

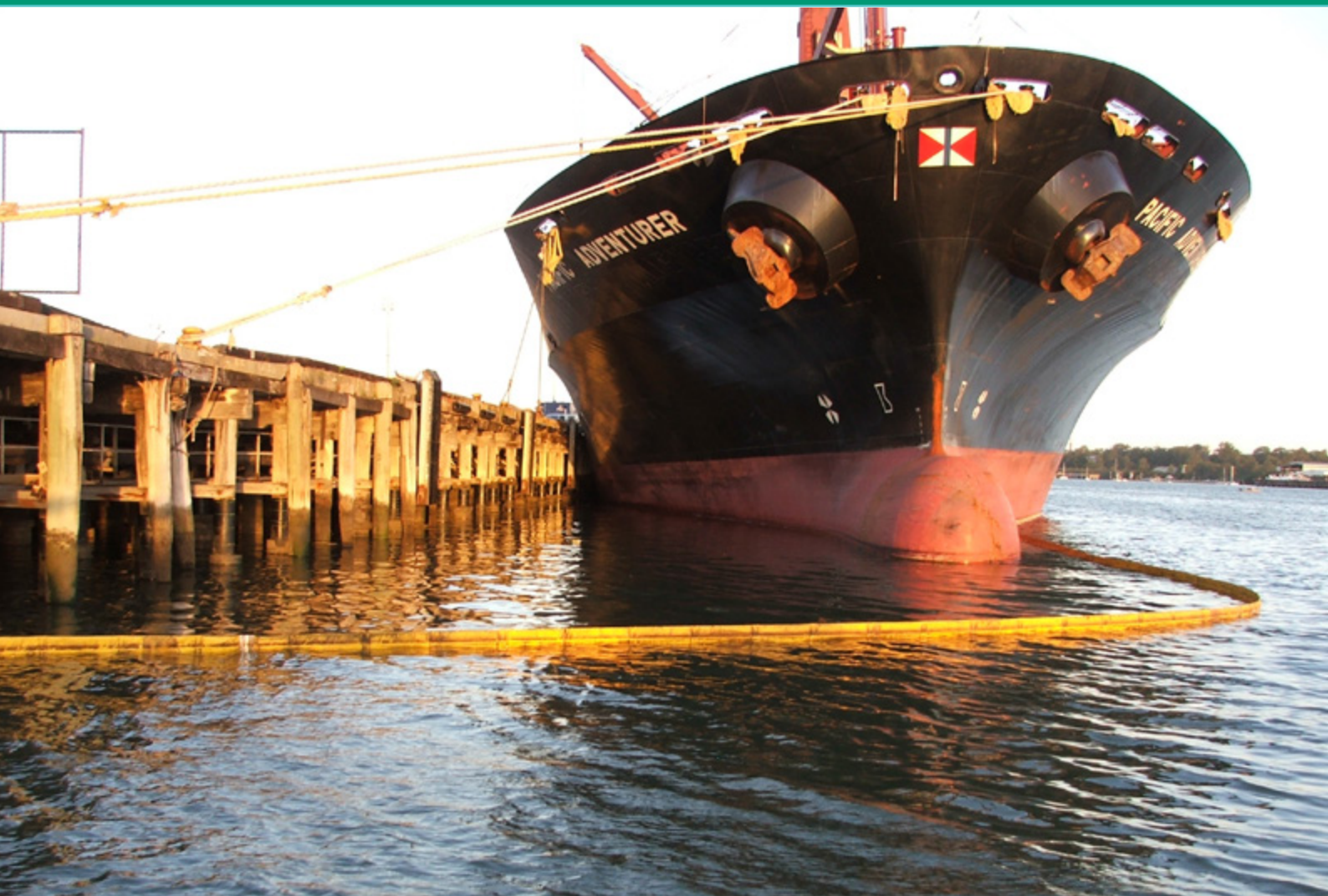


Australian Government
Australian Maritime Safety Authority

National Plan for Maritime Environmental Emergencies

Claims management guidelines

For reimbursement of claims by AMSA
arising due to ship-sourced pollution incidents





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1. Introduction and background

- 1.1 The Australian marine, coastal and riverine environments are a common and valued environmental, social and economic resource. It is therefore a primary task of the shipowner and/or their insurers in conjunction with the Australian/state/territory maritime administrations to avoid, limit and undo any environmental damage arising from ship-sourced pollution by whatever measures deemed necessary. Additionally, the Australian/state/territory maritime administrations recognise that Australian citizens should not have to pay directly through their taxes for the costs of dealing with ship-sourced pollution incidents, and that the persons or bodies responsible for causing the incident should meet all the costs reasonably incurred, in accordance with the “polluter pays” or the “potential polluter pays” principles. The Australian/state/territory governments have a policy of using their best endeavours to recover all of the costs that they reasonably incur in dealing with an actual, or threatened, pollution incident.
- 1.2 Dealing with ship-sourced pollution of the environment affecting sea areas, coastlines and rivers may be a protracted and expensive exercise. Ideally, those response costs should be directly borne by the source of the pollution. As a consequence, it is suggested that the Australian/state/territory maritime administrations in charge of implementing their response plans should engage immediately with the ship-sourced polluter and/or their insurance representatives [for e.g. Protection and Indemnity Club (P&I Club) or other ship insurance provider], as soon as possible after an incident has occurred and keep them advised of the response and general operations during and after any ship-sourced environmental emergency.

Purpose

- 1.3 Australia’s National Plan for Maritime Environmental Emergencies (the National Plan) provides arrangements for responding to:
- ship-sourced pollution of the sea by oil and hazardous and noxious substances;
 - pollution damage due to discharge from an offshore petroleum facility; and
 - situations where an emergency towage capacity may be warranted in order to mitigate the likelihood of a ship-sourced pollution event occurring.
- 1.4 The purposes of these Guidelines are to provide assistance to maritime administrations and associated agencies seeking reimbursement from the Australian Maritime Safety Authority (AMSA)¹ under the National Plan for costs incurred in relation to responding to ship-sourced pollution incidents only, where costs:
- (a) may be paid by AMSA prior to reimbursement from the polluter and/or their insurer;
 - (b) are not able to be fully recovered from the polluter and/or their insurer; or
 - (c) cannot be attributed to a specific vessel (the so called “mystery spill”).

¹ A list of terms, abbreviations and acronyms used in these Guidelines are listed in Appendix A.

- 1.5 For offshore petroleum facility-sourced pollution incidents, petroleum titleholders are required, under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, to maintain adequate assurance to cover the costs of responding to an incident. Recent amendments to the Act clarify this requirement, as well as the requirement for titleholders to cover the costs of the incident response. Vessels or craft undertaking exploration (for example jack-up rigs or drill ships) or the production or processing of oil (for example, Offshore Production Units) do not fall within the definition of ‘ship’ as agreed to by the IOPC Funds, and thus are not required to maintain insurance or other financial security to cover liability for pollution under the 1992 Civil Liability Convention. It is important to note that these Guidelines, while informative, do not apply to any claims that may arise as a result of an offshore petroleum facility-sourced pollution incident.
- 1.6 These Guidelines seek to assist the Australian/state/territory maritime administrations and associated agencies with the processes necessary to achieve a successful claim or cost recovery action. There are many international and national legal instruments in place providing a framework for the process of cost recovery, however, the prime purpose of these Guidelines is to seek to expand and advise on the practical usage of these instruments. It should be borne in mind that the international regimes currently in place do not seek to over compensate damaged parties following a ship-sourced pollution incident. They do however seek to compensate those that have outlaid actual money in the response to the incident and those who suffer loss of earnings as a result of the incident. It needs to be clearly borne in mind that reimbursement of relevant response costs is a cost recovery process and is not a revenue raising exercise.
- 1.7 These Guidelines are a “living or evolving” document and as Australian/state/territory maritime administrations define their preparatory work and internal claims management policies, this may impact on this document. Lessons learned from each incident and settlement procedures practiced may also impact on this document necessitating its review and update.
- 1.8 While there are several publications² available for assistance when compiling a claim arising from an incident involving an oil tanker, the purpose of these Guidelines is to provide guidance to Australian/state/territory maritime administrations and associated agencies on how to make claims to AMSA for ship-sourced pollution incidents involving all types of vessels.

² See for example: the International Oil Pollution Compensation Funds’ Claims Manual 2016, International Tanker Owners’ Pollution Federation (ITOPF) Preparation and submission of claims from oil pollution 2014, International Petroleum Industry Environmental Conservation Association (IPIECA), Economic assessment and compensation for marine oil releases 2016.

Scope

- 1.9 The scope of these Guidelines is to address the compilation and management of a claim submitted to AMSA by any Australian Government agency, state or territory maritime administration or related response agency regarding reimbursement of costs incurred due to responding to a ship-sourced incident polluting or threatening to pollute the marine, coastal or riverine environment within their area of jurisdiction.
- 1.10 These Guidelines are for the use of Australian/state/territory maritime administrations and their staff involved in claims handling and preparations, though some principles and advice may be useful for other claimants.
- 1.11 It should be understood by all parties that this document is advisory only and is in no way mandatory. These Guidelines do not in any way seek to supersede individual Australian/state/territory domestic legislation, policies or claims compilation practices.

2. The National Plan for Maritime Environmental Emergencies

- 2.1 The National Plan is Australia's national integrated Australian/state/territory government and industry organisational framework enabling effective response to maritime environmental emergencies involving those vessels which are liable to pay the Protection of the Sea (POTS) Levy. AMSA manages the National Plan, working with state/territory governments and the shipping, oil, exploration and chemical industries, emergency services and fire brigades to maximise Australia's response capability.
- 2.2 The National Plan is based on the following three funding principles:
- preparedness for ship-sourced pollution incidents should be funded on the basis of the principle that the potential polluter pays;
 - response to ship-sourced pollution (or potential pollution) incidents should be funded on the basis of the principle that the polluter (or potential polluter) pays; and
 - maritime administrations responding to and incurring costs in relation to pollution incidents where the polluter is not identified, or costs are not recoverable, will be reimbursed by AMSA on the basis of the potential polluter pays.
- 2.3 The National Plan is funded by the POTS Levy. The Levy is based on the "potential polluter pays" principle, therefore shipowners, as potential polluters are liable to pay the Levy. The Levy applies to ships that are more than 24 metres in length and have on board more than 10 tonnes of oil in bulk as fuel or cargo at any time during a calendar quarter.

3. Cost recovery arrangements

- 3.1 Under international and national arrangements, reasonable costs associated with the response to a ship-sourced pollution incident are recoverable. Costs and expenditure for the purposes of the Australian National Plan relate to reasonable measures taken to respond to maritime environmental emergencies such as combating pollution by oil or hazardous and noxious substances, defending sensitive resources and/or cleaning shorelines and coastal and riverine installations. In general, costs will be considered “reasonable” if they result from actions that:
- were undertaken on the basis of a technical appraisal of the incident;
 - sought to enhance the natural processes of recovery; and
 - were not undertaken purely for public relations reasons.
- 3.2 These costs are met by those responsible for the spill through various international and domestic arrangements. In general, for Australian/state/territory maritime administrations and associated agencies, reimbursement is normally through international liability and compensation funds or shipowner’s liability insurers (i.e. P&I Clubs or other ship insurance providers).
- 3.3 The means of reimbursement is legally complex and varies depending upon the location of the incident, the type and size of the ship, whether pollution has been discharged, and whether the pollutant is cargo or fuel.
- 3.4 In general, for reimbursement to be successful the following criteria apply to all claims:
- any expense, loss or damage must actually have been incurred ³;
 - any expense must relate to measures that are considered reasonable and justifiable;
 - any expense, loss or damage is compensated only if and to the extent that it can be considered as caused by contamination resulting from a spill or from approved actions in response to a threatened spill;
 - there must be a reasonably close link of causation between the expense, loss or damage covered by the claim and the contamination caused by the spill;
 - a claimant is entitled to reimbursement only if they have suffered a quantifiable economic loss; and
 - a claimant has to prove the amount of their expense, loss or damage by producing appropriate documents or other evidence ⁴.

³ See also applicable comments in Appendix F regarding the opportunity cost of interest

⁴ All criteria sourced from the IOPC Funds’ Claims Manual, October 2016 Edition

International Arrangements

3.5 International arrangements exist that will generally ensure that the cost of combat and response to spills or threatened spills originating from oil tankers and non-tankers will be recovered. These arrangements are set out in four international conventions to which Australia is signatory.

For Oil Tankers

- the International Convention on Civil Liability for Oil Pollution Damage 1992 (the “1992 Civil Liability Convention”);
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the “1992 Fund Convention”);
- the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the “2003 Supplementary Fund Protocol”).

For Non-Tankers (or all other ships)

- International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the “Bunkers Convention”).

3.6 While the Bunkers Convention applies only to ships greater than 1,000 gross tons, ships operating in Australian waters are also covered by general liability regimes operated by the ship’s insurance provider. The Commonwealth’s Protection of the Sea (*Civil Liability*) Act 1981 requires ships of 400 or more gross tons and less than 1,000 gross tons carrying oil as cargo or bunkers to have appropriate insurance in place.

3.7 The ability to utilise the cost recovery arrangements set out above relies on the ability to identify the polluter and to prove that they have appropriate insurance cover. The only exception to this is where it can be demonstrated that a so-called “mystery spill” originated from an oil tanker. In such circumstances, the Fund Convention mentioned above may meet response costs and compensation.

