

# Environmental Defenders Office of Northern Queensland Inc.

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30 July 2010

**Via Email:** [navactrewrite@infrastructure.gov.au](mailto:navactrewrite@infrastructure.gov.au)

Mr Michael Pahlow  
General Manager  
Maritime Policy Reform Branch  
Department of Infrastructure, Transport,  
Regional Development and Local Government  
GPO Box 594  
Canberra ACT 2601

**Re: Discussion paper: Re-write of the Navigation Act 1912 (June 2010) –  
Submission of Environmental Defenders Office of Northern Queensland Inc.**

Dear Mr Pahlow,

The Environmental Defenders Office of Northern Queensland Inc. (“EDO-NQ”) welcomes the opportunity to submit comments in response to The Hon Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government’s call for stakeholder views regarding the proposed re-write of the *Navigation Act 1912 (Cth)* (“*Navigation Act*”). EDO-NQ commends the Minister for undertaking this important, and long-overdue, rewrite of the nation’s maritime shipping and safety laws and hopes that those laws will duly include provisions that are designed to provide greater protection to the unique marine ecosystems and resources found in the oceans and seas that surround the Australia.

## **A. BACKGROUND AND INTEREST OF EDO-NQ**

EDO-NQ is a not-for-profit community legal centre specialising in public interest environmental law and serving the general public of Northern Queensland (i.e., all of Queensland north of the community of Sarina and west to the border with Northern Territory, including the Torres Islands). Among other things, EDO-NQ provides legal and practical advice to members of the public about environmental law issues, makes policy submissions that advance the public interest in environmental matters, and, in some circumstances, litigates public interest environmental law matters in state and federal courts on behalf of individuals and community groups. Consequently, the interests EDO-NQ seeks to advance in this submission are those of citizens of northern Queensland, particularly those living on or near its Pacific and Gulf of Carpentaria coasts and those who interact with the marine environment in these areas. Obviously, these interests are considerably different or from traditional

“stakeholders in the maritime and shipping industries,”<sup>1</sup> but are no less important and deserving of consideration.

## B. OVERVIEW OF THE MINISTER’S CALL FOR SUBMISSIONS AND EDO-NQ’S COMMENTS

In his call for submissions, the Minister noted that the *Navigation Act* is an “outdated piece of legislation,” rooted in 19th century British shipping legislation that addressed the “generally poor working conditions of seafarers and the high loss rate of both ships and lives”.<sup>2</sup> As outlined in the Minister’s June 2009 speech to the National Shipping Industry Conference, “a rewrite of the [*Navigation Act*] is being undertaken as part of the Government’s maritime reform program,” and that this program includes “amendment of the Australian Maritime Safety Act 1990” as “the main vehicles for the necessary legislative amendments to implement the national regulator for commercial vessels.”<sup>3</sup>

While the rewritten Act “will **include** the safety components existing in the Navigation Act, as part of the rewrite process,” a fair reading of the Discussion Paper makes it clear that the rewrite will (and EDO-NQ believes should be) broad in its scope. For example, the Discussion Paper notes that the “provisions of *Navigation Act* should be restructured around the objective of creating a modern framework for maritime safety **and marine environment regulation**”.<sup>4</sup> Likewise, the objectives of the Navigation Act’s rewriting includes “enhanc[ing] ship safety and protection of the marine environment” and “introduc[ing] greater flexibility to allow regulation to remain contemporary with national and international standards”.<sup>5</sup>

That the *Navigation Act*’s rewriting is intended to be wide-ranging is further borne out by public statements of the Minister recorded in the press. For example, Minister Albanese has characterised the process as a “root and branch rewrite” of national maritime laws, and that the “review’s outcome is expected to include relevant findings to emerge from a separate review on the adequacy of penalties for shipping companies and crews caught engaging in ‘unsafe and irresponsible actions at sea’”.<sup>6</sup> Moreover, Minister Albanese has suggested that the *Navigation Act*’s rewrite is timely because the Australian Maritime Safety Authority (“AMSA”) would

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<sup>1</sup> EDO-NQ notes that the Minister’s call for submissions sought “your views, as stakeholders in the maritime and shipping industries, on the proposed changes” to the *Navigation Act*. See <http://www.infrastructure.gov.au/maritime/paper/index.aspx> (accessed 29 July 2010). However, EDO-NQ does not read the Minister’s call as excluding other stakeholders’ submissions and does not believe the Minister intended such a limitation.

