ International Bird Rescue Research Centre, "Treasure Spill Report and Press Releases", Retrieved 26 April 2003; http://www.ibrrc.org/treasure_report_1.html.

¹⁴ The following facts are taken from AMSA, *Major Oil Spills in Australia: Kirki oil pollution incident, Western Australia, 21 July 1991*, March 2001, retrieved 28th April 2003: <http://www.amsa.gov.au/me/edu/kirki.htm>. The actual SITREPS of the salvors involved in attempting to stabilise the *Kirki* are reproduced in White, Michael, *Marine Pollution Laws of the Australasian Region* (Federation Press, Sydney, 1994), 316-319.

¹⁵ White, Michael, *Marine Pollution Laws of the Australasian Region* (Federation Press, Sydney, 1994), 165-6.

4. **Recent Developments at the IMO**

As a consequence of incidents such as those involving the *Erika*, *Castor*, *Treasure* and the *Prestige*, the IMO has come under pressure to deal with the problems created when coastal states refuse to assist ships in distress that request a place of refuge. The call for action has come from shipowners,¹⁶ coastal states¹⁷ and salvors alike.¹⁸

4.1 **Proposed Guidelines on Places of Refuge**

In May 2002, the IMO's Maritime Safety Committee (MSC) approved in principle a general framework for future action on guidelines for granting places of refuge formulated by its Sub-committee on Safety of Navigation (NAV).¹⁹

This approved framework for future IMO guidelines shows they are intended to cover the following:

1. *The action expected from coastal states providing places of refuge to ships in distress;*
2. *How to evaluate the risks associated with the provision of places of refuge;*
3. *The proper action to be taken by the masters of ships in need of a place of refuge; and*
4. *The proper action to be taken by other important actors such as the crew of other ships and salvors.*²⁰

It appears these guidelines will take the form of a definite procedure to be followed in circumstances where a ship is seeking refuge. This would help to prevent coastal states from arbitrarily rejecting a ship's request for refuge.²¹

The guidelines are intended to be used in situations where a ship is in need of assistance but there is no immediate danger to human life. They hold true to the principle that safety is the paramount concern in any marine casualty.²² In a situation where a ship is seeking a place of refuge, this may include the safety of crew-members, salvors and other persons directly involved in rescue and salvage operations, port-users and members of the wider community.

The guidelines also recognise that, where a ship has become distressed, the best way to prevent further damage and pollution from the ship's progressive deterioration is to

¹⁶ See e.g. the comments of Mr Maersk McKinney Moller, chairman of AP Moller calling for designated places of refuge in Porter, J, *AP Moller chairman backs call for ports of refuge* (25th April 2003) Lloyds List. Retrieved 28th April 2003: http://www.lloydslist.com/NASApp/cs/ContentServer?pagename=LLPortal/Home&var_element=LLPortal/content/dynamic/generic/render_article&display_channel=maritime&article_id=20015887762.

¹⁷ E.g. Mrs. Loyola de Palacio Vice-President of the European Commission recently raised concerns on behalf of European Union member states when meeting with the IMO Secretary-General in Brussels on 4 April 2003. See *Joint communiqué on the outcome of the meeting between the Vice-President of the European Commission, Mrs. Loyola de Palacio, responsible for relations with the European Parliament, Transport and Energy and the Secretary-General of the International Maritime Organization, Mr. William O'Neil* (Brussels, 4 March 2003), IMO Press Briefing, retrieved April 28th 2003: http://www.imo.org/Newsroom/mainframe.asp?topic_id=758&doc_id=2847.

¹⁸ *ISU Welcomes Prompt IMO Action on Casualty Refuge Issue*. (20th June, 2001). ISU Media Release. Retrieved 19th May, 2002: <http://www.amsa.gov.au/amsa/haven/Watkinso.pdf>; Waite, John, *The Perils of Denying Refuge*. (2001). Retrieved 13th August, 2002: http://www.wreckage.org/salvage_lines/spring_2001/denying_refuge.htm

¹⁹ The progress of the IMO in addressing place of refuge issues is documented in full on the IMO's website under the title "*Places of refuge*" - *addressing the problem of providing places of refuge to vessels in distress*. This information, as at 28th April 2003, may be found at http://www.imo.org/Newsroom/mainframe.asp?topic_id=72.

¹⁸ *Report of the Marine Safety Committee in its Seventy-Fourth Session*. (2001). MSC 74/24, 2.29.

²¹ *Ibid.*

²² *Report of the Marine Safety Committee in its Seventy-Fourth Session*. (2001). MSC 74/24, 2.26.

transfer the cargo and bunkers and to repair the casualty. They also recognise that, because of the risk to coastal states and the highly political nature of the decision to grant refuge, each request should be considered on a case-by-case basis.²³

It is suggested that the formulation of international guidelines is a positive step forward. While international guidelines may not be able to prevent coastal states making decisions on places of refuge that pay scant regard to safety or the environment, they might at least provide a framework for judging such decisions against objective criteria. International guidelines may also provide a ready made procedure that can be incorporated into, or at least reflected in, national legislation.