3.8 Further details on the international legal framework including compensation funds are outlined in Appendix B.

Domestic Arrangements

3.9 While the international conventions mentioned above have similar applications in terms of directly incurred response costs, the conventions are, in general, far broader in their scope and application than the National Plan arrangements. Types of claims that may be accepted under the international conventions that are not part of the National Plan arrangements include:

- consequential loss – loss of earnings suffered by the owners or users of property contaminated as a result of a spill, for example the loss of income by a fisher as a result of their nets being contaminated;

- pure economic loss – loss of earnings sustained by persons whose property has not been polluted, for example a hotelier whose premises are closed due to a contaminated public beach; and
 - damage to property, such as repair or cleaning of boats not involved in response activity, or cost of repairing roads or jetties damaged by clean-up operations.
- 3.10 Where Australian/state/territory maritime administrations and associated agencies are unable to recover costs that have been incurred in responding to pollution incidents in Australia or may have difficulty in meeting financial commitments while waiting for reimbursements from the shipowner/ship's insurance provider, AMSA may reimburse the response costs.
- 3.11 In general terms, AMSA will replace consumable materials used and reimburse the assessed costs and expenditure incurred by a state/territory maritime administration and any assisting agency in the prevention and response to ship-sourced pollution where the total assessed value of the materials and costs and expenditure incurred in responding to an oil or hazardous and noxious substances spill during a financial year exceeds \$6,000. While this figure is to be subject to annual CPI indexation, it will only be increased at \$1,000 increments at appropriate intervals.
- 3.12 Where assessed response costs in respect of a single incident exceed \$6,000 and the polluter cannot be identified, AMSA will also reimburse the first \$6,000. While circumstances where cost recovery is impossible most commonly arise where the polluter cannot be identified, other common circumstances might include where:
- legal action (criminal and/or civil) against an identified vessel is unsuccessful;
 - the owner/operator of a vessel is unable to meet their financial obligations;
 - the international arrangements provide an exemption for the particular incident; or
 - unforeseen technical issues regarding any applicable cost recovery legislation, such as a drafting oversight or error.
- 3.13 For major incidents involving significant costs and where reimbursement is likely to be delayed (for example due to potential legal action), Australia's National Plan may make part/progress payments to meet reasonable response costs prior to reimbursement from the international regimes or by shipowner/ship's insurance provider. The relevant state/territory maritime administration should contact AMSA as soon as a need for a part/progress payment is identified. Where such payments are made, the option of including interest in the subsequent claim should also be discussed with AMSA.
- 3.14 A state/territory maritime administration should use their best endeavours to recover all reasonable costs incurred in responding to an incident in its jurisdiction including, to the extent it is practicable to do so, the institution of criminal or civil proceedings for recovery from the owner or the master of the ship which caused any pollution (including costs and expenses incurred by a maritime administration on its behalf or an assisting agency).

- 3.15 Any amount recovered by a state/territory maritime administration will be deducted from the amount payable by AMSA. If, however, the maritime administration has already been paid the full amount of such costs and expenses by AMSA, the maritime administration will pay the full amount recovered to AMSA including any interest charged by AMSA.
- 3.16 Where AMSA has agreed to reimburse costs in advance of recovery from insurers⁵, AMSA will pay an agreed amount, not exceeding 75% of the invoiced amount, within 30 days. Consideration of the financial capacity of the state/territory to perform its statutory functions will be taken in determining an amount less than 75% of the invoiced amount. For payments:
- over \$3 million, the state/territory maritime administration should allow a 60 day payment period in any invoice issued to AMSA; and
 - over \$10 million, the state/territory maritime administration should allow a 90 day payment period in any invoice issued to AMSA.
- 3.17 Payment of the remaining invoiced amount will be dependent upon the final assessment of the claim by the ship's insurer in consultation with the state/territory maritime administration.
- 3.18 AMSA will be responsible for the recovery of all its costs incurred in assisting the state/territory to respond to the maritime environmental emergency. This includes, but is not limited to, all AMSA direct costs and the costs of any assistance provided or arranged by AMSA under the National Plan arrangements such as transport of National Plan industry or overseas equipment and the provision of a National Response Team, or overseas personnel involved in the response.
- 3.19 The cost recovery arrangements under the National Plan do not affect the rights of any claimant in Australia to pursue these types of claims under the international conventions, protection and indemnity insurance arrangements, through the courts or any insurance policy held by a claimant.

Appendix C outlines a decision tree for considering National Plan cost recovery processes for ship-sourced pollution incidents.

Costs and expenditure that may not be reimbursed under the National Plan

- 3.20 In general, costs that may not be reimbursed under the National Plan include:
- costs not directly related to the response;
 - expenditure that cannot be substantiated or justified, or was not approved by the Incident Controller or their delegate. It should be noted that costs associated with the actions of a state/territory duty officer in investigating and assessing an incident such as a mystery spill where no Incident Controller has been appointed would be met;
 - unused and/or excess resources;

⁵ Such agreement will be subject to AMSA's financial capacity to pay at the time of the claim.

- resources that were stolen or damaged through misuse;
- monitoring (other than response phase monitoring under the National Plan and some impact studies assessment as set out in Appendix F);
- legal costs associated with action other than recovery of response costs (such as prosecution costs);
- the payment of compensation or damages for the death or injury to a person;
- a payment made pursuant to legislation relating to worker's compensation, other than the premium for insurance directly relevant to persons involved in a particular incident;
- asset purchases. The total cost of an asset that has a residual value may not be fully recoverable. However, a portion (pro rata) of the total cost of the asset may be reimbursed;
- backfilling response personnel to perform usual maritime administration or associated agency business where the costs of those response personnel are also being recovered;
- loss or damage of personal items (e.g. sunglasses, mobile phones, cameras etc.);
- observers – as per the National Plan Protocol for attendance by observers at marine pollution incidents and exercises. In general, costs of attendance of an observer shall not be chargeable to the National Plan unless the observer is later used as a member of the Incident Management Team or response team in which case costs would be met on a pro rata basis;
- the costs of patrol, search and surveillance or other activities not directly related to a particular incident, actual or reported, or not approved by the Incident Controller or their delegate; and
- claims are not accepted if the claimant could have foreseen that the measures taken would be ineffective in the particular circumstances of the incident. On the other hand, the fact that the measures prove to be ineffective should not in itself be a reason to reject a claim for the costs incurred.

3.21 The fact that a state/territory government or other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of reimbursement of assessed costs under the National Plan. The technical reasonableness is assessed on the basis of the facts available at the time the decision is made to take a specific measure.

4. Generic description of claims management

- 4.1 Experience has shown that dealing with ship-sourced environmental emergencies can be a protracted and expensive business. Initially the response costs fall on those undertaking them. Under current legislation, those incurring expenses as part of the response may later seek to recover them from those responsible for meeting such costs. This Section outlines some of the general principles drawn from experience gained by AMSA/states/territory during recent responses.

Polluter Pays or Potential Polluter Pays Principles

- 4.2 The “polluter pays principle” and the “potential polluter pays principle” are key principles as regards pollution incidents in international environmental law. They are also key principles of Australia’s environment policy in that the cost of preventing pollution or of minimising environmental damage due to pollution or potential pollution should be borne by those responsible. Under these principles, it is not the responsibility of a government to meet the costs involved in either prevention of environmental damage, or in carrying out remedial action because the effect of this would be to shift the financial burden of the pollution or potential pollution incident from the polluter or potential polluter to the Australian taxpayer.

General Principles

- 4.3 It is essential, from the outset of an incident, that a designated finance and administration officer is appointed to keep adequate records and control expenditure. Similarly, it is essential that all participants keep personal records of how, when and why response measures are taken, and be able to explain why they were at a response and what they were doing. These records are needed to support claims for cost recovery and to show that the actions taken were proportionate and reasonable for the threat from pollution and the risks to safety.
- 4.4 Experience has shown that while claims may be well supported with financial documents, the provision of more contextual information will assist AMSA and shipowner/ship’s insurance providers to understand the reasons for the expenditure and so enable the claim to be assessed on the basis of facts. Essentially a claimant needs to provide sufficient supporting documentation and explanatory information so as to enable AMSA and the shipowner/ship’s insurance provider to readily determine ‘why’ a cost was incurred. Such contextual information may include any documentation describing response activities (e.g. photographs, diagrams, maps, spreadsheets, response narrative, etc.). Also, the decisions of the Incident Controller, records and decisions from meetings of the Incident Management Team and any daily record of activities would be helpful for not only understanding what was proposed but what actually occurred.
- 4.5 It is also vitally important that financial systems are in place as part of a jurisdiction’s contingency plans, in advance of an incident. During a response, there is often pressure, frequently severe, to deal with pressing response issues and problems and

to relegate record keeping to a lesser priority. However, the importance of records and good record keeping cannot be over emphasised. It is simply not realistic to rely on memory to reconstruct events in a fast moving, complex and possibly lengthy incident. All responders must therefore arrange to keep adequate records. The compilation of a photographic and/or video library, with all forms of media dated and time stamped would be of great assistance as a proof of activities. Record keeping is essential for good cost recovery. Documents compiled during an incident response should clearly show information received, decisions taken, directions given, actions taken and daily personal activity logs as well as all direct financial expenditure. A photographic library and catalogue of supporting and relevant documentation should provide an overview of essentials matters.

- 4.6 The aim of a state/territory maritime administration should be to recover the total costs expended in the response to mitigate damage caused by the incident (as far as these costs in full live up to requirements of the administration's law and legislation). The claim should represent the actual costs incurred by the maritime administration. It is for each Australian maritime administration to consider if, and how, they could apply these Guidelines.
- 4.7 It is recommended that:
- claims management be considered a necessary part in overall incident management with good claims management leading to maximum cost recovery, playing a preventive role and acting as a deterrent;
 - a maritime administration's incident response contingency plan is not complete unless it contains a clear policy line on how that administration will seek to recover its costs;
 - claims management is conducted in accordance with clearly pre-defined guidelines, reflected upon by the relevant stakeholders, familiarised by training and evaluated regularly; and
 - lessons learned from each individual case need to be recorded and shared through the National Plan arrangements with other Australian maritime administrations.

The increased workload of claims compilation

- 4.8 Most state/territory maritime administrations do not have specific bodies or even individuals appointed specifically for claims management. It appears to be usual for this particular activity to be an "add on" to another role within the responsible organisation. However, the investment in time, logistics and finances necessary for the management of a specific claim adds to the requirements of the normal work schedule of the responsible public service. In the case of a major pollution incident, the successful combination of several tasks is often extremely difficult.
- 4.9 State/territory maritime administrations should be aware that individuals appointed to compile claims will have an increased workload whilst this work is ongoing. Planning and training for this event should be outlined in State/Territory contingency plans.

- 4.10 The establishment of framework agreements to call upon external assistance (lawyers, consultants, etc.) is an important part of this preparatory work. These framework agreements have to be established in line with relevant state/territory maritime administrations' procurement procedures as appropriate.

Development of hire rates and methods of calculation

- 4.11 The development and regular review of hire rates and methods of calculation before an incident occurs has several advantages:
- claims compilation work can absorb a great deal of time and effort, so the availability of this material beforehand can mean a significant saving in human resource time; and
 - state/territory maritime administrations may choose to share their hire rates and the formula used with domestic and/or international institutions, e.g. AMSA, ITOFF, ship's insurance providers. This action may shorten the settlement process.
- 4.12 Section 5 of this document provides more details on hire rates for response equipment, and how these rates could be calculated.

Pro forma claim submission

- 4.13 To aid consistent submission and assessment of claims Australian/state/territory maritime administrations should use the standard format for presenting a claim and all supporting documentation. This will ensure that every response activity is considered and included in the claim if deemed appropriate. Section 6 and Appendix F of this document provides further details on sections for claim formats.

Defining a strategy for the claims management of small-scale and large-scale pollution incidents

- 4.14 Management of every claim compilation and settlement exercise requires an investment in time and financial and logistics resources, not only by state/territory maritime administrations, but also by AMSA. However, some claims are too limited to justify an extensive investment of time and resources, while other claims are too extensive to justify the dismissal of the case. It is for each state/territory maritime administration to determine whether they will pursue cost recovery in every case, or determine whether some cases are too small to warrant the human resource investment. It is necessary to bear in mind that the "polluter pays" principle applies equally to small incidents as it does to the major ones. Each state/territory should develop a claims management strategy to cover as many ship-sourced pollution incidents as possible.
- 4.15 In anticipation of the occurrence of a maritime incident, the claims management plan should be regularly reviewed by the sharing of best practices with national colleagues, and the organisation of desktop exercises.

5. Determining a cost and pricing structure

Objective and general principles

- 5.1 The objective of this Section is firstly, to identify the most frequent items included in claims, and secondly, to suggest a reasonable approach to calculate the cost.
- 5.2 It is recommended that whenever possible the full cost of the incident should be sought from the shipowner and all efforts should be made to ensure this occurs. The claimant should not be financially penalised for any costs incurred by the polluter.

General recommendations

- 5.3 It is useful to have a schedule of prices published beforehand to provide the liable party with confidence that the rates are reasonable, and justifiable. This may also avoid disputes during claim settlement meetings.