<sup>2</sup> *Discussion Paper*, ¶12 (accessed at [http://www.infrastructure.gov.au/maritime/paper/files/Navigation\\_Act\\_Final.pdf](http://www.infrastructure.gov.au/maritime/paper/files/Navigation_Act_Final.pdf)).

<sup>3</sup> *Id.* at ¶¶1 & 4.

<sup>4</sup> *Id.* at ¶8 (emphasis added).

<sup>5</sup> *Id.* at ¶9.

<sup>6</sup> See “Six weeks for maritime law review,” Thomson Reuters Environmental Manager (Issue EM770, 16 June 2010) (accessed at <http://tax.thomsonreuters.com.au/cpdnews/pdf/enm10770.pdf>).

soon nationally regulate all shipping, “doing away with differing state-based regulations after more than a century of failed attempts and false starts,” and that Australia’s maritime laws needed to reflect “the age of the super tanker; not the era of the steamship.”

EDO-NQ quite agrees that the nation’s shipping laws are in need of a sweeping overhaul. This is particularly true if national shipping laws are going to replace or supersede the state-based shipping laws currently on the books in order to “implement the national regulator for commercial vessels”. The comments submitted herein are consistent with that understanding.<sup>7</sup>

### **C. SHIPPING IN THE AGE OF THE SUPER TANKER POSES SIGNIFICANT ENVIRONMENTAL RISKS**

As the Minister rightly points out, we live in “the age of the super tanker; not the era of the steamship”. Technology has advanced considerably in the decades since the *Navigation Act* was enacted. Ships are bigger, faster, and infinitely more complex than they were in 1912. They correspondingly pose much greater threats to marine resources and ecosystems if not properly operated and maintained. Similarly, the tools for monitoring and controlling modern sea-going vessels are considerably more sophisticated than those available to coastal states in 1912. However, those tools can be more effective in protecting the safety of not only seamen but also the safety and health of the seas they sail upon only if they are effectively employed.

#### **1. Maritime Accidents in Recent Decades Illustrate the Risk.**

A brief review of maritime accidents, spills and disasters in recent decades illustrates the increased risks posed to marine and coastal ecosystems in the age of the super tanker quite well. Increasingly larger ships carry increasingly more hazardous cargoes through increasingly crowded waters that wash upon increasingly populated coastal areas.<sup>8</sup> The harms that flow from accidents associated with maritime shipping today are therefore potentially far greater than those that occurred in earlier centuries.

Of course, oil spills associated with super tanker accidents and groundings represent the sorts of failures of maritime shipping and safety programs that come most readily to mind among the public. The *Torrey Canyon*, *Amoco Cadiz*, and *Exxon Valdez* tanker spills are probably among the most well-known, huge oil tanker spills

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<sup>7</sup> While the Minister has graciously provided a template for stakeholders to use in submitting their views and comments, EDO-NQ’s concerns focus on just a few of the issues identified in the template. Moreover, some of EDO-NQ’s comments and suggestions do not appear to fit neatly in the issues identified in the template. Accordingly, EDO-NQ has elected not to utilize the template.

<sup>8</sup> Similarly, technology advancements have permitted the construction and operation of offshore facilities today – the deep water drilling rigs and platforms that extract the oceans’ mineral resources – that were only hinted at in the works of Jules Verne or H.G. Wells. Likewise, the great factory ships that harvest the living resources of the seas are largely products of the age of the super tanker. These particular aspects of maritime operations in the age of the super tanker, however, are generally beyond the scope of EDO-NQ’s submission.

that were the product of failings in maritime shipping and safety programs but several other incidents that are less well-known were considerably larger.