4.2 Establishment of Marine Assistance Services

At its 48th session in July 2002, NAV agreed on a draft resolution recommending that each coastal state establish a Marine Assistance Service (MAS).²⁴ Like the guidelines on places of refuge, a MAS would only operate in situations where there is no immediate threat to human life. A MAS would receive reports, consultations and notifications required under various IMO instruments. Should such a report indicate an incident which might result in a ship requesting assistance, a MAS would monitor the ship's situation and act as a point of contact between the ship and the coastal state. A MAS could also provide a liaison between the relevant authorities of a coastal state and salvors in situations where the coastal state wishes to monitor the salvage operation.

The major problem with the concept of a MAS, at least as presently developed, is that it seems to ignore the fact that the only way a reasonable decision can be made about granting a place of refuge in a timely manner is if the relevant authority is tasked with the actual power to make that decision in accordance with what is best for the safety of the lives of seafarers and the preservation of the marine environment. As presently conceived, MAS' lack the powers to make crucial decisions that such a body should possess. A MAS could be a starting point for countries who lack maritime safety agencies, such as those Australia already possesses at both the state and federal levels, but such bodies, if established in line with the current MAS model, would lack the decision-making power necessary for them to make a worthwhile contribution in terms of implementing policy with regard to places of refuge. A MAS, as presently conceptualised, would be unable to play any role in making decisions under the guidelines the IMO may formulate concerning places of refuge.

The MSC will consider draft resolutions on both issues at its 77th session in April-June 2003. The NAV sub-committee will then finalise these drafts at its 49th session in June-July 2003. It is expected that the final version of these resolutions will be submitted to the 23rd IMO Assembly in November 2003.²⁵

5. Australia and Places of Refuge

This section discusses the obligations Australia has under existing IMO conventions in relation to places of refuge and details the existing statutory regime relating to precisely

²³ "Places of refuge" - addressing the problem of providing places of refuge to vessels in distress. IMO Press Briefing. Retrieved 1 April 2003: http://www.imo.org/Newsroom/mainframe.asp?topic_id=72.

²⁴ "Places of refuge" - addressing the problem of providing places of refuge to vessels in distress. IMO Press Briefing. Retrieved 1 April 2003: http://www.imo.org/Newsroom/mainframe.asp?topic_id=72. The following details about the way in which a MAS is to operate are drawn from the same source.

²⁵ Maritime Safety Committee - 76th session: 2-13 December 2002. Retrieved 7th April 2003: http://www.imo.org/Newsroom/mainframe.asp?topic_id=110&doc_id=2325#refuge.

which Australian authorities have the ability to decide to grant refuge to a ship in distress.

5.1 IMO Conventions

Australia is a party to the *International Convention on Salvage* 1989 (“the Salvage Convention”) which is presently the only IMO convention that touches, and then only indirectly, on places of refuge. Article 11 of the Salvage Convention provides that:

“A State party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.”²⁶

Australian legislation gives effect to a number of key provisions in the Salvage Convention, but Article 11 does not currently have the force of law.²⁷ This is in keeping with the consistent policy of Australian governments not to enshrine in legislation what can be instituted by way of administrative guidelines.²⁸

It has been suggested that Australian jurisdictions should adopt Article 11, possibly through a uniform set of statutory guidelines on places of refuge.²⁹ This approach has been criticised as unlikely to have any meaningful effect on whether or not an Australian government or other authority would grant refuge in any particular case.³⁰ In any event, this debate will become irrelevant once the IMO decides on a new set of guidelines that relate specifically to places of refuge. It should then be the IMO guidelines that are looked at for incorporation into legislation.

5.2 The National Plan

Unlike countries such as the United States and the United Kingdom, there is no one authority responsible for marine safety in Australia.³¹ The responsibility is divided between the Federal government and the governments of the States.³² The National Plan is an agreement between the State and Commonwealth governments which provides a strategy for dealing with situations involving the serious threat of marine pollution.³³

The National Plan provides for, among other things, contingency planning to deal with marine pollution incidents, stockpiles of equipment for dealing with such incidents

²⁶ *International Convention on Salvage* 1989, art 11.

²⁷ See *Navigation Act 1912* (Cth), s315.

²⁸ *Comite Maritime International - Places of Refuge Draft Questionnaire to Member Associations: Response By MLAANZ*. (2002). Retrieved 29th July 2002: www.mlaanz.org/refuge.doc; Harper, Stephen. (2002). *Port Channel Blockage*. Retrieved September 12, 2002: <http://www.amsa.gov.au/amsa/haven/Harper.pdf>; Elsworth, Timothy. (2002) *Legal Implications of Granting Safe Haven*. Retrieved September 12, 2002: <http://www.amsa.gov.au/amsa/haven/Elsworth.pdf>.