Items commonly included in claims

- 5.4 The activities and equipment to be included in a claim depend on the incident itself, however, the items often included are expanded upon below:

Checklist

- Maritime assets: tugs, work boats, oil and hazardous and noxious substances recovery vessels, patrol boats, etc.
- Aerial assets: helicopters, surveillance aircraft, etc.
- Contract personnel: working hours, daily allowances, hotels, flights, etc.
- Staff personnel and associated costs
- Subcontracted companies
- Equipment: booms, skimmers, anchors, containers, power packs, etc.
- Vehicles: cars, trucks (owned and rented); heavy machinery, etc.
- Sample analysis: laboratory analysis, sample collection equipment
- Satellite images
- Documentation: videos, pictures, charts, etc.
- Trajectory spill modelling
- Environmental assessment to aid a response
- Environmental damage (if applicable)
- Capture, cleaning and rehabilitation of wildlife
- Cleaning, repairing or replacing property

- ☑ Special weather reports
- ☑ Outsourced expert advice (technical, legal, claims handling consulting, media management, public relations, etc.)
- ☑ Waste management (storing and disposal)
- ☑ Telecommunication expenses
- ☑ On site office set up, utility costs (electricity, etc.)
- ☑ Mail expenses
- ☑ Miscellaneous

Recommended guidelines to determine a cost and pricing structure

5.5 It is recommended that state/territory maritime administrations claim for all their activities when responding to a shipping incident inside their respective jurisdictional areas. It is highly likely that there will be two types of items to be claimed for:

- state/territory resources, i.e. equipment, staff; and,
- actual expenditure to third parties.

5.5.1 State/NT Owned Resources

When the expenditure is generated by state/territory owned resources: that is, personnel, response equipment, etc., which are paid and maintained directly or by a contract, or even purchased before the incident occurred. In essence, these resources are “hired” to the incident at predetermined rates. All evidence of charters or hire and evidence of payment should be kept.

5.5.2 Actual Expenditure to Third Parties

These costs should be evidenced by an invoice submitted by the providing organisation. In this case, the invoice is included as supporting documentation in the claim and it is up to the discretion of individual state/territory maritime administrations whether they choose to add a reasonable operational overhead related to the handling cost to these invoices or not. This decision would have been part of the planning and preparation work carried out prior to an incident occurring.

Determining Hire Rates

5.6 In this Section, there are some recommendations to calculate the price of the items usually included in maritime claims based on prior experience of AMSA and the state/territory maritime administrations. This Section is applicable when the cost of equipment is recovered through equipment hire rate charges and may include a cost component for a range of other matters such as storage, maintenance, depreciation, etc. However, it is up to each state/territory maritime administration to define its own criteria within the frameworks of its legislation and its own price structure since there are different methods to calculate the price of an asset or service.

- 5.7 In determining hire rates there are two types of response units for which rates are generally calculated – a response asset and response equipment. A response asset is typically the larger maritime or aerial platforms used during a response such as a helicopter, aircraft or tug while response equipment is typically the booms, skimmers and related spill equipment familiar to most state/territory maritime administrations.
- 5.8 The methodology used to calculate hire rates for a response asset, including indirect costs, is not addressed in these Guidelines.

Aerial and Maritime Units

- 5.9 As mentioned earlier it is recommended that the states/territory claim for assets both owned by themselves and chartered from third parties. It is considered reasonable to include all response activities of these major assets, such as surveillance, costs for preparedness and standby, equipment deployment, transporting equipment or technicians or supporting operations.
- 5.10 When calculating the costs of both aerial and maritime assets it should be noted that these may be charged on an hourly or daily basis. It is necessary at this stage to determine whether to include bunkering and consumables within the rate, or to consider them as an additional expenditure.
- 5.11 It is up to the discretion of the state/territory maritime administrations to charter aerial and maritime units as they deem necessary for the response scenario they are facing. The rates for these chartered vessels and aircrafts should be included in the claim. Any aerial and maritime units chartered in for a specific response will be from the open market and dependent upon what is available on that day.

Response Equipment

- 5.12 As outlined in paragraph 5.7, above there are two types of response units for which rates are generally calculated – a response asset and response equipment. The guidelines focus on response equipment, which is typically the booms, skimmers and related spill equipment familiar to most state/territory maritime administrations.
- 5.13 State/territory maritime administrations should include costs for their response equipment from the moment it is mobilised from its normal storage place until it is returned to that place, fully refurbished and ready for the next incident. Response equipment should also be charged for during preventive, response and salvage operations, even if it is subsequently found that the equipment, although mobilised to the site of an incident, was not needed.

Recommended Response Equipment Approach

- 5.14 To determine the rate for response equipment, it is recommended to amortise the value of the equipment over its expected life and add a mark-up for overheads such as storage, maintenance, training, exercises, depreciation, etc.

5.15 The amortisation periods vary according to the type of response equipment and are based on the expected durability of this equipment. The expected durability of the equipment should be based on AMSA/state/territory personnel's experience and not the manufacturer's warranty or guarantee period associated with the particular type of equipment. Periods are usually determined in multiples of thirty days. Following general AMSA and international practice, it is recommended that the following life expectancies may be applied:

- 180 days for mechanical equipment (e.g. power packs, pumps, skimmers, etc.);
- 90 days for heavy plastic equipment (e.g. off-shore booms, temporary storage equipment, etc.); and
- 30 days for plastic and rubber materials (e.g. in-shore booms, etc.).

It is, however, up to the discretion of state/territory maritime administration to define, and justify within a claim, the life expectancy considered most suitable for each type of equipment.

5.16 It is standard practice for the cost of response equipment placed on standby, or in transit or undergoing decontamination, but not actually deployed, to be assessed usually at a lower rate to reflect the reduced wear and tear on the equipment. Some state/territory maritime administrations apply a fixed standby rate of 50% of the in use rate. This does not prejudice the right of a maritime administration to use a different rate but any variation will need to be justified.

5.17 Should a piece of response equipment break down while it is in use or on standby, it is considered reasonable to charge for the days that it was used or on standby up until it was determined that the item was unfit for use.

5.18 It is recommended that decontamination and repairs to response equipment should be charged for in line with the purchase invoices if repaired by private companies, or with the equipment used and time spent by personnel if repaired by state/territory employed staff or subcontracted companies.

Personnel

5.19 It is recommended that state/territory maritime administrations charge for all personnel involved in the incident, i.e. Incident Controller, response teams, scientific and logistical support, finance/claims support, etc.

5.20 Personnel rates are usually calculated in line with the contract of employment plus all on-costs such as entitlements, superannuation, any applicable taxes and insurance costs, etc. Government employee pay structures can be highly complex, often involving scales of pay which include a base time rate, time and a half or double time. It is recommended that state/territory maritime administrations pre-determine their staff charge out rates prior to any incident occurring in accordance with any applicable state/territory policies and/or guidelines.

5.21 Personnel contracted to support the state/territory's response should be charged as per the invoice.

Goods and Services Tax (GST)

- 5.22 AMSA may reimburse other government bodies (national, state, local) for costs incurred in undertaking activities conducted under the National Plan. Costs associated with an incident may include for example, staff costs, purchase of consumable items or hire charges for equipment, taxi or air travel costs and accommodation charges.
- 5.23 Costs incurred will generally include GST ⁶. The receipts for all such items should identify a net cost, to which a GST amount of 10% has been added.
- 5.24 When compiling the claim for reimbursement of response costs:
- the body must identify the GST exclusive cost of the goods or services provided;
 - the body recovers the GST paid on the expenses it has incurred, from the Australian Taxation Office (ATO) through the body's Business Activity Statement;
 - the body then seeks recovery of the GST exclusive cost from AMSA;
 - under the National Plan arrangements;
 - the body then totals the GST exclusive cost of all goods and services provided. As the body has provided a service to AMSA under the National Plan, GST, calculated at 10% of the total, GST exclusive cost, should then be added to the Tax Invoice made out to AMSA; and
 - when payment of the Tax Invoice is received by the body from AMSA, the GST amount will be remitted to the ATO through the body's next Business Activity Statement.

A worked example of how GST is calculated and applied under the National Plan is shown in Box 1.

- 5.25 Finally, all claimants need to ensure that all invoices tendered to AMSA for consideration for payment comply with the ATO guidelines as to what constitutes a valid tax invoice. Detailed information as to what constitutes a valid tax invoice can be found at the Australian Tax Offices' website at:

<https://www.ato.gov.au/Newsroom/smallbusiness/GST-and-excise/Tax-invoices-and-record-keeping-for-GST-credits/>.

⁶ There are a small number of supplies that are "GST-free". Some transactions are outside the scope of the GST altogether because, for example, they are made by unregistered people/entities, or have no connection with Australia. Others are "GST-free" which means that the supplier does not charge GST. The main GST-free items are exports, health, food, education, international travel and certain charitable activities. Of this list, food is likely to be the most common item encountered as a reasonable response cost for which reimbursement is sought under the National Plan

Other possible considerations

- 5.26 A state/territory maritime administration needs to be aware that if a ship-sourced pollution incident results in:
- extensive response activities outside the boundary of the territorial sea (that is, more than 12 nautical miles from the low tide mark or closing lines); or
 - a special budgetary measures being taken by any government, to cover some or all of the cost of the response activities (this is unlikely to occur);

then different GST considerations may be relevant. In such circumstances, the state/territory maritime administration should seek further advice from their GST advisors, in conjunction with AMSA.

Box 1: GST – A worked example

A state/NT maritime administration incurs \$3,948,000 of expenditure on various items while undertaking response activities under the National Plan. The maritime administration is seeking reimbursement from AMSA for:

• Vehicles & vessels	\$ 385,000
• Aircraft & helicopters	\$ 275,000
• Pollution equipment	\$ 880,000
• Operational & equipment hire	\$1,100,000
• Accommodation	\$ 110,000
• Travel	\$ 132,000
• Food	\$ 66,000
• Salaries	\$1,000,000
Total	\$3,948,000

The vehicles & vessels, aircraft & helicopter, pollution equipment, operational & equipment hire, accommodation and travel will include 10% GST that is, amounts of \$35,000, \$25,000, \$80,000, \$100,000, \$10,000 and \$12,000, respectively for a total GST component of \$262,000.

The food component will need closer scrutiny. If the food costs are all for café or restaurant meals then it will include GST. However, if there is a component for items purchased at a supermarket, GST may be included on some items but, depending on the items purchased, some items may be GST exclusive. The dockets received from the supermarket will identify those items which have GST and the total GST charged.

Assuming that GST has been applied to 50% of the food costs then the GST amount for this component will be \$3,000.

There is no GST on salaries.

Therefore, the maritime administration should seek a refund of \$265,000 GST from the Australian Taxation Office through the maritime administration's Business Activity Statement. The net cost of the response to the state/NT maritime administration will therefore be \$3,683,000.

The maritime administration will then seek to recover the \$3,683,000 from AMSA.

The invoice to AMSA for recovery of these response costs should therefore clearly list the expenditure items, total the GST exclusive amounts, then add GST, at 10%, to the total. In this example, the total of the invoice will be \$4,051,300 comprising:

• Vehicles & vessels	\$ 350,000
• Aircraft & helicopters	\$ 250,000
• Pollution equipment	\$ 800,000
• Operational & equipment hire	\$1,000,000
• Accommodation	\$ 100,000
• Travel	\$ 120,000
• Food	\$ 63,000
• Salaries	\$1,000,000
Sub-total	\$3,683,000
Plus GST	\$ 368,300
Total payable by AMSA	\$4,051,300

AMSA will make a payment of \$4,051,300 to the maritime administration which, as provider of the service will be required to remit 1/11th of the amount, i.e. \$368,300, to the Australian Taxation Office through the maritime administration's next Business Activity Statement.

6. Drafting the claim – claim format

- 6.1 Some general principles of good practice that may be adopted by Australian/state/territory maritime administrations and associated agencies are:
- identify the source of the pollution involved in the incident;
 - record name and address of the claimants and of any representative;
 - a summary of events – together with why the working methods or courses of action were selected (maintain a narrative of the incident);
 - an expense must have been incurred and third party invoices provided;
 - response measures must be deemed to be reasonable and justifiable – proportionate;
 - obtain quotes and undertake a comparative assessment to ensure equipment hire rates were reasonable;
 - keep a record of dates on which work was carried out at every site – date and timed photographic evidence;
 - keep a record of the number and categories of response personnel, regular/overtime rates of pay and who is paying them – names;
 - keep a record of travel, accommodation and living costs for response personnel;
 - calculate hire rates for response equipment in use and standby;
 - keep a record for all equipment costs for every site:
 - o type of equipment;
 - o rate of hire;
 - o cost of purchases – noting the need to identify any purchased asset with a residual value;
 - o quantity used of each piece of equipment;
 - o period of use – (in use and on standby);
 - photograph any equipment damaged during the response – if possible get assessed by an independent body (ship surveyor, expertise Bureau, Special Casualty Representative) prior to repair or replacement;
 - no betterment of equipment – i.e. do not bring damaged equipment up to a better state than it was at the commencement of the hire;
 - keep a record of consumable materials – get responders to sign out consumables and say which site the item will be used on; and
 - keep a record of waste disposal quantities, routes and costs.

Record Keeping

- 6.2 It is not possible to specify the precise form of records, as this varies with the circumstances however, there are two principle points to keep in mind:
- the records serve a variety of purposes and are the source material for much information drawn; and
 - responders should be made aware that records may be used for the purpose of legal proceedings, and that all records are discoverable. As such, record keeping should err on the side of too much rather than too little detail.

