

7. IMPROVING LEGISLATIVE POWERS REGULATING SHIPPING

- 7.1 The regulatory framework for shipping operating in the Great Barrier Reef involves a complicated application of international law, international maritime conventions, and Commonwealth and State legislation. The main agencies with an interest in regulating shipping in the Reef are the Queensland Department of Transport (QT), the Australian Maritime Safety Authority (AMSA) and the Great Barrier Reef Marine Park Authority (GBRMPA).
- 7.2 The review was tasked with identifying strategies to improve the regulatory framework governing shipping operations in the Great Barrier Reef. This included examining Australia's ability to regulate foreign shipping to the maximum extent possible under international law; defining Commonwealth and State jurisdictional boundaries; identifying areas of inconsistency between Commonwealth and State laws and potential conflicts between different legislation governing the Reef region.
- 7.3 The review also sought to identify any gaps in the legislative powers of intervention and detention, examined potential improvements to offences and penalties, and restitution action in the current regulatory framework.

INTERNATIONAL LAW

United Nations' Convention on the Law of the Sea 1982

- 7.4 Australia has undertaken to comply with certain international legal obligations that affect Australia's legislative powers to regulate foreign ships in Australian waters⁸⁵. The most significant of these is the United Nations' Convention on the Law of the Sea 1982 (UNCLOS). This sets out a general framework of internationally agreed responsibilities and jurisdictions of a ship's Flag State, which grants a ship the right to sail under its flag; Coastal States through whose maritime zones the ship is sailing; and Port States whose port the ship has entered.
- 7.5 UNCLOS divides maritime waters into a number of zones of jurisdiction, with the main zones being: internal waters, territorial sea, exclusive economic zone (EEZ) and high seas. In determining the extent of each maritime zone, UNCLOS relies upon the concept of baselines to establish the points on the coast from which the outer limits of each zone are measured. The baseline is normally the low-water line along the coast, which can be extended by features such as islands, reefs and historical practice.
- 7.6 Internal waters are on the landward side of the baseline. These waters mostly comprise bays, estuaries and ports. Coastal States may regulate the conduct and safety of foreign flag ships in internal waters as required, subject to any rights conferred by international treaty. For example, the

⁸⁵ This chapter's general discussion of the application of UNCLOS to Australia is based on advice from the Office of International Law, Attorney-General's Department of 27 January 2000.

Convention and Statute on the International Regime of Maritime Ports, to which Australia is a party, grants reciprocal right of access to, and equality of treatment within, maritime ports.

- 7.7 Territorial sea generally extends from the territorial sea baselines to 12 nautical miles. An exception exists for a number of islands in the Torres Strait where the territorial sea remains at three nautical miles, as agreed between the Australian and Papua New Guinean Governments in the Torres Strait Treaty. UNCLOS recognises the sovereignty of the Coastal State over foreign flag ships in the territorial sea but subject to their right of innocent passage, which is defined as being “not prejudicial to the peace, good order or security of the Coastal State”. Foreign ships are allowed to navigate through the territorial sea to transit these waters without entering any port or in the course of proceeding to or from internal waters or calling at a port.
- 7.8 The Exclusive Economic Zone (EEZ) extends from the outer limit of the territorial sea to a limit of 200 nautical miles from the baselines. Within this zone, the Coastal State has sovereign rights to explore and exploit, conserve and manage natural resources and other resources such as production of energy from water, currents and winds. It also has jurisdiction to establish artificial islands, installations and structures, conduct marine research and protect and preserve the environment. Foreign flag ships have rights closely associated with those applying on the high seas, such as freedom of navigation.
- 7.9 High Seas encompass all parts of the sea that are not included in other maritime zones (internal waters, territorial sea and the EEZ). No State may subject any part of the high seas to its sovereignty. The high seas are open to all States and they have the right to freedom of navigation over the high seas. In general, a flag State has the exclusive right to exercise jurisdiction over its ships on the high seas.