²⁹ Harper, Stephen. (2002). *Port Channel Blockage*. Retrieved September 12, 2002: <http://www.amsa.gov.au/amsa/haven/Harper.pdf>.

³⁰ Timms, Roger. *Current IMO Position of Safe Havens, Salvage & Wreck Removal*. (2002) Retrieved 12th September 2002: <http://www.amsa.gov.au/amsa/haven/Timms.pdf>.

³¹ In the United States the Coast Guard has a designated Office of Response that administers vessel response plans and shipboard emergency response plans (See <http://www.uscg.mil/vrp/>). The Maritime and Coastguard Agency of the United Kingdom performs similar functions (See <http://www.mcagency.org.uk/>).

³² Lord, John. (2002). *Save Havens Policy and Practice in Australia: A Victorian Appreciation* Retrieved 12th September 2002: <http://www.amsa.gov.au/amsa/haven/Lord.pdf>

³³ White, Michael. (1994). *Marine Pollution Laws of the Australasian Region*. Sydney: Federation Press, 276.

and allocation of responsibility for combating oil spills and similar environmental catastrophes in particular areas to specific authorities.³⁴ There are also State oil spill contingency plans and special local plans for dealing with particular areas such as the Great Barrier Reef (REEFPLAN) and Torres Strait (TORRESPLAN).³⁵

In 1993 a working party tasked with reviewing the National Plan considered the matter of places of refuge. This included discussions on whether pre-determined areas should be designated as places of refuge. This proposal was rejected as being counter-productive, in that negotiations with local governments, environmental agencies and other interested organisations would be difficult, particularly where the organisations in question did not appreciate the critical importance of places of refuge in a casualty situation. It was considered that the chances of obtaining approval to use an area as a place of refuge would be better at the time of the incident, when local authorities could be assured that proper procedures and equipment were being employed.³⁶

The working committee did, however identify a number of criteria that should be taken into consideration when assessing the suitability of an area to be used as a place of refuge.³⁷ These included:

- depth of water
- good holding ground
- shelter from the weather
- relatively unobstructed approach from seaward
- the environmental classification of the area
- access to air and land transport
- access to facilities for loading and unloading emergency equipment.

Delegates at the *AMSA/AAMPA Conference on Safe Havens and Salvage 2002* recognised the need to overhaul the National Plan with regard to places of refuge, in particular with regard to assessment of requests for safe haven and the development of national risk assessment guidelines.³⁸ This suggests that whether or not the process leading to the drafting of IMO guidelines is ever successfully completed there is the necessary awareness of the problem in Australia and what is required to solve it to ensure that future progress is made.

5.3 Responsibility for Granting Refuge

One of the voids to be filled in the National Plan is which authority is to have the ultimate responsibility for making the decision to grant or refuse refuge in Australia. At present various pieces of legislation appear to empower various authorities including the Commonwealth through the Australian Maritime Safety Authority (“AMSA”), State government ministers and port authorities to grant or deny refuge to ships in distress.

The relevant Commonwealth legislation is the *Protection of the Sea (Powers of Intervention) Act 1981*. Under this Act the Commonwealth has the power to direct a

³⁴ *National Plan to Combat Pollution of the Sea by Oil and other Noxious and Hazardous Substances* (March 2002). Retrieved 6th August 2002: <http://www.amsa.gov.au/me/natplan/Contplan/plan.pdf>; Ibid, 276-7.

³⁵ *Overview: The National Plan*. (2002). Retrieved 21st November 2002: <http://www.amsa.gov.au/me/natplan/overview.htm>

³⁶ Baird, David & Lipscombe, Ray. (2002). *Safe Havens Policy and Practice in Australia*. Retrieved 12th September 2002: <http://www.amsa.gov.au/amsa/haven/Baird.pdf>.

³⁷ Ibid.

³⁸ Thompson Clarke Shipping Pty Ltd. (2002). *AMSA / AAPMA Report on Safe Haven & Salvage Conference and Workshop*. Retrieved 19th September 2002: <http://www.pc.gov.au/inquiry/harbourtowage/subs/subdr043e4.pdf>.

ship involved in a marine casualty to enter a port or sheltered area, regardless of whether the relevant port authority or State government consents. Various pieces of State legislation also confer power to direct, move or destroy ships. For example, in Queensland the *Transport Operations Marine Pollution Act 1995* confers wide powers to move, salvage, sink, destroy or otherwise deal with a ship.³⁹ These powers can only be exercised with the written consent of the Minister, so one might infer that the ultimate responsibility for granting refuge rests with the Minister. Under the National Plan, the Queensland government, through the Department of Transport has primary responsibility relating to places of refuge within Queensland waters. Where a casualty occurs within the territorial sea or Australia's Exclusive Economic Zone, AMSA has primary responsibility but must consult with Queensland authorities in serious cases.⁴⁰