Subject Headings for Claims

- 6.3 The following paragraph headings (*italics*) indicate the recommended subject headings for sections of a claim. A detailed explanation of the subject headings can be found in Appendix F. The italicised headings indicate either claims items of lesser importance or may provide policy guidance for Australian/state/territory maritime administrations and associated agencies.
- 6.4 As each one of these sections is compiled all the guidance in other sections of this document, must be borne in mind. It should be noted that not all of these sections will be necessary with every claim compiled, and occasionally other sections may need to be added. This is a recommended structure for Australian/state/territory maritime administrations and associated agencies to consider adopting in part or in its entirety. The sections are designed for major incidents, however for the smaller ones, it should be possible to combine some of the sections.
- 6.5 Format for claims ⁷
1. *Area affected*
Delineation of the area affected, describing the extent of the pollution and identifying those areas most heavily contaminated (for example using maps or nautical charts, supported by photographs, video or other recording media)
 2. *Analysis and/or other evidence linking the oil pollution with the tanker involved in the incident*
Laboratory analysis and/or other evidence linking the oil pollution with the tanker involved in the incident (such as chemical analysis of oil samples, relevant wind, tide and current data, observation and plotting of floating oil movements)
 3. *Summary of events*
Summary of events, including a description and justification of the work carried out at sea, in coastal waters and on shore, together with an explanation of why the various working methods were selected
 4. *Dates on which work was carried out*
Dates on which work was carried out, identifying particularly work at individual sites

⁷ This format is taken from the IOPC Example Claim Form, 2018 Edition

5. *Labour costs*
Labour costs (number and categories of response personnel, the name of their employer, hours or days worked, regular or overtime rates of pay, method of calculation or basis of rates of pay and other costs) and relevant information (invoices, receipts, worksheets and wage records, log books, deck books, etc). Please identify the individual worksites at which the labour was employed
6. *Travel, accommodation and living costs for response personnel*
7. *Equipment costs*
Equipment costs (types of equipment used, supplier, rate of hire or cost of purchase, method of calculation of hire rates, quantity used, period of use), and relevant information (invoices, contracts, hire or charter agreements, worksheets, log books, etc.) Please identify the individual worksites at which the equipment was used
8. *Cost of replacing damaged equipment beyond reasonable repair*
Cost of replacing equipment damaged beyond reasonable repair (type and age of equipment, supplier, original purchase cost and circumstances of damage supported by photographs, video or other recording media)
9. *Consumable materials*
Consumable materials (description, supplier, quantity, unit cost and where used) and relevant information (purchase orders, invoices, receipts, etc.)
10. *Remaining value*
Any remaining value at the end of the operations of equipment and materials purchased specifically for use in the incident in question
11. *Age of equipment not purchased specifically for use in the incident in question, but used in that incident*
12. *Transport costs*
Transport costs for personnel, equipment, waste material, etc. (number and types of vehicles, vessels or aircraft used, number of hours or days operated, distance travelled or start and end locations, rate of hire or operating cost, method of calculating rates claimed) and relevant information (tickets, weighbridge reports, manifests, log books, etc.)
13. *Cost of temporary storage (if applicable) and of final disposal of recovered oil and oily material*
Cost of temporary storage (if applicable) and of final disposal of recovered oil and oily material, including quantities of waste handled, unit cost and method of calculating the claimed rate.
14. *Miscellaneous*

7. Submitting a claim

Payment by AMSA prior to reimbursement from polluter and/or their insurer

- 7.1 There is a general obligation on a state/territory maritime administration to furnish AMSA with a report of every incident, which will include details of the methods used to determine whether the pollution came from a ship source and the preventative and response measures taken. Where reimbursement of costs is being sought from AMSA prior to reimbursement from the polluter and/or their insurer, the Report should attach a claim as outlined above setting out full details of the incident and the response including inter alia personnel, the equipment, dispersant and other materials used and costs and expenses incurred.
- 7.2 The Report must be submitted no later than twelve months after completion of a response to:
- Chief Financial Officer
Australian Maritime Safety Authority
GPO Box 2181
CANBERRA ACT 2601

Identified/Suspected Polluter

- 7.3 Costs of putting in place contingency arrangements, e.g. deployment of personnel and equipment, in response to potential ship-sourced pollution incidents involving an identified polluter (i.e. “pure threat” situations, such as the grounding of a vessel with no loss of oil) will not be reimbursed by AMSA where cost recovery cannot be undertaken by the state/territory maritime administration through legal process because of a known deficiency in applicable state/territory cost recovery legislation.
- 7.4 A claim where a polluter is identified, but costs cannot be recovered, for reasons other than a known deficiency in the applicable state/territory cost recovery legislation, should cover all of the relevant items in Section 6, above, as well as:
- the circumstances of the spill, including analytical and/or other evidence linking the pollution with the ship involved in the incident, such as chemical analysis of oil samples, relevant wind, tide and current data, observation and plotting of floating oil movements; and
 - details of actions taken by the maritime administration in attempts to recover the costs from the identified or suspected polluter, including, as appropriate:
 - o outcome of any legal proceedings; and
 - o legal advice regarding appropriate action based on available evidence.

- 7.5 Claims of this nature will only be considered for vessels that are subject to payment of the pollution levy imposed by the *Protection of the Sea (Shipping Levy) Act 1981*. In summary, these are ships that:
- at any time during a calendar quarter, had on board a quantity of oil in bulk weighing not less than 10 tonnes; and
 - have a tonnage length of not less than 24 metres.

Unidentified polluter or “mystery spill”

- 7.6 It needs to be borne in mind that unlike the ship’s insurance representative who are more often than not on site at ship-sourced spills where the polluter is known, or at ship based incidents with potential to result in a spill, AMSA does not, in the majority of cases, have a presence at a state/territory managed incident involving a “mystery” spill that may lead to a claim for reimbursement. For this reason alone, a state/territory report needs to provide sufficient information to support any claim for reimbursement submitted to AMSA.

A comprehensive report with supporting documentation is required to assist the Authority determine the reasonableness of the actions taken and associated costs. It is essential that supporting documentation shows how the expenses for response operations are linked with the actions taken at specified work sites.

- 7.7 For mystery spills jurisdictions shall have regard to the National Plan Joint Investigation Guidance into spills of unknown source. The agency investigating the source of an incident should adopt best practice investigative standards so that they can identify the polluter. If, while undertaking an investigation an investigator forms the opinion that a person has committed an offence they must give that person the appropriate caution. Failure to do this may render any evidence collected inadmissible. An investigator should maintain all records relevant to the investigation separate from records relating to other activities (e.g. inspections) being undertaken.

- 7.8 In summary, a report that includes a claim for costs needs to clearly set out:
- **What?** Summary of events, including a description and justification of the work carried out on water, in coastal waters and on shore, together with an explanation of why the various working methods/response options were selected, any supporting advice or opinions from technically qualified third parties.
 - **When?** Dates/times when decided, implemented, and terminated.
 - **Where?** Delineation of the area affected, describing the extent of the pollution and identifying those areas most heavily contaminated, for example using maps or nautical charts, supported by photographs or video.
 - **By whom?** Government/port agencies, industry, contractors, volunteers, military.
 - **How much?** Include a detailed list with supporting documentation such as receipts and tax invoices for those relevant items as outlined in Section 6, above.

Certification/Sign-off by Agency Chief Executive Officer or Chief Financial Officer

- 7.9 All claims for payment to AMSA under the National Plan should be submitted with a qualifying statement/certification that all expenses forming part of the claim are directly related to the response effort and that the costs and working hours claimed are an accurate account of the time spent on the activities. This statement/certification should be signed by the maritime administrations' or associated agency's Chief Executive Officer or equivalent, or the Chief Financial Officer.

8. Assessment of a claim

- 8.1 AMSA addresses the claims from a standpoint of normal audit requirements and reasonableness, i.e. it will apply the same general criteria used by a ship's insurance provider and their correspondents when assessing the reasonableness of claims for reimbursement of costs incurred in responding to a spill, or potential spill. In general, costs will be considered "reasonable" if they result from actions that:
- were undertaken on the basis of a technical appraisal of the incident;
 - sought to enhance the natural processes of recovery; and
 - were not undertaken purely for public relations reasons.
- 8.2 Claims will be addressed as quickly as possible. To aid claims assessment it is important that all maritime administrations or associated agencies submitting a claim for payment to AMSA keep a copy of the claim for their own records so as to allow for any inquiries to be responded to.

9. Recording lessons learned

- 9.1 In the event of a maritime environmental emergency, Australia's National Plan is tested in actual conditions. Many of its aspects (e.g. communication schemes, response plans, salvage arrangements) are later evaluated and the findings may lead to a review of existing plans. Many incidents, especially those with a large impact such as the *Pacific Adventurer*, have been presented to a wider audience where experts from state/territory maritime administrations discussed various aspects of the management of the maritime incident. However, the issue of Claims Management and the procedures used for cost recovery are seldom addressed.
- 9.2 The need for a "lessons learned" session following the submission and consideration of a claim by AMSA and/or the ship's insurance provider is also vitally important. It is necessary to understand those aspects of the process that raised concern, that were thoroughly argued and that required the highest level of justification. Compilation and presentation of a claim, providing the justification for the expenses and proof of the reasonableness of specific parts of the claim and – most importantly – the narrative should also be reflected in a lessons learned session.
- 9.3 The lessons learned session is not a descriptive presentation of the fact and figures of the response measures, but it is to make state/territory maritime administration's claims management experts aware of the relevant aspects of a claim that may have been disputed in the settlement of the claim with either AMSA and/or the representative of the polluter (i.e. the ship's insurance provider). Of special interest may be any issues that may cause consideration for review of these Guidelines on claims management.
- 9.4 As most state/territory maritime administrations may not have extensive experience in claims management and as these Guidelines are a compilation of best practices brought together by AMSA in conjunction with representatives from state/territory maritime administrations and endorsed by the National Plan Strategic Coordination Committee, it is not feasible to provide an exhaustive list of items to be addressed in this Section on lessons learned. However the Guidelines' authors are confident that the state/territory maritime administrations can and will work together to provide an outline of lesson learned in the process of cost recovery after an incident and consequently better the guidance in these Guidelines with regards to future claims processes.



Terms, abbreviations and acronyms

1992 Civil Liability Convention	International Convention on Civil Liability for Oil Pollution Damage, 1992
1992 Fund Convention	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992
AMSA	Australian Maritime Safety Authority
Bunkers Convention	International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001
CPI	Consumer Price Index
EEZ	Exclusive Economic Zone is a maritime area that a coastal State (country) may claim adjacent to and beyond its territorial sea that extends seaward up to 200 nm from its baselines (or out to a maritime boundary with another coastal State)
In use	Equipment shall be deemed “In Use” in respect of any period during which the equipment is in use and not in transit or on standby. See also definition of “On Standby”, below.
IOPC Funds	<p>International Oil Pollution Compensation Funds 1992</p> <ul style="list-style-type: none"> • a worldwide intergovernmental organisation established for the purpose of administering the regime of compensation created by the 1992 Fund Convention • also administers the Supplementary Fund • as a Party to the 1992 Fund Convention, Australia is a Member of the IOPC Funds. N.B. Australia is also a Party to the Supplementary Fund
ITOPF	<p>International Tanker Owners Pollution Federation Ltd</p> <ul style="list-style-type: none"> • a not-for-profit organisation established on behalf of the world’s shipowners to promote an effective response to marine spills of oil, chemicals and other hazardous substances • provides objective technical advice and information on all aspects of a response and the effects of spills on the marine environment. Technical services provided include on-site response advice, claims assessments, pollution damage assessment, assistance in response planning, contingency planning advice, and the provision of training and information

LLMC Convention	Convention on Limitation of Liability for Maritime Claims (LLMC), 1976 and its 1996 Protocol
MARPOL	International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocols of 1978 and 1997 <ul style="list-style-type: none"> • the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes
National Plan	Australia's National Plan for Maritime Environmental Emergencies
On Standby	Equipment shall be deemed "On Standby" in respect of any period during which the equipment is in transit, on standby or otherwise not in use. See also definition of "In use", above.
P&I Club	Protection and Indemnity Club <ul style="list-style-type: none"> • provides protection and indemnity insurance for shipowners • provides technical, legal and financial advice to shipowners • assesses reasonableness of claims and ensures adequate supporting documentation • liaises with IOPC Funds representatives
POTS Levy	Protection of the Sea (POTS) Levy
Supplementary Fund Convention	Protocol of 2003 to the 1992 Fund Convention

International legal framework including compensation funds

- B.1 Shipowners are generally entitled to limit their liability in respect of claims arising from pollution damage caused by their ships. The maximum liability of a shipowner is calculated based on the gross tonnage of the ship involved in the incident, not on the amount of damage caused by the incident.
- B.2 The preferential treatment of the shipowner, striving for the encouragement of shipping and trade, has traditionally been to the detriment of the claimants. However, during the last decades, the imbalance between protecting shipowners and providing compensation to claimants has been addressed, frequently in the wake of a major maritime incident.
- B.3 A number of Conventions, but not all, combine the legal concepts of “strict liability” and “limited liability”. The first means that shipowners are required to pay compensation, without the need for the claimant to prove recklessness, negligence or intention on the part of the shipowner. The second concept means that the liability is limited to a determined level. Related provisions provide for a mandatory insurance of the shipowner to cover their liabilities and for “direct action” against the shipowner’s insurer.
- B.4 Depending on the convention, the liability limits can differ for claims arising out of death/loss of life and personal injury and for property claims. However, these Guidelines focus on material damage.
- B.5 Liability limits in International Maritime Organization (IMO) conventions are expressed in Special Drawing Rights (SDR). The SDR is an artificial unit. The value of the SDR is calculated by the International Monetary Fund (IMF) on the basis of a weighted basket of four currencies: US dollar, euro, Japanese yen, and UK pound. The four currencies and their relative weightings are revised every five years.