Great Barrier Reef

- 7.10 The application of the UNCLOS maritime zones to the Great Barrier Reef presents a relatively complex pattern for the regulation of shipping whereby ships transiting the Inner Route may move between internal waters, Australia’s territorial sea and EEZ. Similarly, the Outer Route passes through Australian territorial waters, the EEZ and the high seas.
- 7.11 For the parts of the GBR within the territorial sea, UNCLOS allows Australia to designate sea lanes and traffic separation schemes in the interests of navigational safety. While this would not require prior International Maritime Organization (IMO) approval, Australia would need to take into account any IMO recommendations on the use of sea lanes and traffic separation schemes.

Great Barrier Reef as a Particularly Sensitive Sea Area

- 7.12 The IMO endorsed the concept of a Particularly Sensitive Sea Area (PSSA) in November 1990, consistent with Article 211 of UNCLOS, which allows States, acting through a “competent international authority” like the IMO to establish international rules and standards to prevent, reduce and control pollution from ships.
- 7.13 The IMO has recognised the right of a Coastal State to introduce a range of special protective measures where it declares a PSSA, including:
- Restrictions on discharges from ships;
 - Special design, construction, equipment or manning standards for ships operating exclusively in the PSSA;
 - Ships Reporting System;
 - Ships' routing measures near or in the area in accordance with IMO general principles on ships' routing. For example, areas to be avoided, traffic separation schemes, inshore traffic zones, precautionary areas and deep water routes;
 - Vessel Traffic Services;
 - Compulsory pilotage or tug escorts; and
 - Special rules for anchorage, such as designated areas and special anchor watch.
- 7.14 In November 1990, the GBR was recognised by the IMO as the world's first PSSA. Australia successfully gained IMO endorsement in October 1991 for a scheme of compulsory pilotage for ships posing a potential environmental hazard in designated areas of the GBR PSSA. Unlike most other compulsory pilotage schemes in the world, the GBR scheme operates in an area outside of internal waters.
- 7.15 Australia had to present a strong case to justify the imposition that a compulsory pilotage scheme posed to a ship's right to innocent passage in territorial waters. This had regard to the navigational hazards and potential harm to the environment from shipping incidents in specific areas of the GBR that are now subject to compulsory pilotage.

Extending the existing compulsory pilotage area

- 7.16 The current compulsory pilotage area is implemented under the *Great Barrier Reef Marine Park Act 1975*. All vessels of 70 metres or more in length and all loaded oil and chemical tankers or liquefied gas carriers of any length are required to carry a licensed pilot on the Inner Route between Cape York (latitude 10°41'S) and the vicinity of Cairns Roads, north of Cairns (latitude 16°40'S) or when passing through the Hydrographers Passage.

- 7.17 Legal advice indicates that Australia cannot extend the compulsory pilotage within Australia's EEZ beyond the existing defined areas without further reference to the IMO.⁸⁶ Article 211(6) of UNCLOS requires a Coastal State to notify the international organisation of the special laws or regulations it intends to adopt for a PSSA over and above any general standards that the organisation may have adopted for PSSAs. The IMO has not adopted any general standards for PSSAs nor has it endorsed compulsory pilotage in particular for such areas. Therefore compulsory pilotage could only be introduced consistently with UNCLOS as an additional law or regulation under Article 211(6)(c).
- 7.18 Such additional laws or regulations are subject to a twelve month period for the agreement of the international organisation and a further three months before they become applicable to foreign ships in the area. Australia notified, and sought endorsement of, the IMO for compulsory pilotage in a specified area, not the whole of the Great Barrier Reef Marine Park. Further regulation to extend compulsory pilotage to other areas has not yet had the endorsement of IMO or the requisite notice periods and so would not be consistent with UNCLOS.
- 7.19 Any application for extension of the current compulsory pilotage area would involve preparation of a substantial supporting case, including assessment of the navigational hazards in the southern part of the Inner Route; the likely environmental damage to the area in the event of a major pollution incident; detailed analysis of the number of incidents that had occurred since 1990 in these areas; and the current density of shipping traffic.