Still other legislation and regulations permit port authorities in various States to direct shipping within the limits of ports.⁴¹ In the absence of any direction to the contrary, there appears to be no reason why a port authority could not grant refuge to a ship. Port authorities may also impose conditions on ships when granting refuge.⁴²

The problem with various State and Commonwealth authorities being empowered under different statutes to grant refuge in different areas is that there is presently no express requirement that all those statutes be uniform, so there is no guarantee that they are suitably comprehensive. An example of this problem is in Tasmania where that State adopted the provisions of the same convention underlying the Commonwealth's *Protection of the Sea (Powers of Intervention) Act 1981* into legislation, but regulations only empower the relevant government authority, Marine and Safety Tasmania, to exercise such powers within port limits.⁴³

A solution to this problem would be to repose the responsibility for making such decisions in a single authority with a national reach. An idea along these lines found favour among delegates to the recent *AMSA/AAPMA Conference on Safe Havens and Salvage 2002*.⁴⁴ A central authority might also find it easier to operate in congruence with the proposed IMO guidelines. It has been pointed out that IMO literature on the subject of places of refuge tends to assume that any guidelines will operate against the backdrop of a centralised nation-state, such as the United Kingdom or New Zealand, neglecting the kind of power-sharing arrangements common between different levels of government federations such as Canada or Australia.⁴⁵

Another issue that needs to be resolved is who should be considered to have the standing to request refuge, should it be the master, the shipowner or the salvor? The issue is an important one because sometimes owners and salvors cannot be contacted while it is possible for a master to be incapacitated through injury or, as was the case

³⁹ The situation is similar in other Australian States e.g., *Marine Pollution Act 1987* (NSW), s48; *Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987* (SA), s28; *Marine Act 1988* (Vic), s45.

⁴⁰ Watkinson, John. (2002). *Queensland Safe Havens Guidelines*. Retrieved September 12, 2002: <http://www.amsa.gov.au/amsa/haven/Watkinson.pdf>.

⁴¹ Eg. *Port Services Act 1995* (Vic).

⁴² Elsworth, Timothy, *Legal Implications of Granting Safe Haven*, (2002) Paper presented at AMSA Safe Havens and Salvage Workshop <http://www.amsa.gov.au/amsa/haven/Elsworth.pdf>.

⁴³ Marine and Safety (Pilotage and Navigation) Regulations 1997 (Tas), s64. A more comprehensive discussion of the Tasmanian situation is provided in Black, Charles., *Safe Havens Policy and Practice in Tasmania* (2002). Retrieved 28th April 2003: <http://www.amsa.gov.au/amsa/haven/black.pdf>.

⁴⁴ Thompson Clarke Shipping Pty Ltd. (2002). *AMSA / AAPMA Report on Safe Haven & Salvage Conference and Workshop*. Retrieved 19th September 2002: <http://www.pc.gov.au/inquiry/harbourtowage/subs/subdr043e4.pdf>

⁴⁵ Lord, John. (2002). *Safe Havens Policy and Practice in Australia: A Victorian Appreciation* Retrieved 12th September 2002: <http://www.amsa.gov.au/amsa/haven/Lord.pdf>.

with the *Erika*, taken into custody. The best course would be to ensure that any guidelines on this subject allow for some degree of flexibility depending on the circumstances. Formalities must not be allowed to stand in the way if prompt action is needed to prevent environmental disaster.

5.4 Centralising the Power to Make Decisions About Granting Places of Refuge: A Question of Jurisdiction

If power to make a decision to grant a place of refuge to a ship in distress is to be centralised as suggested above it becomes necessary to consider whether the Commonwealth has that legislative power. This issue is inextricably bound up with the question of which level of government has jurisdiction over Australia's territorial waters.

The issue of who has jurisdiction over Australia's territorial waters has been contentious ever since the first major discoveries of offshore mineral and petroleum deposits in the mid-1960's highlighted that there is no explicit provision in the Australian Constitution as to the precise extent of Commonwealth and State jurisdiction over Australia's offshore areas.⁴⁶ The issue was conclusively settled in 1975 when the High Court of Australia upheld the constitutional validity of the *Seas and Submerged Lands Act 1973* (Cth).⁴⁷ The Act provided that "sovereignty in respect of the territorial sea, and in respect of the airspace over it and in respect of its bed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth".⁴⁸ As a consequence of the High Court's decision, the States and the Commonwealth arrived at what is known as the 1979 Offshore Constitutional Settlement ("the OCS").