Overview of the international legal regimes

- B.6 This Appendix gives a brief description of the international legal instruments addressing claims generated by ship-sourced pollution incidents. However, the purpose is not to provide definitive legal advice since those instruments are generally complicated and not reflected in detail in this Appendix. State/NT maritime administrations and associated agencies should seek their own legal advice.
- B.7 The main international legal instruments are:
- (a) where persistent oil, carried by an oil tanker causes, or threatens to cause, pollution damage:
 - 1992 Civil Liability Convention;
 - 1992 Fund Convention; and
 - 2003 Supplementary Fund Protocol;

- (b) where bunker oil, carried by any other type of ship causes, or threatens to cause, pollution damage:
 - 2001 Bunker Oil Convention with liability limits linked to those established by the Convention on Limitation of Liability for Maritime Claims, 1976 including the 1996 Protocol;
- (c) where a discharge of oil by an offshore facility causes pollution damage across jurisdictional boundaries:
 - no global regime of liability and compensation exists in such incidents. However, Australian legislation requires titleholders to maintain appropriate insurance cover for eventualities such as pollution damage and response costs.

B.8 Various Conventions that may be considered in parallel with the previous legal instruments are the Convention on Limitation of Liability for Maritime Claims, 1976 including the 1996 Protocol, provides limitation to the shipowners' liability.

B.9 More detailed information can be found at either the IMO (www.imo.org) or the IOPC Funds (www.iopcfund.org) websites.

Limitation of Liability for Maritime Claims (LLMC)

B.10 The Convention on Limitation of Liability for Maritime Claims, 1976 (1976 LLMC), including the 1996 Protocol, is another IMO instrument. The 1976 LLMC runs parallel with some of the international conventions mentioned above.

B.11 Both "shipowners" (owner, charterer, manager and operator of a seagoing ship) and "salvors" (any person rendering services in direct connection with salvage and/or recovery operations) may limit their liability. The liability limitation applies to general ship-sourced damage, discriminating between claims concerning death/loss of life or personal injury and property claims.

B.12 The 1976 LLMC, and its Protocol, provides for a virtually unbreakable system of limiting liability. It declares that a person liable will not be able to limit liability only if "it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result".

B.13 Competent court:

Any person alleged to be liable may constitute a fund with the court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. Limitation of liability may be invoked without constituting a limitation fund, unless otherwise provided in national law.

B.14 Entry into force:

- 1 December 1986: 1976 LLMC;
- 13 May 2004: 1996 LLMC Protocol.

B.15 More detailed information is available on the IMO (www.imo.org) website.

Pollution caused by persistent oil carried in tankers

- B.16 The international compensation regime for persistent oil pollution damage from tankers, developed under the auspices of the IMO, is a three tier system:
- First tier: the International Convention on Civil Liability for Oil Pollution Damage 1992 (the “1992 Civil Liability Convention”);
 - Second tier: the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the “1992 Fund Convention”); and
 - Third tier: the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the “2003 Supplementary Fund Protocol”).
- B.17 The 1992 Fund and the 2003 Supplementary Fund are financed by contributions paid by any person who has received, during the preceding calendar year, more than 150,000 tonnes of crude oil or heavy fuel-oil in a Party State after sea transport.
- B.18 The owner of a tanker has a strict, but limited liability. The owner of a tanker carrying more than 2,000 tons of oil in bulk as cargo is obliged to maintain insurance or other financial security (mostly through a P&I Club or other ship’s insurance provider). Tankers must carry on board a State-issued certificate to attest that such financial security is in place.
- B.19 The pollution damage costs exceeding the first tier level should be claimed against the 1992 Fund and the 2003 Supplementary Fund. In some rare cases, the Funds may meet ‘1st tier’ claims (for example, if the claimant cannot identify the tanker owner, or if the tanker owner has no insurance cover and is insolvent).
- B.20 The following costs of pollution damage as outlined in the IOPC Funds’ Claims Manual are covered:
- cost of response operations on water and on shore;
 - cost of reinstatement of the environment;
 - property damage;
 - economic losses by fishermen or those engaged in mariculture;
 - economic losses in the tourism sector; and
 - the costs of preventive measures, to prevent or minimize such damage, are also covered.
- B.21 One of the most essential criteria for establishing that a claim is eligible is the reasonableness of the measures, based on an assessment of the facts available at the time of the decision to take them. Claims are not accepted if the claimant could have foreseen that the measures taken would be ineffective in the particular circumstances of the incident. On the other hand, the fact that the measures prove to be ineffective should not in itself be a reason to reject a claim for the costs incurred.

The assessment of the grave and imminent threat shall be made on actual facts and objective criteria at the time the decision was made.

B.22 Entry into force:

30 May 1996: the 1992 Civil Liability Convention and the 1992 Fund Convention;

3 March 2005: the 2003 Supplementary Fund.

B.23 More detailed information can be found at either the IMO (www.imo.org) or the IOPC Funds (www.iopcfund.org) websites.

Pollution caused by persistent oil carried in ships other than tankers

B.24 The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (“Bunkers Convention”), also established within the IMO, is a single tier international compensation regime.

B.25 The owner of a ship, other than a tanker has a strict, limited liability for pollution damage arising from an incident involving bunker fuel. The owner of a ship over 1,000 gross tonnage must maintain insurance or other financial security. A State-issued certificate attesting that such a security is in force shall be carried on board the ship. The owner of the ship and the person(s) providing insurance or other financial security are entitled to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims (1976 LLMC) and its Protocol.

B.26 The following costs of pollution damage are covered:

- cost of response operations on water and on shore;
- cost of reinstatement of the environment;
- property damage;
- economic losses such as:
 - o those engaged in mariculture;
 - o economic losses by fishermen;
 - o economic losses in the tourism sector;
 - o costs and losses for a port or harbour; and
- the costs of preventive measures, to prevent or minimize such damage, are also covered.

B.27 Entry into force of the Bunkers Convention:

21 November 2008

B.28 More detailed information is available on the IMO (www.imo.org) website.

Pollution caused by pollutants other than persistent oil carried in ships

- B.29 There is currently no international liability and compensation regime which directly addresses pollution damage caused by hazardous and noxious substances.

Pollution caused by offshore installations

- B.30 Where a discharge of oil by an offshore facility causes pollution damage that extends into other jurisdictions, there is no global regime of liability and compensation for such cross-boundary pollution.
- B.31 However, under the Australian legislation regulating offshore petroleum exploration and production in Commonwealth waters (the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*), petroleum titleholders must hold adequate financial assurance (e.g. self-insurance, bank guarantees, traditional insurance) to cover costs, expenses and liabilities arising in connection with carrying out a petroleum activity, such as costs associated with pollution damage and clean-up, which may include clean up across jurisdictional boundaries. Recent amendments to the Act clarify this requirement, as well as strengthen and clarify the “polluter pays” requirement for titleholders to cover the costs of the incident response. The “polluter pays” provisions only apply, however, in relation to the costs of clean-up and remediation within Australia’s jurisdiction; they do not require the titleholder to undertake clean-up or remediation activities outside Commonwealth waters, or pay for these activities outside Australian waters, or provide for compensation for economic loss suffered by persons either within or outside Australian jurisdiction.

International Convention on Salvage

- B.32 The International Convention on Salvage, 1989, introduces a “special compensation” (Article 14) to be paid to salvors who have failed to earn a reward in the normal “no cure, no pay” way. This special compensation takes pollution into account and creates an incentive to a salvor to undertake an operation that has only a minor chance of success.

For this special compensation, SCOPIC 2011 is an extra provision in the Lloyds Open Form (LOF 2011 contract).

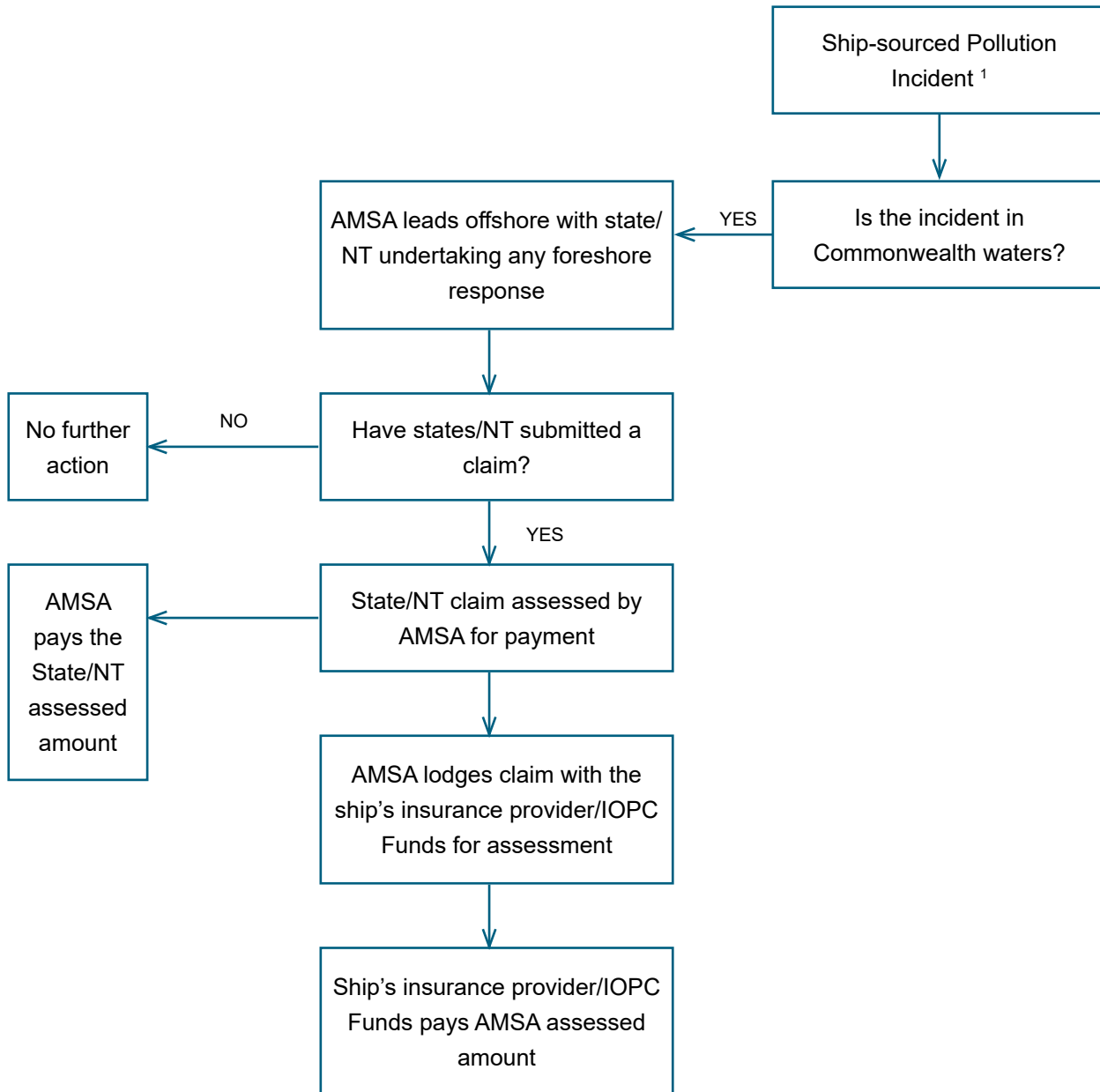
If SCOPIC is invoked, a SCR (Special Casualty Representative) is instructed to follow up the salvage and to report to P&I and Hull and Machinery underwriters.

- B.33 More detailed information is available at www.imo.org.

Pollution from an unidentified source

- B.34 Generally, claimants can only obtain compensation if they know its precise source. However, there is one exception to this. The IOPC Funds may pay compensation for pollution damage if the claimant can prove (for example, by sophisticated chemical analysis) that the pollution resulted from a spill of persistent oil from a tanker in a signatory State.