Torres Strait

- 7.20 In the Torres Strait, there is a more complex application of international law because this is an international navigation strait for shipping and a shared boundary with Papua New Guinea. UNCLOS provides that foreign flagged ships have the right of transit passage in an international strait which shall not be impeded. This means that foreign ships have freedom of navigation for the purpose of continuous and expeditious transit of a strait between one part of the high seas or an EEZ and another part of the high seas or an EEZ.
- 7.21 UNCLOS limits the ability of bordering States, such as Australia, to control shipping transiting a strait to specific matters. These include the designation of sea lanes and prescription of traffic separation schemes for safe passage of ships. A bordering State also may adopt laws for pollution prevention, control of fishing and loading and unloading of commodities.

Compulsory pilotage in Torres Strait

- 7.22 Torres Strait is identified as a navigationally hazardous region with an environment vulnerable to harm from marine pollution, and which is

⁸⁶ Advice by Office of International Law, Attorney-General's Department on 10 November 2000.

important culturally and economically for local indigenous communities. Compulsory pilotage has been identified as a significant risk reduction measure in this region. Australia's ability to impose a mandatory pilotage requirement on ships transiting the Torres Strait is circumscribed because of the UNCLOS provisions regarding transit passage of ships through an international strait.

- 7.23 However, not all the Torres Strait may be regarded as coming within the UNCLOS definition of an international strait between one part of the high seas or EEZ and another part of high seas or EEZ. The Prince of Wales Channel is the main navigable passage in the western part of Torres Strait immediately north of Cape York. The Channel passes between Goods, Hammond (Keriri) and Wednesday Islands (see Figure 7.1).
- 7.24 The geographic location of Prince of Wales Channel appears to be unique in that it passes between two parts of Australian territory and the waters on either side of the Channel are internal waters. This geographic distinction may be sufficient to allow Australia to exercise greater control over shipping passing through the Channel and may include the ability to impose compulsory pilotage.

Recommendation 38

The review recommends that legal advice should be sought from the Office of International Law in the Attorney-General's Department as to whether there is scope for Australia to exercise sovereign powers over the Prince of Wales Channel, given that it passes between Australian territory and falls within Australian internal waters.

- 7.25 However, it is recognised that, if such scope were found to exist, the imposition of compulsory pilotage would still raise issues of foreign relations because of the strategic importance of the Prince of Wales Channel to international navigation through the Torres Strait. All ships entering or leaving the northern end of the Inner Route transit the Channel. There is growing interest by the maritime community in pollution prevention from shipping operations. This may provide greater support internationally for measures to improve safety of navigation in this environmentally sensitive region.

JURISDICTIONAL ISSUES

Commonwealth/State Jurisdiction

- 7.26 Under the Australian Constitution, the Commonwealth shares responsibility for regulating shipping with the States and Northern Territory. The Constitution's division of powers was further defined in 1979 by the Offshore Constitutional Settlement (OCS) between the Commonwealth and States whereby the Commonwealth agreed to share powers with the States over a range of matters.