Under the OCS the Commonwealth agreed to legislate to create State 'adjacent territorial seas' extending out to three miles offshore. States would also enjoy rights over the seabed out to the same territorial limit. Within the three-mile limit State law would govern. Outside the three-mile limit the relevant legislative framework would be provided by the Commonwealth though administration of this legislation could be delegated to State government officials. To implement this arrangement the Commonwealth passed the *Coastal Waters (State Title) Act 1980*⁴⁹ and the *Coastal Waters (State Powers) Act 1980*.⁵⁰ This legislation was "designed largely to return to the States the jurisdiction and proprietary rights and title which they had previously believed themselves to have over and in the territorial sea and underlying seabed".⁵¹ The States have full power to legislate within three miles of the high water mark but the Commonwealth retains an unrestricted power to legislate in respect of all territorial waters beyond the high water mark by virtue of the external affairs power,⁵² meaning that the Commonwealth can override State law within the three-mile limit by way of s 109 of the Constitution.⁵³

⁴⁶ See Hunt, C.D., *The Offshore Petroleum Regimes of Canada and Australia*, The Canadian Institute of Resources Law, University of Calgary, 1989 at 61.

⁴⁷ *Seas and Submerged Lands Act 1973* (Cth), s 65.

⁴⁸ See *New South Wales v The Commonwealth (Seas and Submerged Land Act Case)* (1975) 135 CLR 337.

⁴⁹ See in particular ss 3(1), 4(2) & 4(5) of the Act.

⁵⁰ See definition in s 3(1) of the Act.

⁵¹ *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 358 quoted with approval in *Commonwealth of Australia v Yarmirr* (2001-2002) 208 CLR 1 at 66 in the joint judgement of Gleeson CJ, Gaudron, Gummow and Hayne JJ.

⁵² *New South Wales v The Commonwealth* (1975) 135 CLR 337; *Robinson v Western Australian Museum* (1979) 138 CLR 283.

⁵³ Butler, D.A. & Duncan, W.D., *Maritime Law in Australia*, Legal Books, New South Wales, 1992 at 19-21.

It appears clear that the Commonwealth government has the necessary legislative power to centralise the authority for making place of refuge decisions in a single authority as suggested above. It is this power that underlies the Commonwealth *Protection of the Sea (Powers of Intervention) Act 1981* which provides the Commonwealth, through AMSA, with the option of overriding a State authority if there is a disagreement as to how to deal with a particular maritime casualty.⁵⁴ All this article is suggesting is that a single Commonwealth authority, with the obvious candidate being AMSA, be given the power to decide on all requests for places of refuge made within Australian waters so that such requests do not become bogged down in extended discussions between AMSA and State marine authorities.

It is not being suggested that the States be completely removed from the process. More than likely, States will still need to play a consultative role once the decision to grant refuge is made so that emergency services and necessary equipment can be on hand if needed. The National Plan will remain useful as a blueprint for these measures. The key point is that the decision to grant refuge should either be made wholly a matter for a single Commonwealth authority or such decisions should only be made by State authorities with reference to a single uniform standard as laid down by Commonwealth legislation. The short timeframes in which a place of refuge decision has to be made in order to avoid environmental disaster are not amenable to decision-making by committee. It is to ensure that quick decisions can be made when an incident occurs that countries such as Norway have placed responsibility for handling vessels in distress in the hands of one central agency.⁵⁵

6. Implications of Suggested Changes

This section looks briefly at the present regime of liability for marine pollution in Australia and suggests some possible changes that need to take place should a new Australian policy on places of refuge, hopefully building on IMO guidelines, be formulated.

6.1 Overview of the Legal Regime dealing with Marine Pollution in Australia

Persons responsible for causing marine pollution may be liable for the damage caused by such pollution in Australia. In addition to actions at common law, there are now a number of sanctions imposed by Commonwealth and State legislation and under international law. Where a ship is allowed into port and causes loss or injury to the port authority or other port users, the parties responsible may also be liable in tort.

6.1.1 Liability at Common law

The starting position, when considering liability at common law for marine pollution is that there is no specific tort of environmental damage or pollution.⁵⁶ This means that merely proving that one party has polluted the oceans or coastline will not be sufficient to entitle another party to compensation for damage that may have been suffered as a result of that pollution. Anyone seeking damages at common law for loss or injury

⁵⁴ Baird, David & Lipscombe, Ray. (2002). *Safe Havens Policy and Practice in Australia*. Retrieved 12th September 2002: <http://www.amsa.gov.au/amsa/haven/Baird.pdf>.

⁵⁵ In Norway's case this agency is the Norwegian Coastal Directorate's Department for Emergency Response (DER). Further details on the Norwegian arrangement can be found in 'Norwegian Refuge', *The Maritime Advocate Online*, Issue 103, April 29, 2003 at <http://www.maritimeadvocate.com/newsletter/index.php?choice=search&id=140>.