Outline of National Plan Cost Recovery Processes (Maritime)

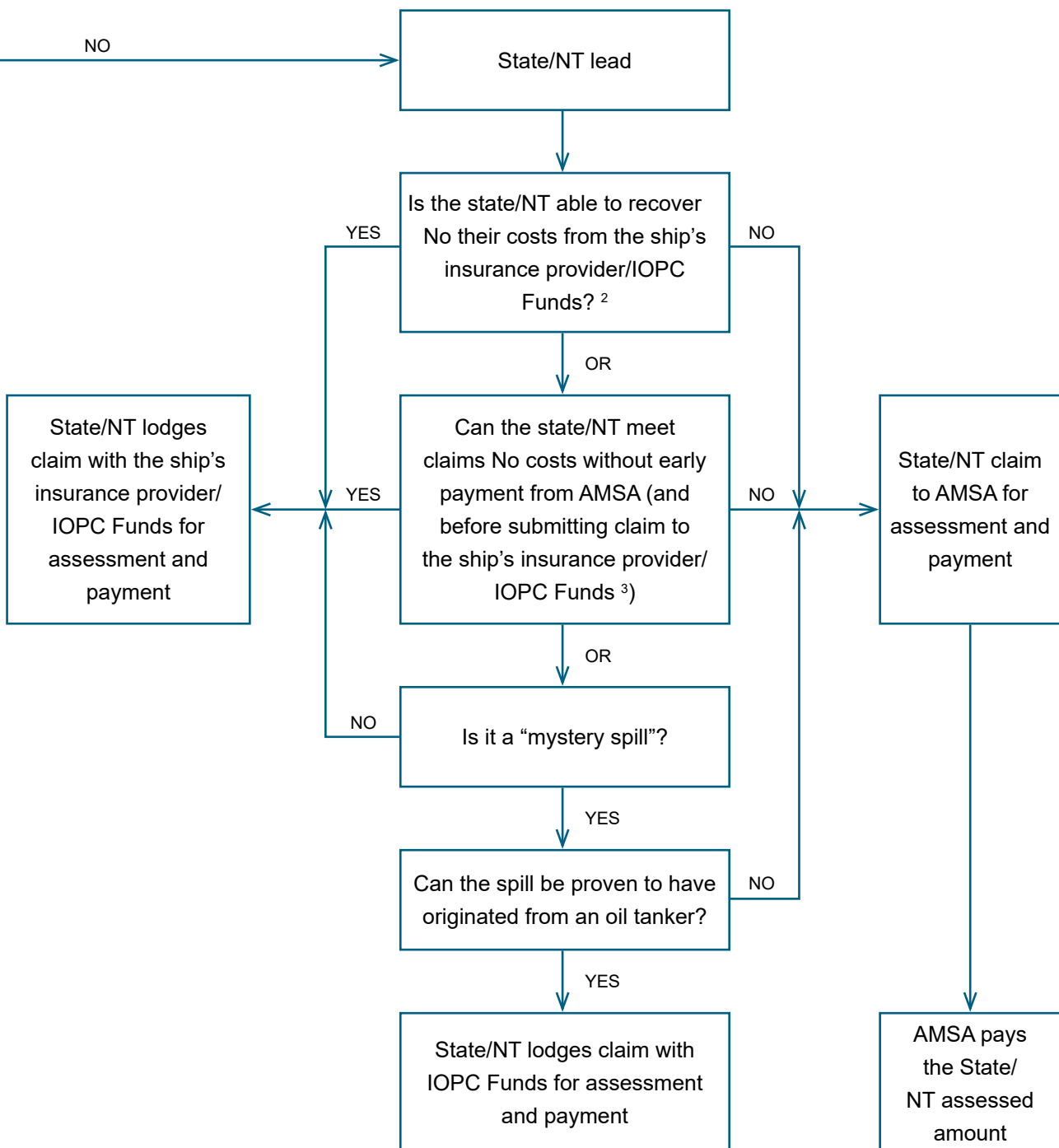


Notes:

¹ For an incident occurring outside of Australia involving an NRT response, all claims should be submitted to AMSA for forwarding to the relevant overseas maritime authority.

² Circumstances where a state/NT maritime administration may be unable to recover their costs include inter alia where legal action is unsuccessful; the owner/operator of a vessel is unable to meet their financial obligations; the international arrangements provide an exemption for the particular incident, etc.

³ Following payment by AMSA, a state/NT lodges their claim with the ship's insurance provider with subsequent reimbursement to AMSA once payment received.



Indicative examples of activities associated with reinstatement / restoration of an impaired environment that may be met under the National Plan

Habitat	Activities that may be met	Activities that may not be met
Sandy beaches, rocky headlands, sand dunes	Beach/shoreline clean-up including low impact cleaning of sandy beaches and rocky headlands and physical removal of contaminated sediments, reprofiling beach, replanting of dune plants, sand replenishment ¹⁰ .	Artificial breeding, recolonisation or replanting programs to enhance local populations Habitat reinstatement or reconstruction including sand replenishment of damaged beaches.
Coral reefs	Dive inspections to identify sources and locations of oil. Low-level saltwater washing of coral communities if warranted.	Artificial breeding, recolonisation or replanting programs to enhance local populations Habitat reinstatement or reconstruction. Physical damage caused by ship groundings is outside the scope of the international liability and compensation Conventions, and is not included under the National Plan.
Mangroves & salt marshes	Low volume saltwater flushing of oil from mangroves and salt marshes	Artificial breeding, recolonisation or replanting programs to enhance local populations Habitat reinstatement or reconstruction

Populations	Activities that may be met	Activities that may not be met
Seabirds and other wildlife	Collection, transport and treatment of wildlife Measures to prevent wildlife being affected, such as hazing, including collection, care in captivity and release	Artificial breeding, recolonisation or replanting programs to enhance local populations Monitoring, after release, of treated wildlife or their local population
Seagrass communities	Low volume saltwater flushing of oil from seagrass communities	Artificial breeding, recolonisation or replanting programs to enhance local populations Habitat reinstatement or reconstruction
Open ocean & pelagic communities	Removal of surface oil if warranted	
Seabed communities	Removal of surface oil if warranted	

⁸ These are indicative examples only. Any and all restoration or reinstatement measures or activities will need to be considered in the particular circumstances associated with the incident, the response and the environment affected. In general any restoration or reinstatement activities or measures should only be considered if they are likely to achieve one or more of the following outcomes: accelerate or improve the natural processes of recovery; or prevent further damage as a result of the incident or the response; or prevent the degradation of other habitats. These measures should also be technically feasible and their costs should not be disproportionate to the extent of the damage and duration of likely recovery, nor to the benefits likely to be achieved.

⁹ The costs incurred and the relationship between those costs and the benefits derived or expected, should be proportionate. While it is understood that response organisations often find themselves compelled by political pressure and concerns expressed by the public and the media to adopt measures which are not technically reasonable, such actions are unlikely to qualify for compensation

¹⁰ Sand replenishment is rarely likely to be considered a reasonable option as long as natural processes are likely to replenish sand removed in cleanup operations. A possible exception might be considered to provide a usable recreational beach immediately following clean-up operations undertaken at the height of the tourist season, however, this would normally be considered as a preventive measure to minimise economic loss in the tourism sector.

Other activities	Activities that may be met	Activities that may not be met
Post spill studies	Studies are sometimes required to establish the nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible	Studies to research or investigate or test the nature of likely suitable restoration methods or actions
Restocking of fisheries through aqua/ mariculture techniques	Not applicable	Not applicable
Implementation of other environmental offsets as mitigation	Not applicable	Not applicable
Community restoration projects	Not applicable	Not applicable
Removal of oil or hazardous and noxious substances in a sunken vessel	<p>Determining the quantity of oil or hazardous and noxious substances remaining on board a sunken ship</p> <p>Determining whether measures to remove any remaining oil or hazardous and noxious substances from a sunken ship are reasonable is done on a case-by-case basis, taking into account a range of factors.¹¹</p>	Not applicable

¹¹ For further information see the IOPC Funds' Claims Manual, December 2016 Edition

Examples of supporting information and documentation for claims¹²

Aircraft
<p>Examples of supporting documentation that could be included:</p> <ul style="list-style-type: none"> • Aircraft supplier/operator • Aircraft type and call sign • Hourly rate (showing components included in the rate for government aircraft) • Logs showing flying hours and number of crew • Receipts for landing fees and crew expenses • Passenger names and affiliations • Area surveyed, flight path followed, weather and visibility • Aerial survey reports, charts, photographs and video clips
Disposal
<p>Examples of supporting documentation that could be included:</p> <ul style="list-style-type: none"> • Source of waste (vessel names or beach name for shoreline point of origin) • Cost of temporary storage, location of sites used and records of movement of waste; material coming in and going out • Disposal methods and quantity of waste by each method • Name of disposal contractors and location of facilities • Unit rate for each disposal method showing how costs were derived • Weigh bridge tickets • Waste authority consignment notes or equivalent • Transport costs: vehicles used, distance travelled, rate/km • Invoices and receipts • Photographs
Vessels and spill response equipment
<p>Examples of supporting documentation that could be included:</p> <ul style="list-style-type: none"> • Vessel supplier/operator • Craft characteristics: name, length overall, horsepower (kW) • Daily rate (showing components included in the rate for government vessels) • Normal crew complement • Fuel and lubricant consumption and receipts (if not included in daily rate) • Port dues and receipts • Passenger names and affiliations • Deck log including record of operational area, activities, working hours • Inventory of spill response equipment on board each vessel, daily rate for each type of equipment (if not included in vessel rate), deployment log recording period 'in use' for each equipment type, photos and video clips • A daily estimate of the quantity of oil recovered • Record of volume of oil discharged (to mother ship or ashore) for each discharge • Records of any equipment damage including circumstances in which damage occurred and photographs • Materials consumed by each vessel e.g. dispersant

Shoreline clean up

Examples of supporting documentation that could be included:

- Maps or charts of the extent of shoreline pollution
- SCAT team (Shoreline Clean-up Assessment Technique) reports or equivalent detailing levels of pollution and recommended clean-up techniques and end points for each worksite or section of shoreline, photographs and video clips
- Daily worksite (Beach master) reports recording work done, for example, hours worked, area cleaned and amount of oily waste collected
- For each worksite, daily lists of equipment used, rates and supplier
- Incident or damage reports
- For each worksite daily lists of materials consumed, noting supplier
- Contractor rate sheets
- Rates and time sheets for personnel by worksite (showing components included in the calculation of the rate for government employees)
- Payslips

Response organization

Examples of supporting documentation that could be included:

- Organisational structure, roles and responsibilities
- Personnel rates related to roles and responsibilities (showing components included in calculation for government employees) time sheets, pay advice and justification of expenses incurred for travel, accommodation and food
- Photographs, video clips, and charts identifying the area affected by the spill and chronicling progress of clean-up operations
- Records of weather conditions and predictions of oil movement
- Communication logs with each sector of the response operation
- Log of events
- Minutes of strategic meetings, noting amongst other things, how priorities were set and the rationale for response decisions including decisions to bring operations to a close
- Minutes of daily progress review meetings

Wildlife cleaning and rehabilitation

Examples of supporting documentation that could be included:

- Name of organisations involved
- Names of personnel, roles, responsibilities and qualifications, hours worked and amounts paid as for other spill response personnel
- Number of each species undergoing treatment
- Photographs and video clips
- Period required for cleaning and rehabilitation
- Numbers of animals successfully released back into the wild
- Cost breakdown as for other spill response costs e.g. personnel, equipment, materials, transport and disposal
- Value of any donations or aid received

Protection of sensitive resources

Examples of supporting documentation that could be included:

- Maps of location of sensitive resources and associated protective measures
- Description of sensitive resources
- Description of type of protective measures implemented e.g. hard booms, sorbent booms, temporary physical barriers, tidal currents, lengths involved, materials used, costs
- If booms were used; manufacturer, model, length deployed, anchoring arrangements, daily rates, period of deployment and supplier
- Photographs

¹² IOPC Guidelines for presenting claims for clean up and preventive measures, 2018 Edition

Format for claims

1. **Area affected**

Delineation of the area affected, describing the extent of the pollution and identifying those areas most heavily contaminated (for example using maps or nautical charts, supported by photographs, video or other recording media).

2. **Analysis and/or other evidence linking the oil pollution with the vessel involved in the incident**

Analytical and Legal

In any ship-sourced pollution incident, the substance released may have to be sampled for different reasons. First of all it is necessary to identify the substance for safety and response purposes. Secondly, the analysis might be required for legal proceedings against the suspected polluter. The sampling should be done according to state/territory legislation (criminal law), meaning that an authorised person needs to take the sample, keep it secure and follow strictly documented administrative procedures for handling the sample until it has been delivered to an appropriate accredited laboratory. Sampling may need to be repeated regularly, because there is a possibility other discharges could be carried out illegally close to the polluted area. In the event that the laboratory needs assistance by other experts these can be contracted in and charged accordingly with associated supporting documentation. Costs for sampling and sample analysis may be part of the costs submitted to AMSA for reimbursement.

Where the assessed response cost for any one incident exceed \$20,000, the responsible maritime administration may seek reimbursement from AMSA for the costs of analysing oil and hazardous and noxious substances spill samples and legal costs incurred in the effort to recover response costs. However, such claims will need to be clearly documented with appropriate supportive and descriptive information to substantiate the nature of the legal costs incurred. AMSA will not meet legal costs associated with any other types of actions. In particular, AMSA will not reimburse legal costs incurred in mounting a prosecution. Such costs are rightly the responsibility of the appropriate state/NT government depending on jurisdiction of the area of the spill.

3. **Summary of events**

Summary of events, including a description and justification of the work carried out at sea, in coastal waters and on shore, together with an explanation of why the various working methods were selected.

4. **Dates on which work was carried out**

Dates on which work was carried out, identifying particularly work at individual sites.

5. **Labour costs**

In preparing the staff cost component of a claim it is important for state/territory maritime administrations' claim handlers to ensure that all the necessary documentation is

collated to justify the staff rates and expenses in a claim. Such documentation could include:

- pre-determined staff charge out rates calculated in line with their contracts of employment plus all on-costs such as entitlements, superannuation, any applicable taxes and insurance costs;
- daily timesheets and personal logs;
- overtime claim forms; and
- payroll tax, etc.

It will be necessary for the state/territory maritime administration's claim handler to check that all the timings on these documents match.

Supervisory personnel should daily record:

- the operations in progress;
- the equipment in use, where and how it is being used;
- the names and number of personnel deployed, how and where they are deployed; and
- the materials consumed.

It should be noted that AMSA will not meet costs associated pursuant to legislation relating to workers' compensation, other than the premium for insurance directly relevant to persons involved in a particular incident nor will AMSA pay compensation or damages for the death or injury to a person or the loss of or damage to property. Also, AMSA will not meet a general uplift factor that may be applied to salaries or wages, nor will it meet add-on costs such as disaster loadings, etc., which may occasionally be claimed.