- 7.27 The OCS followed the decision by the High Court in 1975⁸⁷ to the effect that the boundaries of the States terminated at the low water mark and that the Commonwealth had plenary power to legislate over the territorial sea. In the OCS, the Commonwealth and the States agreed that the powers of the States should be extended to the territorial sea, including the seabed.
- 7.28 The establishment of the Great Barrier Reef Marine Park in 1975 under the *Great Barrier Reef Marine Park Act 1975* predated the OCS. There was an ancillary agreement to the OCS, the Emerald Agreement, between the then Prime Minister and Queensland Premier acknowledging that the boundary of the Great Barrier Reef Region would remain as defined by the *Great Barrier Reef Marine Park Act 1975* which would continue to apply unchanged despite the OCS jurisdictional arrangements.
- 7.29 The Commonwealth legislated to confer title in and powers over coastal waters on the States and Northern Territory through the *Coastal Waters (State Title) Act 1980* and the *Coastal Waters (State Powers) Act 1980*. The rights and title vested in Queensland in respect to the territorial sea were expressly made subject to the operation of the *Great Barrier Reef Marine Park Act 1975*.⁸⁸
- 7.30 The *Seas and Submerged Lands Act 1973* provides that States retain jurisdiction over any waters within any bay, gulf, estuary, river, creek, inlet, port or harbour that were, on 1 January 1901, within the limits of a State, and remain within the limits of the State⁸⁹ (referred to here as the “State’s internal waters”, which are different to the internationally defined “internal waters” under UNCLOS discussed in paragraph 7.6). These State’s internal waters are excluded from inclusion in the Great Barrier Reef Marine Park and fall within the constitutional boundaries of Queensland.
- 7.31 Under the OCS, the States and Northern Territory have jurisdiction over coastal waters. Coastal waters comprise the State’s internal waters and internal waters in the international law sense (ie those waters on the landward side of the baselines drawn in accordance with UNCLOS) and the territorial sea up to the first three nautical miles seaward from the baselines.
- 7.32 However, in the case of the waters of the Great Barrier Reef Marine Park, the State’s powers in relation to the OCS’ coastal waters are subject to the *Great Barrier Reef Marine Park Act 1975*. Under section 109 of the Constitution, where Commonwealth and State laws are inconsistent, the Commonwealth law prevails to the extent of any consistency. Where a provision of *Great Barrier Reef Marine Park Act 1975* is in conflict with a Queensland law, the State law will to the extent of the inconsistency be invalid.

⁸⁷ *New South Wales v. the Commonwealth* (1975) 135 CLR 337

⁸⁸ Section 4(3) *Coastal Waters (State Title) Act 1980*

⁸⁹ Section 14 *Seas and Submerged Lands Act 1973*

- 7.33 In many places in the GBR, islands and reefs generate their own territorial baseline and therefore are surrounded by coastal waters. Jurisdiction to regulate activities within these internal and coastal waters within the Great Barrier Reef Marine Park lies with Queensland, subject to the operation of the *Great Barrier Reef Marine Park Act 1975*.

Defining Jurisdictional Boundaries

- 7.34 The majority of the GBR waters are within the territorial sea and EEZ, and come under Commonwealth jurisdiction. A smaller proportion of the waters in the GBR, but significantly the waters most used by shipping, are Queensland coastal waters that come within State jurisdiction, but again subject to the *Great Barrier Reef Marine Park Act 1975* in the marine park area.
- 7.35 The capacity of Commonwealth and State regulatory agencies to deal with a shipping incident depends on whether it occurred in Queensland internal waters, the territorial sea, the EEZ or on the high seas. The presence of an international border with Papua New Guinea adds to the complexity of jurisdiction in Torres Strait. The review considers that a detailed computerised jurisdictional map of the GBR region would ensure certainty of all participants in a response action as to their legislative responsibilities and authority.

Recommendation 39

The review recommends, as part of the proposed Shipping Management Plan, computerised jurisdictional maps should be compiled of the entire Great Barrier Reef and Torres Strait area to enhance efficiency and certainty during responses to marine incidents.

Shipping Regulation

- 7.36 The OCS included the Shipping and Navigation Agreement, which provides for sharing of powers based on the nature of the voyage being undertaken by the ship. Under the agreement, the Commonwealth was responsible for:
- Trading vessels proceeding on an interstate or international voyage;
 - Fishing vessels proceeding on an overseas voyage;
 - Ships belonging to the Commonwealth or Commonwealth authority; and
 - Certain ships operating in the offshore industry.
- 7.37 The States and Northern Territory are responsible for trading ships on intrastate voyages, fishing vessels, pleasure craft and inland waterways vessels.
- 7.38 The *Navigation Act 1912* is the main legislation discharging the Commonwealth's responsibilities for shipping and focuses on larger

commercial ships. It includes coverage of ship construction standards, survey of ships, safety of ships, crews, passengers and cargo, and seafarers' qualifications, engagement and welfare. These provisions of the Act are administered by AMSA.