For example, in 1967, the *Torrey Canyon* super tanker struck a shoal off the coast of Cornwall, England and spilled between nearly 600,000 and 900,000 barrels (“bbl”) of oil that contaminated 80 km of French and 190 km of Cornish coast, killed around 15,000 sea birds and nearly all fish within a 75 mile radius before the 700 square km slick dispersed. The 1978 grounding of the *Amoco Cadiz* off the coast of Brittany, France released 1.6 million bbl of oil into the sea, covering 320 km of coastline, some of which tarred beaches for several years. The *Exxon Valdez* spill in 1989, in contrast, spilled 260,000 to 750,000 bbl of crude oil into Prince William Sound, Alaska but ultimately covered 2,100 km of coastline and 28,000 square km of ocean.

As alluded to above, other tanker spills have actually been far larger and potentially more devastating to the marine ecosystems than the foregoing “infamous” spills but may not be as well known, particularly if the spills occurred far out to sea. Case in point, the *Atlantic Empress* spilled 2.1 million bbl of oil into the Caribbean in 1979 and the *ABT Summer* spilled 1.9 million bbl when it sank 1,300 km off the coast of Angola in 1991. Similarly, the *Castillo de Belver* spilled over 1.8 million bbl of oil into the ocean off South Africa in 1983. These spills were substantially larger than either *Torrey Canyon* or *Exxon Valdez* but took place farther out to sea and/or in deeper water. Another less well known but nonetheless significant spill, the *MT Haven* spilled over 1 million bbl of oil into the Mediterranean near Genoa when it caught fire and sank while offloading its cargo in 1991.<sup>9</sup>

Australian waters have had their share of oil spills in the age of the super tanker as well, though thankfully of much lesser magnitude than the aforesaid accidents. Recent accidents include the 2009 *Pacific Adventurer’s* spilling of 27 tonnes (or roughly 200 bbl)<sup>10</sup> of bunker oil into the sea near Moreton Island, Queensland. More recently, on 3 April 2010, the *Sheng Neng 1* grounded on Douglas Shoal in the Great Barrier Reef approximately 50 nautical miles north of the entrance to the port of Gladstone, Queensland. The *Shen Neng 1’s* grounding resulted in the breach of at least 1 fuel oil tank and the release of 20-30 bbl of bunker oil into the waters of the Great Barrier Reef.<sup>11</sup>

## 2. The Threat is Not From Oil Tankers Alone.

Offshore oil production platforms and associated facilities pose a significant, potentially greater threat to marine and coastal ecosystems. The Deepwater Horizon disaster in the Gulf of Mexico that began in April this year represents the largest release of oil into the ocean that has ever occurred, discharging anywhere

<sup>9</sup> See [http://en.wikipedia.org/wiki/Oil\\_spill](http://en.wikipedia.org/wiki/Oil_spill).

<sup>10</sup> See *id.* (one tonne of crude oil is equal to roughly 7.33 bbl of oil).

<sup>11</sup> See ATSB Safety Report Marine Occurrence Investigation No. 274, MO-2010-003 Preliminary (April 2010) (accessed at [http://www.atsb.gov.au/media/1371728/mo2010003\\_prelim.pdf](http://www.atsb.gov.au/media/1371728/mo2010003_prelim.pdf)); see also [http://en.wikipedia.org/wiki/2010\\_Great\\_Barrier\\_Reef\\_oil\\_spill](http://en.wikipedia.org/wiki/2010_Great_Barrier_Reef_oil_spill). Initial estimates were that up to 150 tonnes of bunker oil had been released, equivalent to approximately 1,000 bbl of oil.

from 3 to 9 million bbl of oil (estimates of the scale of the discharge vary widely). Another Gulf of Mexico oil platform disaster, the *Ixtoc I* in 1979, resulted in the discharge of over 3.5 million bbl of oil into the marine ecosystem. In the Persian Gulf, acts of war and marine accidents in 1983 led to the discharge of nearly 2 million bbl of oil from platforms in Iran's Nowruz offshore oil field.<sup>12</sup> As with tanker spills, Australia has been relatively lucky in avoiding oil platform spills as significant as these but incidents involving offshore facilities and platforms have occurred and threatened to harm the country's marine and coastal ecosystems.