Finally, state/territory maritime administrations should note that the time spent on claim compilation and supporting document collation can also be included in the claim.

Staff costs for personnel above the Marine Pollution Controller

State/NT maritime administrations need to ensure that claims for all costs associated with senior department/associated agency personnel who fall outside of the direct line responsibility for managing a maritime incident are excluded. Such personnel may include, but are not limited to, an agency head, Chief Executive Officer, Chair, Director-General and Chief Financial Officer. Claims for costs associated with Ministers and their staff should not be included. The National Plan has an established policy of only meeting costs for response personnel limited to the Marine Pollution Controller (MPC) and below. This has been AMSA's position since the National Plan commenced, and is based on the IOPC Funds' Claims Manual and their general policies and procedures.

Staff cost for personnel engaged in activities not directly related to the response

In a similar fashion as outlined above, state/territory maritime administrations need to ensure that costs associated with staff working on peripheral matters related to a response such as preparation of Ministerial briefs, etc., are not inadvertently included in their claims.

Volunteers

It is quite common in some response efforts that use is made of volunteers, particularly with regards to responding to oiled or injured wildlife. In general, for a range of reasons

(such as lack of insurance, lack of training, etc.,) the National Plan tends to discourage the use of volunteers. However, reasonable travel, meals and accommodation costs of volunteers are in principle acceptable and could be claimed as would be any costs associated with organising and coordinating volunteers.

Scientific and Technical Advice/Contractors

Should a state/territory maritime administration require the services of contracted- in scientific and technical staff it is necessary to acquire a daily time sheet from each individual recording time, activities undertaken, an hourly rate and any expenses incurred. This additional expert advice should be to aid decision making for the response operations to assess its effectiveness and to ensure that more damage is not being incurred by the response measurers adopted.

6. Travel, accommodation and living costs for response personnel

All travel costs including flights, ferries, etc., should be included as part of the claim. Similarly, all accommodation, whether hotel/motel, bed and breakfast, etc., for response staff should be included.

Costs for any paid travel allowance (i.e. to meet breakfast, lunch, dinner, incidentals, etc.) when staff are working away from their normal place of work are usual claims accepted for payment under the National Plan. State/territory maritime administrations will need to support their claim with relevant travel and expense forms.

7. Equipment costs

Generally, plant and equipment should be hired wherever possible. However, under some circumstances, the hire of essential plant or equipment may not be possible and purchase is the only feasible option available. If this is the case, any supporting documentation justifying the purchase of an asset should be forwarded as part of the claim. It should be noted that the total cost of an asset that has a residual value may not be fully recoverable. However, a portion of the total cost of the asset (pro rata) may be reimbursed.

Third party invoices must be provided and included in the claim for all items purchased.

Experience indicates that state/territory maritime administrations and/or associated agencies should, if possible, directly procure any items necessary. This is preferable to appointing contractors to procure items as they may apply a mark-up, which may then subsequently be found to be unacceptable to AMSA. It is also noted that the incident circumstances may not allow standard public procurement procedures to be implemented in a timely manner.

At the close of an incident if an item has been purchased and used specifically for that incident, the claim compiler must consider whether the item has a residual value. If so, a deduction should be made from the claim. Claims should also indicate any items purchased for the response that may have been sold afterwards. Any moneys received need to be factored into the claim and the claim settlement by AMSA. Items purchased but not used for the incident cannot be claimed.

Room/Venue/Site hire

Additional building space and/or land may need to be leased for an Incident Control Centre (ICC), Forward Operating Base (FOB), or storing equipment. The equipment and running costs required to effectively operate the ICC or FOB may be claimed. This may include:

- venue hire (e.g. building, room, or land);
- hire of office equipment (e.g. photocopiers, faxes, computers, whiteboards, tables and chairs);
- hire of site equipment (toilets, tents, etc.); and
- associated security.

It is important to ensure appropriate contract arrangements are in place and that copies of these supporting documents are supplied with the claim to AMSA.

Similarly, the cost of room hire for meetings or to actually work in should be included in this section. If for the latter requirement, justification for the extent of the hire is necessary.

Communications

Any extra telephone lines ordered and fitted into the response centres should be included in the claim with fully itemised bills. Public service response staffs' mobile telephone bills should also be included with the removal of any non-response related calls if not added as a small percentage mark-up on the overall claim. The option of applying a small percentage mark-up is further considered in Appendix F.

Utility costs

States/NT maritime administrations should also give consideration to including any additional costs associated with operating any of their response centres out of hours or over weekends. Such items may include a cost component for any additional electricity, gas or water consumption as well as costs for air conditioning, heating, etc.

8. Cost of replacing damaged equipment beyond reasonable repair*Damaged Asset*

Should a purchase be for the replacement of a damaged piece of equipment, the damage must be photographed and an independent report obtained where possible/practical. Where a purchase of equipment is to replace a damaged piece of equipment, the cost of the replacement equipment should be reduced by:

- a) the accumulated depreciation of the damaged equipment at the time of damage and
- b) an expected scrap or sale proceeds from the disposal of the damaged equipment.

Replacement of Personal Protective Equipment (PPE)

Costs for replacement of personal protective equipment used during a response are a standard item that may be reimbursed by AMSA under the National Plan. State/NT maritime administrations will need to support their claim with relevant documentation, including invoices, receipts, etc.

9. Consumable materials

Consumable resources used in the response are potentially eligible for reimbursement and can be defined as follows:

- general stationery and incidentals;
- items that have a single use e.g. food, water, sandbags, absorbents, plastic sheeting or limited number of uses e.g. disposable overalls;
- items that could not be used for any other purpose after the event e.g. due to contamination; and
- all operating consumables – fuel, oil, grease, etc.

10. Remaining value

Any remaining value at the end of the operations of equipment and materials purchased specifically for use in the incident in question.

11. Age of equipment not purchased specifically for use in the incident in question, but used in that incident

12. Transport costs

Transport costs for personnel, equipment, waste material, etc. (number and types of vehicles, vessels or aircraft used, number of hours or days operated, distance travelled or start and end locations, rate of hire or operating cost, method of calculating rates claimed) and relevant information (tickets, weighbridge reports, manifests, log books, etc.).

Car Hire

All vehicles hired for the mobilisation of response staff need to be included in this section clearly stating who the drivers were and what their activities were for the entire hire period. All supporting documentation – hiring contracts, daily rates, fuel purchases, etc., should be provided.

In some cases, state/territory maritime administrations and/or associated agencies may also make use of government owned or personal vehicles. Also, in some cases specialised vehicles equipped with a range of telecommunications equipment have been developed for response purposes. The daily charge out rate for all such vehicles and the basis for calculating this rate as well as any supporting logbooks will need to be provided to AMSA when submitting the claim.

13. Cost of temporary storage (if applicable) and of final disposal of recovered oil and oily material

Waste treatment and disposal

In most response operations to oil/hazardous and noxious substances pollution incidents waste will be collected. Deployed equipment that is contaminated with oil/hazardous and noxious substances requires cleaning and the cleaning of response vessels can be time consuming and costly. Also the recovery of oil/hazardous and noxious substances from the coastline may result in tonnes of oily debris e.g. oil/hazardous and noxious substances and sand mixture.

Experience gained in many incidents shows that the effective waste treatment and disposal of waste can take many weeks or even months. A claim cannot be completed until all tasks have been completed and also waste disposal is finalised, unless parties agree that the total costs for the disposal can be settled on the basis of the estimated costs. National and state/territory contingency plans should include waste disposal policy and any pre-agreed arrangements, if applicable.

All invoices associated with the temporary storage (if applicable), treatment and final disposal of recovered oil and oily material waste from a response should be forwarded to AMSA for reimbursement as part of any claim under the National Plan.

Wash Down/Decontamination Facility

Any state/territory maritime administration or associated agency, port or contractor appointed to establish a wash down/decontamination facility needs to devise a system to log vessels and large equipment in and out of the facility, preferably taking photographs regularly during the cleaning process. This photographic evidence and invoices should be included with the claim. Records of wastewater disposal should also be maintained.

14. Miscellaneous

Depreciation

The depreciation of an asset owned by a maritime administration and used in a response activity may be recoverable. This Section should only be applied where there is no equipment hire rate charges and cost recovery is based on depreciation of the asset used (see also paragraphs 5.6-5.19 where a depreciation component is built into equipment hire rate charges). The depreciation amount claimed should be calculated using the depreciation method applicable to that asset in the financial year of its use (i.e. as used in the maritime administration's annual report for that year). The method of calculation must comply with the Australian Accounting Standards.

The length of time used in calculating the asset's depreciation will be driven by the life of the asset and the length of time the asset was used in the response. An asset with a short useful life (e.g. one year may recover its full depreciation cost whereas a long life asset should only recover the depreciation cost relative to the time it was used in the response). Evidence of use of the asset should be provided in a record keeping system, for example in the assets' log or maintenance book.

Insurance

Pro rata insurance costs associated with both personnel and assets utilised during a response may be included in a claim to AMSA under the National Plan.

Commercial charges

Profit surcharges and margins included in claims for commercial business units of Government agencies may be accepted under the National Plan, so long as they are reasonable and in accordance with usual business practices. Justification for the commercial charges and the basis of calculation will be required to be submitted with the claim.

Loss of revenue

Loss of revenue in state/territory managed areas such as parks and reserves may be included in claims. Acceptable claims for loss of profit from impairment to the environment include reduced income from car parking, camping or mooring fees.

Interest

Interest charges (if claimed) must fall under the broad IOPC Funds requirement for 'quantifiable economic loss' and may generally arise in two scenarios:

- interest on money borrowed to pay for response costs; or
- the opportunity cost of not being able to invest money spent on response costs.

In such circumstances there may be an interest component charged or sought from AMSA by the state/NT maritime administration, its Treasury or financial provider. Should such circumstances arise, the state/NT maritime administration is urged to discuss their proposed arrangements with AMSA as soon as possible to clarify the position on such interest payments and prior to entering any binding commitment. In circumstances where an interest charge is sought, the claimant will need to demonstrate and provide supporting documentary evidence to AMSA's satisfaction which of the two scenarios outlined in Appendix F apply. In general, it is considered that interest charges:

- would only arise in major incidents;
- should be applied from the date that all response operations are formally concluded; and
- on individual claim items should normally not start to accrue before an expense has in fact been incurred.

In circumstances where AMSA has agreed to pay an interest component in a claim, simple interest will be calculated using the Reserve Bank of Australia's published 90 day Bank Accepted Bill Rate.

Where AMSA has made progress payments to a state/territory maritime administration, the state/territory maritime administration should include an amount in any claim submitted to the shipowner/ship's insurance provider to cover interest for such payments payable to AMSA. AMSA should be requested to provide details for inclusion in claims.

Indexing

A common practice in some quarters is to subject an initial response claim to indexing based on the consumer price index (CPI). The National Plan does not recognise the indexing of claimed amounts by the CPI or any other indexing factor.

Percentage mark-up on some claim components

A practice that may apply is to include a small percentage mark-up on some claim components prior to submission to a shipowner/ship's insurance provider. This approach is used to meet or cover those costs which may be either time consuming to compile such as mobile communication costs or difficult to factor in such as indirect costs that may not be easily built into a daily charge out rate. While AMSA will consider claims which utilise such an approach care need to be taken to ensure that there is no double counting of costs such that AMSA is charged twice for one cost component. For example, for the daily charge out rate for response assets, either a percentage mark-up

may be applied or charge out rates are calculated exclusive of indirect costs. State/NT maritime administrations will need to clearly identify which approach has been used and provide supporting documentation in support of their adopted methodology.

Post Incident Debriefs

It is widely recognised that many benefits can be obtained from immediate or “hot” post incident debriefs of responders to gain an insight into lessons learned for future responses. Costs associated with such debriefs and feedback sessions are seen as being of benefit to the agencies involved and therefore should not be claimed from AMSA. Costs for such debriefs could be pursued from the shipowner, the ship’s insurance provider or the IOPC Funds. In contrast, “hot” debriefs conducted at the end of a day’s work or activity, which are designed to improve subsequent response actions the following day, may be included in a claim for reimbursement.

Catering

Cost associated with catering for meetings directly related to response operations are usually an acceptable item under the National Plan. Supporting documentation indicating costs, purpose of meeting, names attending, etc., should be included in claims documentation submitted to AMSA.

Miscellaneous - Other

This section should be used for any response purchases or activities that do not fall into any of the above-mentioned categories.

Salvage costs

It is likely that during a response certain response measures may be directly arranged for (and paid for) by the owners. For instance in the recovery of lost containers or for the removal of pollution from a potentially polluting wreck, the owners may contract a salvor for this work. In such circumstances, there would be no claim for payment for salvage costs submitted to AMSA for reimbursement under the National Plan.

However, circumstances may arise during a maritime incident and its subsequent response as to whether activities are being undertaken as an action under the National Plan and/or as a preventative measures or whether activities are related to actions under the National Plan’s emergency towage capacity in addressing salvage and related activities.

In addressing such situations, AMSA will apply the IOPC Funds’ test of “primary purpose”. That is, the actions and or operations could be considered as falling within the definition of preventive measures only if the primary purpose was to prevent pollution. If operations primarily had another purpose, for example to salvage the hull or cargo, the operation would not be covered by the definition and accordingly any such action should be claimed directly from the salvor and not against the National Plan. Examples of such activities could include hydrographic survey costs or hydrodynamic modelling costs prior to bringing a vessel into a place of refuge.