- 7.39 The *Transport Operations (Marine Safety) Act 1994* applies to ships within Queensland's responsibilities, which focus on smaller commercial ships, fishing vessels, recreational and pleasure craft. It is administered by the Queensland Department of Transport.
- 7.40 The *Great Barrier Reef Marine Park Act 1975* establishes the marine park and provides for its multiple use, control, care and development by GBRMPA. The Act applies to all persons (including foreigners) and vessels (including foreign flag ships) whether or not they are within the Australian coastal sea. A "vessel" is broadly defined as including a ship, boat, raft, or pontoon.
- 7.41 The Act provides for a statutory planning regime, including the making of Zoning Plans, Plans of Management and regulations, including a permit system. The Marine Park currently comprises 33 sections and there are Zoning Plans in force for four of those sections (Far Northern, Cairns, Central and Mackay/Capricorn), covering approximately 98% of the Marine Park. These Plans aim to regulate and prohibit use of, and entry into, particular regions of the marine park. Zoning plans are complemented by Plans of Management that address in more detail issues specific to an area, species, or ecological community.
- 7.42 The Act also implements a major permit system to control activities identified in the plans, such as tourism, moorings, and sea dumping. This allows for extensive regulation of shipping and boating to promote safety and protection of the environment.

Areas of inconsistency

Performance based regulatory framework

- 7.43 The *Transport Operations (Marine Safety) Act 1994* is based on a modern, performance-based, regulatory framework. This sets out the duties of all parties associated with ship safety and pollution prevention and focuses on the achievement of safety and environmental outcomes. The Queensland Government has previously noted that its introduction of performance-based maritime safety legislation in 1995 has led to a 17% reduction in safety incidents.⁹⁰
- 7.44 The *Navigation Act 1912* is based on the more traditional, prescriptive approach to regulation. The recent review of the Act recommended adoption of the performance-based regulatory model.⁹¹ Submissions by

⁹⁰ Department of Transport and Regional Services and AMSA, June 2000, *Review of the Navigation Act 1912, Final Report*, page 55.

⁹¹ *Ibid*, page 60

ship operators and ship users to the review support the simplification of legislation so it clearly sets out all parties' obligations and adopts a performance-based framework that promotes the safety management systems approach of the International Safety Management (ISM) Code.⁹²

Nature of ship's voyage

- 7.45 The application of Commonwealth and State legislation to shipping operations currently depends on the nature of the voyage by the ship, whether overseas, interstate or intrastate. This leads to confusion within the shipping industry and the general community about the jurisdictional division of responsibility for ship safety, particularly where a ship is undertaking a mixture of international, interstate and intrastate voyages.
- 7.46 A division of jurisdiction on tonnage (size) basis would be more clearly understood and better align with the tonnage basis for application of international maritime conventions. In April 1999, Commonwealth and State/Territory Transport Ministers agreed to revise the current jurisdictional arrangements for trading ships based on the size of vessels rather than the type of voyage being undertaken. The *Maritime Legislation Amendment Bill 2000* is currently before the Commonwealth Parliament to implement these changes in the Commonwealth *Navigation Act 1912*. Each State and Northern Territory jurisdiction is introducing complementary legislation.
- 7.47 The change in jurisdiction will see the Commonwealth assume responsibility for:
- All foreign trading ships in Australian waters other than vessels under 500 gross tonnage on intrastate voyages;
 - All Australian trading vessels proceeding on an overseas voyage;
 - All Australian trading ships of 500 gross tonnage or more proceeding on voyages in Australian waters.
- 7.48 This realignment of jurisdiction over trading ships should improve the clarity and effectiveness of safety regulation and this proposal generally has the support of the shipping industry.⁹³ However, this change does not affect current jurisdictional arrangements with respect to Australian fishing vessels, fishing fleet support vessels, pleasure craft, inland waterways vessels, or offshore support vessels.