Oil rig incidents may represent greater threats than tanker accidents because the well heads are harder to reach and greater amounts of oil are potentially discharged over a longer period of time.

### **3. Nor is Oil the Only Threat to Australia's Marine and Coastal Ecosystems.**

Of course it would be a mistake to assume that oil spills, whether from tankers or offshore production platforms and related facilities, are the only threat posed to Australia's marine and coastal ecosystems. There have been numerous accidents, many of them occurring in the waters of the Great Barrier Reef, which have involved spills or discharges of harmful substances other than oil. For example, the 1996 grounding of the *Peacock* on Piper Reef resulted in the discharge of approximately 1 tonne of tributyltin ("TBT") scraped off the vessel's hull when it grounded.<sup>13</sup> TBT is a non-specific biocide that is typically an ingredient in the anti-fouling paint applied to a vessel's hull, and is known to be toxic above threshold concentrations to many marine organisms including corals, anemones and molluscs.<sup>14</sup> TBT apparently was also released into waters of the Great Barrier Reef in other recent groundings, such as that of the *Bunga Teratai Satu* in 2001 and the *Doric Chariot* in 2002.<sup>15</sup>

Moreover, harm to particularly significant sea areas ("PSSAs") – such as the Great Barrier Reef - can result from vessel groundings alone, even if little or no discharge of hazardous substances results. Large vessels running aground in the Great Barrier Reef damage the coral reefs themselves. The most notable case in point is the 3 April 2010 grounding of the *Shen Neng 1*, which apparently created the largest grounding scar (3 km long and 250 m wide) on the Great Barrier Reef known to date. Some of the damaged reef areas have become completely devoid of marine life and some have expressed concern that it may take 10-20 years before the reef returns to the state it was in before the incident.<sup>16</sup>

<sup>12</sup> See [http://en.wikipedia.org/wiki/Oil\\_spill](http://en.wikipedia.org/wiki/Oil_spill)

<sup>13</sup> Peter Glover, "Marine Casualties in the Great Barrier Reef: 'Peacock', 'Bunga Teratai Satu' and 'Doric Chariot'", *18 MLAAZ Journal*, p. 61 (2004).

<sup>14</sup> See Secretariat for the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, "Draft Decision Guidance Document for Tributyltin Compounds," United Nations Environment Programme ((26 November 2006) (accessible at [http://www.pic.int/incs/crc3/n14\)/English/K0654009%20CRC3-14.pdf](http://www.pic.int/incs/crc3/n14)/English/K0654009%20CRC3-14.pdf)).

<sup>15</sup> See Glover, pp. 63-64 and 69-70.

<sup>16</sup> See [http://en.wikipedia.org/wiki/2010\\_Great\\_Barrier\\_Reef\\_oil\\_spill](http://en.wikipedia.org/wiki/2010_Great_Barrier_Reef_oil_spill).

**D. AUSTRALIA CAN, AND INDEED MUST UNDER INTERNATIONAL LAW, ADOPT MORE STRINGENT NATIONAL MARITIME SHIPPING LAWS TO PROTECT THE MARINE ENVIRONMENT AND PREVENT POLLUTION OF THAT ENVIRONMENT.**

As an initial matter, Australia’s right to establish more stringent national maritime shipping laws is consistent with international law. For example, Australia is a signatory to the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”).<sup>17</sup> The basic objective of UNCLOS is to establish:

[A] legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the **conservation of their living resources**, and the study, **protection and preservation of the marine environment**.<sup>18</sup>