⁵⁶ White, Michael. (1994). *Marine Pollution Laws of the Australasian Region*. Sydney: Federation Press, 34.

caused as a result of a marine pollution incident must still bring their claim under an existing cause of action and claim specific loss.⁵⁷

Negligence

There is considerable scope for governments, port authorities and cargo-owners to have actions brought against them in negligence. However, it should be noted that a plaintiff cannot recover for just any damage that occurs as a result of a marine incident. Firstly, in order to recover the plaintiff must still prove the elements of negligence; that the defendant owed the plaintiff a duty, that it breached that duty; that the plaintiff suffered damage and that the damage was caused by the defendant's breach.

A duty of care will usually be found in cases where damage to property occurs. A number of decisions, including those in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'*⁵⁸ and *Perre v Apand Pty Ltd (Perre v Apand)*⁵⁹ suggest that in appropriate cases, there is also a duty of care to guard against pure economic loss.

Perre v Apand

The 1999 High Court decision in *Perre v Apand*⁶⁰ re-evaluated the test for duty of care in pure-economic loss cases. The case involved the sale of potato seeds infected with a disease known as 'bacterial wilt' to owners of a potato farm. The plaintiffs, who were also potato farmers, owned a neighbouring property. Their potato crop was not affected by the disease, however the *Plants Diseases Regulations 1989 (WA)* prohibited the export of any potatoes grown within a 20km radius of an outbreak of bacterial wilt for a period of five years. The plaintiff's farm fell within the quarantine zone and they were consequently unable to sell their potatoes and incurred considerable financial loss.

The High Court was divided as to what the correct test for duty of care in pure economic loss should be. However, plaintiffs were able to recover damages in negligence and the decision represents a considerably wider view of the duty of care in negligence than the courts had held previously.⁶¹

Although the decision does suggest that the courts may take a wider view of liability than previously, it still maintains that there cannot be infinite liability. In *Perre v Apand* McHugh and Hayne JJ noted that it is not the magnitude of liability that is relevant to deciding whether a duty of care exists, but whether the extent of liability can be clearly ascertained.⁶²

The decision has fairly clear implications regarding a decision to give refuge to a ship. For example, a port authority could, in deciding to grant refuge to a ship in distress, expose itself to liability to a large number of plaintiffs. This might include vessels, owners and operators, crews, terminal owners and operators, stevedores, suppliers of port services such as tug operators, users of normal services which have been interrupted, recreational users, owners and occupiers of adjoining properties and businesses such as importers and exporters.⁶³

⁵⁷ See generally

⁵⁸ (1976) 136 CLR 529.

⁵⁹ (1999) 73 ALJR 1190.

⁶⁰ Ibid.

⁶¹ Steve Palyga, *Economic Loss, and Spuds* (1999) 21 Bulletin (Law Society of SA) 8, 8.

⁶² *Perre v Apand Pty Ltd* (1999) 73 ALR 1190, [106], [138], [336].

⁶³ Elsworth, Timothy. (2002). *Legal Implications of Granting Safe Haven*. Retrieved 12th September 2002: <http://www.amsa.gov.au/amsa/haven/Elsworth.pdf>

The decision in *Perre v Apand* has been the subject of a great deal of criticism for not adding greatly to the clarity of the law regarding recovery for economic loss caused by another's negligence.⁶⁴ What is clear from the decision however is that the High Court has shown itself to still be willing to apply the law of negligence in cases of economic loss that fall outside the comparatively rigid categories based around certain specific relationships that have governed this area of the law hitherto.

It seems unlikely that a port authority that refuses to give refuge to a ship would be liable to the ship-owner or cargo-owner for damage sustained as a result of such refusal. There does not appear to be any legal obligation for a port authority or government to give refuge to a ship. Although article 11 the *Salvage Convention* appears to require parties 'regulating or deciding upon matters relating to a salvage operation' to cooperate with other interested parties, including salvors, this provision has not been enacted in Australia. However various State laws may require a port authority to maintain a safe and working port.⁶⁵

It is possible that the existence of a set of guidelines and procedures to be followed when deciding whether to give refuge to a ship might alter the position at common law. For example, guidelines might be used to ascertain what a *reasonable* port authority would do in the circumstances. It must be remembered however that even if Australia did support any new IMO guidelines on places of refuge, it would not necessarily follow that this would give rise to any specific legal obligations unless those guidelines were incorporated into Australian legislation.

Nuisance

There is also considerable scope for the law of nuisance to apply in refuge cases. In appropriate circumstances pollution or obstruction of a public waterway may give rise to an action in public nuisance.⁶⁶ In *Wagon Mound No.2*⁶⁷ Lord Reid observed that navigable waters could be equated to highways.

Shipowners and port authorities may be liable in nuisance for damage or inconvenience caused where a ship is allowed to take refuge in a port. For example, where a ship sinks, blocking access to the port; owners and operators of other vessels and shipping related businesses might sue for the delay, inconvenience or loss of trade caused by the blockage. It is also not beyond the realms of possibility that a port authority could sue for loss of trade caused by the blockage of a port. However, given that the port authority would normally have to consent to a badly damaged ship entering the port in the first place, it seems unlikely that there would be a firm foundation for such an action.