Environment Protection

- 7.49 In relation to environment protection, the OCS recognised the original division of responsibilities in 1960 between the Commonwealth and States in relation to ship-sourced marine pollution, when Australia became a

⁹² Submission No.39 National Bulk Commodities Group/Minerals Council of Australia; Submission No. 6 Australian Chamber of Shipping

⁹³ Department of Transport and Regional Services and AMSA, June 2000, *Review of the Navigation Act 1912, Final Report*, page 41

party to the International Convention for the Prevention of Pollution of Sea by Oil 1954. The convention had been given effect by enactment of Commonwealth legislation that applied to Australian ships outside the territorial sea and similar legislation passed by the States, which applied to all ships within the territorial sea.

- 7.50 The current International Convention for the Prevention of Pollution from Ships 1973/1978 (MARPOL) completely superseded the 1954 Convention. It went beyond oil pollution, with six annexes dealing with all kinds of pollution from ships, including: oil, noxious liquids, harmful packaged substances, sewage, air pollution and garbage, other than dumping at sea. The aspects of MARPOL dealing with ship operations are given effect by the Commonwealth principally through the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. The ship construction and equipment aspects of MARPOL are given effect by the *Navigation Act 1912*.
- 7.51 When originally enacted, the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* was applied by the Commonwealth in accordance with the OCS division of powers so that the Act only applied to Australian ships outside territorial waters. The States were expected to enact complementary legislation. However, in 1986, the Act was amended so that it applied also to the “sea near a State” unless the State law already made provision giving effect to the Convention⁹⁴. The phrase “sea near a State” means the territorial sea of Australia adjacent to a State and the sea on the landward side of the territorial sea adjacent to the State.
- 7.52 A similar arrangement applies in relation to the *Protection of the Sea (Powers of Intervention) Act 1981* which gives effect to the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (Intervention Convention). This allows coastal States that are parties to the Convention to take measures on the high seas necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil. The *Protection of the Sea (Powers of Intervention) Act 1981* applies to ships on the high seas and in the territorial sea. However, it provides in section 5 that it is to be construed as being in addition to any State law and is not in derogation or substitution for it.
- 7.53 Queensland has enacted the *Transport Operations (Marine Pollution) Act 1995*, which gives effect to MARPOL and the Intervention Convention in Queensland’s jurisdiction. The Act acknowledges that it is part of a national scheme complementing the approach of the Commonwealth and other States.⁹⁵ Its jurisdiction is limited to the coastal waters of the State (ie the first three nautical miles of the territorial sea and other State waters subject to the ebb and flow of the tide). If pollution is discharged outside coastal waters, but enters coastal waters, it is taken to have happened in

⁹⁴ Butler DA and Duncan WD, *Maritime Law in Australia*, 1992, Legal Books, Sydney.

⁹⁵ Section 3 *Transport Operations (Marine Pollution) Act 1995*

coastal waters. Section 98 of the *Transport Operations (Marine Pollution) Act 1995* specifically deals with powers of intervention.

- 7.54 The *Great Barrier Reef Marine Park Act 1975* also implements the pollution discharge measures in MARPOL in relation to vessels in the Great Barrier Reef Marine Park. It is an offence under the Act for a person to intentionally or negligently discharge waste in the marine park without permission. ‘Waste’ has the same meaning as the types of pollution defined in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1973*.⁹⁶
- 7.55 There is the potential for the three statutes, the *Protection of the Sea (Prevention of Pollution from Ships) Act 1973*, *Transport Operations (Marine Pollution) Act 1995*, and *Great Barrier Reef Marine Park Act 1975*, to apply to ships operating in the Great Barrier Reef Marine Park. The interaction of these three statutes illustrates the complexities involved with determining the application of Commonwealth and State laws purporting to regulate the same situation.
- 7.56 Legal advice is to the effect that the “roll back” provision of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1973*, whereby it does not apply to “sea near a State” when that State has enacted laws to give effect to MARPOL, would see this Commonwealth Act give way to the Queensland *Transport Operations (Marine Pollution) Act 1995*⁹⁷. However, there is potential for inconsistency between particular provisions of the Queensland Act and provisions of the *Great Barrier Reef Marine Park Act 1975*. The provisions in the Queensland Act therefore would be invalid to the extent of such an inconsistency by virtue of section 109 of the Constitution.
- 7.57 It would be necessary, therefore, to examine each provision of the *Transport Operations (Marine Pollution) Act 1995* to determine which was applicable to a particular incident and whether it was inconsistent with the *Great Barrier Reef Marine Park Act 1975*, in which case the Queensland Act would be invalid to the extent of any inconsistency.