In some instances, activities may incur costs that come under multiple claims criteria. These claims should be sorted as above, not as one claim grouped by activity. Examples of these activities with multiple claims categories include include:

Aerial and satellite resources

- aerial surveillance flying hours – if this is a contracted-in resource the contractor should provide a separate invoice showing hours flown, hourly rate (as determined in the contract), landing fees, subsistence rates and accommodation costs if the flight crew have an overnight stop;
- aerial dispersant spraying hours;
- helicopter use – different rates could be applied here depending upon whether a state/territory resource or a contracted-in one is used, noting costs must still be reasonable and any differences between government and commercial rates should be explained. Also whether the flying hours were at the request of a shipowner appointed salvage organisation. These rates can be pre-determined in the planning stage and prior to any incident occurring;
- mobilisation flying hours – should the state/territory response team charter an aircraft to mobilise to the scene of an incident, this cost should be included but it is necessary to record all personnel on board. If there had been time to get more than one quotation for this flight – include copies of the competitive quotations with the claim; and
- use of satellite resources – occasionally during a response use of satellite resources may be necessary for a maritime administration to assess and survey wide scale pollution distribution. If this is a contracted-in resource, the contractor should provide a separate invoice showing images used, their cost of preparation, staff time (hours), etc.

It should be noted that AMSA will not reimburse costs and expenditure for costs of patrol, search and surveillance or other activities not directly related to a particular incident, actual or reported, or not approved by the Incident Controller or their delegate.

On Water Response

This includes any state/territory owned vessels as well as any vessels chartered in for response operations. It is necessary to acquire supporting documentation of all the vessels' activities as well as the invoice. A full specification of every vessel is needed to justify the expenditure. For example, if applicable, this documentation may include:

- oil/ hazardous and noxious substances response equipment;
- capacity of tanks, including heating, pumping capacity;
- crew size and whether included in the charter rate, possible crew changes and associated travel costs;
- research into rate offered – investigate whether rates had previously been published;
- condition at start of charter – photographs;
- condition at end of charter – photographs;
- if oil/ hazardous and noxious substances recovered – daily quantity/volume recovered and how disposed of;
- daily activity log of every vessel including a log of the vessel's movements and a record of its engine hours;
- if an oil/ hazardous and noxious substances recovery vessel, advice whether charges for the equipment on board are included in the agreed charter rate;
- full contact details for the owner – and who they reported to;
- copy of invoices for any additional harbour dues, mooring charges, fuel and lubes,

- etc. incurred as a direct consequence of an incident;
- whether bunkers were included in the charter party agreement; and
- the previously calculated daily charge out rate for each state/territory owned vessel.

Also include the activities of any salvage equipment stockpile contractor that a maritime administration may have engaged. These contractors should provide a separate invoice for work carried out on a specific incident response. Their invoice should include staff names, hours worked, travel costs, subsistence costs, etc. State/territory maritime administrations should ensure that they request a daily log of what each member of this contracted-in resource were actually working on. This report should be included with the claim as justification for their employment.

Off task activities

State/territory maritime administrations and associated agencies need to exercise care to ensure that accurate records are maintained of the daily activities that a vessel undertakes. Occasions have arisen whereby a state/territory owned or chartered vessel may undertake an activity that clearly falls outside of the scope of the National Plan and is an activity that is undertaken for non- response purposes. Examples have arisen whereby a National Parks vessel involved with a response comes off task to investigate a fishing or boating offence. Such actions will have an impact on the vessel's claimed costs during a response and will need to be factored out of any claim prior to submission to AMSA.

Beach/Shoreline Response

For claims for any contracted-in shoreline response contractor, the contractor should provide a separate invoice for work carried out on a specific incident response. Their invoice should include staff names, hours worked, travel costs, subsistence costs, etc. The state/NT needs to ensure that they request a daily log of what each member of staff was actually working on. This report should be included as supporting documentation with the claim as justification for their employment.

It is possible that state/territory maritime administrations and associated agencies may employ temporary staff to work on beach shoreline response activities. Again, it is necessary to justify this type of recruitment and provide timesheets and logs of activities for every individual. Details of every name must be provided, not just the quantities of staff, even if the recruitment had been facilitated by another organisation.

It is possible that staging areas will need to be established for the distribution of response equipment to several front line sites. Procedures for the issue and distribution for equipment should be established and recorded. These procedures should be especially useful for the justification of the use of consumable items such as absorbent and personal protection equipment, i.e. overalls, gumboots, gloves, hats, etc. It will be necessary to justify the quantities of such equipment. It may be likely that this staging area will need to be hired from a port or local authority. If so, any agreement reached will need to be included in the claim.

It is often necessary to hire further equipment at the scene of an incident. This equipment could include cranes, forklift trucks, etc. The Financial or Claims Coordinator should make every effort to acquire copies of printed/published hire rates from the equipment

supplier and copies of this documentation need to be included with the claim as proof that the rates were not inflated in an exaggerated manner due to the increased demand in the area of the incident.

It should be noted that beach/shoreline response costs may also include not just costs for staging areas as outlined above, but also costs associated with providing meals, shelter, toilets, decontamination, rest areas, medical support, site administration, logistical support, waste management, storage and wildlife treatment centres. All cost associated with activities and infrastructure should be included in the claim.

Wildlife treatment

Pollution may have an impact on wildlife. Mineral oils, but also edible oils, will contaminate bird feathers causing hypothermia (due to the oil impairing the bird's natural waterproofing) while ingestion of oil by wildlife will also have a serious impact. In a similar fashion, hazardous and noxious substances spilt into the environment also have the potential to seriously affect wildlife. All Australian states and territories have in place arrangements for responding to oiled and injured wildlife usually coordinated through government environment and conservation departments. Wildlife authorities will collect living contaminated birds for treatment as well as dead birds (for record purposes and/or research). Wildlife treatment has procedures in place for triage, cleaning and nursing animals.

Costs involved in the collection, transport and treatment of wildlife may be claimed as well as costs for wildlife responders, accommodation, travel, transport of equipment, cleansing and veterinarian medical consumables, site hire, communications, utility costs, etc.

Dispersant

If dispersant is used during an incident response, claims could include such items as:

- types used and how applied i.e. by sea or air;
- where the dispersant was mobilised from;
- cost of transport to airport/port;
- quantity of each type used;
- cost of replacement stock;
- cost of forklift operations;
- cost of other logistic, operations and storage components;
- cost of cleaning containers;
- cost and methodology of special waste disposal/tank disposal;
- costs for platform (e.g. aircraft, helicopters, vessels); and
- any net environmental benefit analysis undertaken prior to the decision to apply the dispersant.

Costs of Modelling

Based on information obtained by satellite/aerial surveillance or directly from the source of the pollution, computer modelling generally is used to predict behaviour and drift of the pollution. Computer models can also be run when containers or other deck cargo has been lost overboard. The outcomes of the modelling are applied in the response measures to get directions for response planning purposes or for deployment of booms. Another example is a model as a decision support tool for the application of dispersants. Cost associated with any such modelling should be included in the claim to AMSA for

reimbursement. It should be noted, however, that in many cases it will be AMSA that arranges and pays for any modelling undertaken and consequently recovery of such costs would be undertaken by AMSA.

Monitoring Studies

Experience has demonstrated that during an incident response, monitoring can provide a valuable feedback tool to responders in quantifying the extent of an incident as well as the effectiveness of response measures. Under the National Plan, two types of monitoring are generally recognised – response phase and recovery phase – more defined by their objectives than their methodologies or application. Examples of each type of monitoring are given in the Oil Spill Monitoring Handbook (CSIRO 2016).

Response phase monitoring relates directly to the objectives of the response and the spill clean-up operations, including planning, execution, assessment and termination. Response phase monitoring (previously termed ‘operational’ or ‘Type I’ monitoring) should be designed to improve situational awareness, enhance information available to response advisors and decision makers, assess the efficacy of the response in mitigating spill effects, and assess any impacts of the response on sensitive resources.

In contrast, recovery phase monitoring (previously known as ‘scientific’ or ‘Type II’ monitoring) includes short- and long-term damage assessments, environmental recovery assessment following an oil spill response, scientific studies on affected resources and all other monitoring activities not strictly related to mitigating the environmental impacts of an oil spill. These costs will not be reimbursed by AMSA. The only exception would be “impact studies” outlined below.

For additional information on response phase and recovery phase monitoring, see Oil Spill Monitoring Handbook (CSIRO 2016), available in digital and physical formats at <http://www.publish.csiro.au/book/7585/>.

Impact Studies

Studies may continue after the first or major response is concluded, should the spill (and effects) become latent or chronic. Response phase studies may be required to ascertain the volume of oil remaining on a sunken vessel and the risk of further or ongoing leaks over a period of time. These leaks may result in further or chronic levels of pollution to the adjacent marine, coastal or riverine environments. Impact studies will not be necessary after all incidents and will normally be most appropriate in the case of incidents where there is a likelihood of further environmental impacts and possible response measures required. In effect, the spill and the response has not fully concluded and is ongoing. AMSA may contribute to the cost of these studies, but where the initial spiller has been identified and response costs sought, the costs of ongoing risk monitoring and response, should be factored in to any future site/vessel/wreck management planning with costs met by the shipowner/ship’s insurance provider.

Where studies are required to establish the precise nature and extent of environmental damage caused by an oil/hazardous and noxious substances spill and/or ship grounding, they are considered recovery phase monitoring or studies. Effects can arise from the original spill and/or the response methodologies applied at the time. It should be noted

that such studies should not wait until after the response is concluded. Good practice would indicate they be started as soon as possible after the spill, and some of the information collected may also inform response actions, even though they are not primarily designed for recovery phase purposes.

In line with the IOPC Funds policies and Claims Manual, AMSA may contribute to the costs of recovery phase studies to establish the nature and extent of environmental damage caused by an oil/hazardous and noxious substances spill. In order to qualify for reimbursement it is essential that any such recovery phase studies are able to contribute to a better understanding of both the effects of the original spill and the effectiveness of response strategies, tactics and techniques. In other words, AMSA's interest is not in whether damage resulted or in the amount of damage; this is clearly the interest of the agency with responsibility for the area and/or resources affected by the spill and response. AMSA would value the results as a means to collect feedback about the spill and response in order to improve response effectiveness. Therefore, a study which demonstrated that no significant long-term environmental damage had occurred does not by itself exclude reimbursement for the costs of the study.

If reimbursement for the costs or partial costs of such studies is to be sought from AMSA, AMSA expects to be significantly involved in the both the design and oversight of the execution of such studies. AMSA will expect that the study design and execution be professional, objective and balanced. It should also meet requirements of scientific rigour and provide reliable information in a timely and useful manner.

Reinstatement/restoration of an impaired environment

Reinstatement or restoration of a damaged or impaired environment is normally considered a step beyond the clean-up process. In many circumstances, recovery of an impaired environment will proceed through natural processes without active intervention. In some circumstances, it may be desirable or necessary to enhance the natural recovery of an impaired environment following an oil spill through reasonable reinstatement or restoration measures. The compensation provided is not for 'pure' environmental damage (compensation for the loss of environmental services that support plants and animals). Rather they cover the costs of reinstatement of the damaged environment to restore those lost services as far as that is possible. Where such intervention is being contemplated, AMSA in conjunction with the state/NT maritime administration may examine ways for this to be done and provide assistance where able. Costs incurred for assessing intervention requirements, as well as those for implementing agreed, reasonable reinstatement measures, may be reimbursed by AMSA. Reasonable reinstatement measures are considered to be measures which aim to re-establish a biological community in which the organisms characteristic of that community at the time of the incident are present and are functioning normally, or which aim to reinstate a baseline or pre-spill condition. A table of indicative activities aimed at reinstating or restoring an impaired environment following a ship-sourced pollution incident that may be reimbursable under the National Plan is at Attachment E.

Post-Incident Response Methodological Studies

In the aftermath of an incident, it may be worth studying the affected environment in relation to response measures as well as the consequences of their impact. This type of

study is useful to learn lessons from the response measures. For example, studies were undertaken following the Amoco Cadiz incident, where high pressure steam cleaning was used in specific areas. As a result of the study, it was found that this response method had a significant impact on natural wildlife and other methods would be preferred in future. While such post-incident response methodological studies and research are of value for future responses, reimbursement for such studies should not be sought from AMSA. Costs for such studies could be pursued through either the shipowner/ship's insurance provider or the IOPC Funds, and in these instances the shipowner's insurer, the 1992 Fund and their experts should be invited, at an early stage, to participate in or provide input to the assessment of whether or not a post-incident study is justified for a particular incident. The specific criteria for environmental damage claims for post-incident claims are:

- The scope of the study should be directed towards establishing the grave and imminent threat of damage, the nature, extent and likely duration of any damage that has occurred, and monitoring the recovery of damaged environments. Elements of the study might also be included to determine the necessity and feasibility of reinstatement measures. It should not be for general scientific interest.
- The scale of the study should be in proportion to the extent of the contamination, the likely effects of that contamination and the benefits achieved through reinstatement. The timing of studies should aim to avoid unnecessarily delaying those benefits.
- The study must provide reliable and useful information and should avoid repeating previous work or duplicating other ongoing studies or projects.
- The study should be carried out with professionalism, scientific rigour, objectivity and balance, that is, studies should follow principles of sound scientific investigation.
- The progress of the study should be monitored and the results clearly and impartially documented.



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