In circumstances where the pollution or disruption interferes with a legally recognised right in land, the person responsible might also be liable in private nuisance.⁶⁸

⁶⁴ Eg. Jones, Doug, Clayton Utz. *High Court on Pure Economic Loss: Unanimous in its Differences* (1999) 70 ACLN 25; Young J, P W *Perre v Apand Pty Ltd: Still Wandering in the Fog?* (2000) 74 ALJ 91; Palyga, Steve. *Economic Loss, and Spuds* (1999) 21 Bulletin (Law Society of SA); Feldthusen, Bruce, *Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel* (2000) 8 Tort Law Review 33.

⁶⁵ Eg. *New South Wales Ports Corporatisation and Waterways Management Act* 1995 (NSW), s10; *Port Services Act* 1995 (Vic), s21(1)(b).

⁶⁶ *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound No.2)* [1966] 2 All ER 709; *Ball v Consolidated Rutile Ltd* [1991] 1 Qd R 524; *Esso Petroleum Co Ltd v Southport Co* [1956] AC 248.

⁶⁷ [1966] 2 All ER 709, 716.

⁶⁸ *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 896-7.

6.1.2 Liability Imposed by Statute

In addition to remedies under the common law, a number of State and Commonwealth statutes now regulate marine pollution. The main Commonwealth statutes are the *Navigation Act 1912*, *Environment Protection (Sea Dumping) Act 1981*, *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Environment Protection and Biodiversity Conservation Act 1999*. The States have also enacted similar legislation which is basically congruent with the equivalent Commonwealth Acts though each piece of State legislation has its own quirks and idiosyncrasies. These statutes impose a number of civil and criminal penalties. For example s9(1) of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) imposes fines on the master and crew as well as the owners of ships that discharge oil or an oily mixture into the sea. The provision gives effect to Australia's international obligations under Regulations 9, 10 and 11 of the *International Convention for the Prevention of Pollution from Ships, 1973*, as modified by the *Protocol of 1978 relating thereto* ("MARPOL"). Each of the other major pieces of Commonwealth legislation in this area can trace its roots back to a similar foundation in Australia's international treaty and convention related obligations.

6.2 Insurance and Compensation

Given the huge potential for legal liability in 'refuge' cases, insurance or some other form of risk transfer is also likely to be an important consideration. A port authority is unlikely to be willing to give refuge to a ship if it is the port authority that has to bear the risk. It should also be noted that in Australia, claims relating to wreck removal and raising and the rendering harmless of cargo are not subject to limitation because article 2(1)(a) of the *Convention on Limitation of Liability for Maritime Claims 1976* has not been incorporated into Australian law.⁶⁹

6.2.1 Loss Suffered by Third Parties Due To Oil Pollution

The majority of loss suffered by third parties in the majority of marine casualties to have occurred thus far has resulted from oil pollution. These losses are dealt with under compulsory insurance conventions such as the *International Convention on Civil Liability for Oil Pollution Damage 1969* ("CLC") and the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971* ("FUND"). These initiatives take the form of indemnity schemes, not unlike Protection & Indemnity schemes, to which owners of tankers and cargoes contribute. Both these conventions have been incorporated into Australian law.⁷⁰

Both CLC and FUND require the owners of oil tankers to take out compulsory insurance and bulk oil owners to join the fund to compensate for oil pollution clean-up

⁶⁹ *Limitation of Liability for Maritime Claims Act 1989* (Cth), s6; *International Convention Relation to the Limitation of Liability of Owners of Sea-going Ships 1979*.

⁷⁰ The provisions of the CLC were given the force of domestic Australian law by the *Protection of the Sea (Civil Liability) Act 1981*, although it should be noted that the Australian Act deals with some other matters not strictly within the realms of the CLC Convention. Australia has denounced the original 1969 provisions of the CLC and is now a party to the 1992 Protocol, so it is the provisions of the 1992 Protocol that are currently given the force of law by the Commonwealth Act. FUND has been incorporated into domestic Australian law by the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth).

costs and damage. Under both CLC and FUND there is strict liability for pollution damage.⁷¹

FUND acts as a supplement where injured parties cannot obtain full and adequate compensation under the CLC. Examples of where adequate compensation can not be obtained under the CLC are where there is no liability under the convention, where the shipowner's insurance is inadequate, or the damage exceeds the upper limit of compensation allowed for under the convention. FUND sets up a fund, called the International Oil Pollution Compensation Fund (IOPC Fund), which is financed by levies imposed on the private companies or other entities in each country that receive, by sea, an annual quantity of more than 150,000 tonnes of crude and/or heavy fuel oil.⁷²