Improving the regulatory regime applicable to shipping in the GBR

- 7.58 The Queensland Government’s submission to the review⁹⁸ strongly favoured the establishment of a seamless regulatory regime for the maritime industry within the State. It maintains that Queensland Transport has jurisdiction for the entire Queensland coast in regard to maritime activity and it is practical and logical for a single regulatory regime to apply. The multi-agency approach is argued to be less cost effective and causes confusion amongst industry.

⁹⁶ Section 38J, *Great Barrier Reef Marine Park Act 1975*

⁹⁷ Advice from the Attorney-General’s Department of 1 September 1999

⁹⁸ Submission No. 49 Queensland Government page 8

- 7.59 GBRMPA's submission to the review⁹⁹ also referred to the potential for overlap and ineffective use of resources flowing from a number of agencies and varied legislation regulating shipping within the Great Barrier Reef. It proposed development of a three-year rolling plan to integrate the initiatives of all agencies involved in ship management and provide strategic directions in relation to ship safety.
- 7.60 There also are other legislative changes that have been identified by the review that would assist in the implementation of its recommended measures. For instance, amendments are required to the Commonwealth *Fisheries Management Act 1991* and the Queensland *Fisheries Act 1994* to allow the release of fishing vessel data by the fisheries agencies to the Ship Reporting System, as described in Chapter 5.
- 7.61 While it is recognised that there are complexities inherent in the Federal system, the current situation with a multiplicity of laws, some covering the same subject matter, causes confusion to the industry and further complicates the discharge of legislative responsibilities by the main regulatory agencies.

Recommendation 40

The review recommends that, as part of the development of a Shipping Management Plan, the main regulatory agencies should examine the existing regulatory regime to rationalise and simplify the complex jurisdictional and legislative arrangements for regulating shipping in the Great Barrier Reef region.

GAPS IN LEGISLATIVE POWERS

- 7.62 In the event of a shipping incident in the Great Barrier Reef region, the main Commonwealth and Queensland legislation involved in responding to the incident would be:
- *Great Barrier Reef Marine Park Act 1975* administered by GBRMPA;
 - *Navigation Act 1912*, the *Protection of the Sea (Prevention of Pollution from Ship) Act 1983*, and the *Protection of the Sea (Powers of Intervention) Act, 1981* administered by AMSA;
 - *Transport Operations (Marine Safety) Act 1994* and the *Transport Operations (Marine Pollution) Act 1995* administered by QT.
- 7.63 Each agency has reviewed the legislation for which it has responsibility in relation to the specific areas nominated in the review terms of reference. The relevant provisions of each statute are summarised in the following attachments:
- Attachment D: Legislative powers of intervention and detention;
 - Attachment E: Legislative provisions on penalties and offences;

⁹⁹ Submission No. 30 Great Barrier Reef Marine Park Authority

- Attachment F: Legislative powers of restitution and recovery of costs.

Intervention and detention

- 7.64 The application of the various Commonwealth and State powers of intervention and enforcement depends on a number of factors, including:
- The location of the vessel at the time of the incident (high seas, EEZ, territorial sea, or internal waters);
 - The type of vessel (eg trading ship, fishing vessel, offshore vessel, pleasure craft etc); and
 - The vessel's intended voyage (overseas, interstate or intrastate).
- 7.65 Another determining factor as to the scope of powers is the threat of, or actual, pollution as a result of the shipping incident. Attachment G summarises the existing provisions from each statute applying in the three situations involving a shipping incident.
- where there is no oil spill or real risk of a spill;
 - where there is a real likelihood of an oil spill; and
 - where an oil spill has occurred
- 7.66 The response to the grounding of *Bunga Teratai Satu* identified differences in the scope of agencies' powers in dealing with this type of incident. For instance, the *Navigation Act 1912* was found to have provisions only dealing with collisions, which were inapplicable in the situation of a ship grounding.
- 7.67 The Commonwealth has extensive powers to take action in combating ship-sourced pollution from oil, chemicals and sewerage, but where there is a shipping incident with no real threat of pollution, the power to intervene is less certain.
- 7.68 There would appear to be gaps in legislative powers in these two instances where amendment to legislation should be considered to ensure appropriate powers are available to meet the different situations encountered in a shipping incident or threat of pollution. During the review, GBRMPA took action to close the gap in relation to the *Great Barrier Reef Marine Park Act, 1975* by enacting a number of new provisions, for instance, making an offence to operate a vessel negligently in the marine park.

Penalties and Offences

- 7.69 GBRMPA also has taken action to introduce new offences and increase penalties under the *Great Barrier Reef Marine Park Act 1975*, which apply to ships when within the boundary of the marine park. These included the introduction of new provisions to make it an offence if:

- A person uses or enters a zone for a purpose other than a purpose permitted under the relevant Zoning Plan. This provision imposes strict liability;
- A ship operates in a zone where a ship is not permitted to be operated under the relevant Zoning Plan. This is a two-tiered offence where the first tier provides for a maximum penalty of \$1.1 million and the second tier imposes strict liability;
- A ship operates in a zone without permission of GBRMPA where such permission is required under the relevant Zoning Plan. This is a two-tiered offence where the first tier provides for a maximum penalty of \$1.1 million and the second tier imposes strict liability;
- A person operates a ship contrary to the conditions of a permission, with the maximum penalty being \$1.1 million.
- A person negligently operates a vessel in the Great Barrier Reef Marine Park in circumstances where that operation results in, or is likely to result in, damage to the Marine Park. This is a two-tiered offence where the first tier provides for a maximum penalty of \$1.1 million and the second tier imposes strict liability;

7.70 The report of the review of the *Navigation Act 1912* recommended revision of offence and penalty provisions in the Act to reflect its recommended adoption of a performance-based regulatory approach. It also observed that many offence provisions did not reflect contemporary approaches to legislative drafting. The Act was found to have a limited number of enforcement options (detaining a ship, suspending a certificate of licence or prosecuting a breach of the Act.).¹⁰⁰

7.71 The review concurs that the Act's offences and penalties should be revised consistent with the Criminal Code and *Crimes Act 1914* and the range of offences updated with the modern performance-based regulatory approach.

Restitution and Recovery of Costs

7.72 There are provisions in Commonwealth and Queensland legislation for recovery of costs and rehabilitation expenses in the case of actual pollution, and to cover costs and expenses incurred in preventing or mitigating pollution. However, recovery options for offences short of actual or threatened pollution are limited.

7.73 The State or Commonwealth authorities may be able to take civil action to recover costs and the expenses of rehabilitation in the event of non-pollution damage but this does not appear to be covered in legislation.

7.74 GBRMPA considers that provisions currently in the *Great Barrier Reef Marine Park Act 1975* in relation to restoration of the environment should include long term monitoring of the marine environment following a

¹⁰⁰ Department of Transport and Regional Services and AMSA, June 2000, *Review of the Navigation Act 1912, Final Report*, pages 177 and 178

shipping incident. The costs for such monitoring should be recoverable from the responsible party, who has been convicted of an offence against the Act.

- 7.75 The *Transport Operations (Marine Pollution) Act 1995* does not provide a regime where punitive damages can be awarded when there is no discharge of a pollutant, or if a pollutant is not one recognised by the Act or MARPOL. An actual discharge is an element of an offence under the Act. In such situations recourse may be needed to other legislation.

Recommendation 41

The review recommends that, as part of the proposed Shipping Management Plan, the main regulatory agencies should bring forward coordinated proposals to improve powers of intervention, restitution and recovery of costs, offences and penalties.