6.2.2 Loss Suffered by Third Parties by Pollution Other Than Oil

In light of the increasing volume of other dangerous goods being carried by sea, the IMO has made a number of attempts to extend marine pollution insurance schemes to cover other risks. For example, the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996* ("the HNS Convention") applies to damage caused by several thousand categories of hazardous substances carried by sea. The convention sets up a two-tiered insurance scheme, similar to those established under the CLC and FUND Conventions. The HNS Convention covers a wide variety of substances including those defined in Annex II of MARPOL. However, the size and complexity of subject matter covered by the HNS Convention and concerns about the administrative structure associated with the convention have proved to be major obstacles to the implementation of the convention.⁷³

The *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001* sets up an insurance scheme for damage and clean up costs associated with oil spills from non-tankers. The convention applies to bunker oil, defined as 'any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residue from such oil'.⁷⁴

In the context of places of refuge, it may also be necessary to seek indemnity against risks such as port blockage. A standard P & I Club guarantee would generally not cover losses such as economic loss suffered by a port operator as a result of port blockage.⁷⁵ It is possible for a port authority to insure against the costs of wreck removal and business interruption. However, it has been pointed out that an insurance underwriter might view allowing a ship that is in distress and presents a serious threat to the environment into port as deliberate and reckless conduct, which would void most insurance policies.⁷⁶

⁷¹ White, Michael. (1994). *Marine Pollution Laws of the Australasian Region*. Sydney: Federation Press, 113, 149; *Oil spills from ships - Who pays?* (2002). Retrieved 22nd November 2002: www.amsa.gov.au/ME/Facts/spills.pdf.

⁷² White, Michael. (1994). *Marine Pollution Laws of the Australasian Region*. Sydney: Federation Press, 116-7.

⁷³ White, Michael. "Marine Pollution from Ships: International Conventions and Australian Laws" in Lipman, Zada, Bates, Gerard Maxwell (ed). (2002). *Pollution Law in Australia*. Chatswood: Butterworths, 382 at 399-400; *Overview to the HNS Convention* (2002). Retrieved 6th April 2003 http://www.imo.org/includes/blastDataOnly.asp/data_id%3D6505/HNSconventionoverview.pdf.

⁷⁴ White, Michael. "Marine Pollution from Ships: International Conventions and Australian Laws" in Lipman, Zada, Bates, Gerard Maxwell (ed). *Pollution Law in Australia*. (2002) Chatswood: Butterworths, 382 at 397.

⁷⁵ Phillips, Barton. (2002) *The Question of Granting Safe Haven – Issues of Risk Management for Port Operators*. Retrieved September 12, 2002: <http://www.amsa.gov.au/amsa/haven/Phillips.pdf>.

⁷⁶ Ibid.

In granting refuge, port authorities are exposing themselves to a wide range of potential liability. Therefore granting a ship refuge may not be an attractive proposition and a port operator would be justified in seeking indemnity from the shipowner before deciding to grant refuge.

It has been suggested that risk-transfer issues could best be dealt with by formulating a pre-conceived standard indemnity and security undertaking, endorsed by the IMO.⁷⁷ This concept is fairly similar to the Lloyds Open Form. Like a salvage agreement, such an indemnity and security undertaking would be used in a situation where both parties are under pressure to come up with a quick solution and it is therefore not practical to undertake protracted negotiations.

This approach would have a number of advantages. All members of the maritime community would be familiar with the terms of such a contract and their legal rights and obligations under it. This would alleviate the delay and uncertainty caused by trying to formulate an agreement at the eleventh hour. It would also ensure that if damage did occur as a result of giving refuge to a ship, someone would be responsible for meeting the costs.

7. Conclusion

Recent events, particularly the *Prestige* incident, indicate the pressing need to address the issue of places of refuge. Recognising this, the IMO has finally accorded the question of places of refuge the priority it deserves and has moved to put guidelines in place by the end of 2003. These guidelines will hopefully go a long way towards providing a common standard for dealing with requests from ships for refuge that has been sorely lacking and establish procedures through which all the different stakeholders, including shipowners, crews, salvors and coastal authorities, can work together to achieve optimal results.

The incident involving the *Kirki* shows that the issue is not one that is irrelevant to Australia. Indeed, given the amount of shipping that makes its way through Australian waters, the likelihood of a similar incident occurring at some point in the future is not so much a matter of if, but when. Australia presently faces problems including the fragmentation of the power to grant refuge amongst different government instrumentalities and the reliance on non-binding instruments such as the National Plan, which relies on a degree of cooperation that may not always be voluntarily forthcoming, to provide a blueprint for cooperation between the Commonwealth and the States when disaster strikes. It is apparent that whether or not the IMO does actually agree on new guidelines substantial changes need to be made to the way requests for places of refuge are dealt with in Australia in the future. This article has suggested a number of areas in which changes could be made with the main recommendation being that the power to deal with requests for a place of refuge in Australia needs to be centralised further. It is time for this gap in Australian maritime policy and procedure, allowed to linger for far too long, to finally be filled.

⁷⁷ Ibid.