Thus, UNCLOS clearly – and for the first time – establishes that conservation of the sea’s resources and protection of the marine environment is a specific goal and objective of international maritime law. More importantly, UNCLOS makes it clear that states must diligently seek to control pollution from all sources that affect the marine environment, expressly providing in Article 192 that “states have the obligation to protect and preserve the marine environment”.<sup>19</sup> This general obligation is carried farther in Article 194 of UNCLOS, which commands that:

**States shall take**, individually or jointly as appropriate, **all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities**, and they shall endeavour to harmonize their policies in this connection.<sup>20</sup>

The measures signatory states like Australia are to take in order to implement their general obligation under UNCLOS is spelled out in further detail to include measures that “minimize to the fullest possible extent: (a) the release of toxic, harmful or noxious substances . . . (b) pollution from vessels [including] preventing intentional and unintentional discharges . . . .”<sup>21</sup> Finally, UNCLOS Article of 194 recognizes a heightened need for states to adopt measures include “necessary to protect and

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<sup>17</sup> See [http://www.un.org/Depts/los/reference\\_files/status2010.pdf](http://www.un.org/Depts/los/reference_files/status2010.pdf).

<sup>18</sup> UNCLOS, Preamble (emphasis added) (accessible at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf)).

<sup>19</sup> UNCLOS, Art. 192.

<sup>20</sup> *Id.*, Art. 194(1) (emphasis added).

<sup>21</sup> *Id.*, Art. 194(3).

preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”<sup>22</sup>

Moreover, UNCLOS’ provisions must be read in conjunction with Agenda 21 of the 1992 Rio Conference Report, which refers to UNCLOS, in providing “the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources.”<sup>23</sup> While Rio’s Agenda 21 does not amend UNCLOS and is not binding on the 1982 convention’s signatory states, it can be taken into account when interpreting or implementing the provisions of UNCLOS, and Rio’s Agenda 21 further has the effect of legitimizing and encouraging legal developments based on perspectives set forth in the 1992 report.<sup>24</sup> Among other things, Chapter 17 of Rio’s Agenda 21 includes an emphasis on integrated and precautionary approaches to protection of the marine and coastal environment, and focuses broadly on the prevention of environmental “degradation” and protection of ecosystems.<sup>25</sup>

It may be a matter for debate whether compulsory pilotage and the other proposals set forth herein is consistent with the principles articulated in these and other provisions of UNCLOS. But the Minister should allow such debate to proceed rather than declare such measures – or any particular measures for that matter – to be “off limits” at the outset.

Significantly, as shown below, many measures are already being employed by Australia or other states to reduce or prevent shipping accidents and pollution to their marine ecosystems.

**E. SPECIFIC MEASURES THE MINISTER SHOULD INCORPORATE IN ANY RE-WRITE OF THE NAVIGATION ACT.**

In light of both the international, national and state maritime shipping laws currently in effect, Australia clearly has the right – and more importantly, the obligation – to enact significantly more stringent maritime shipping laws to protect its inland (ports) and coastal waters and particularly those waters that have been designated as a “particularly significant sea area” (“PSSA”), such as the Great Barrier Reef for example. Under these circumstances, with all due respect, EDO-NQ believes that the Minister’s comments suggesting that he rejects even considering more stringent shipping safety requirements – in particular, establishing compulsory pilotage requirements for at least certain types of vessels or cargoes transiting PSSAs located in Australian waters – are misguided and preclude *a priori* consideration of measures that are the most likely to be effective in preventing marine pollution, or failing that, effectively responding to such events.

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<sup>22</sup> *Id.*, Art. 194(5).

<sup>23</sup> Rio Conference Agenda 21 (accessible at <http://habitat.igc.org/agenda21/>).

<sup>24</sup> P. W. Birnie and Alan Boyle, *International Law and the Environment*, p. 349 (Second Edition, Oxford University Press, Apr 2002)

<sup>25</sup> Rio Conference Agenda 21, Ch. 17, ¶ 17.1.

For purposes of this submission, EDO-NQ recommends that the Minister consider adopting the following specific measures in the context of the *Navigation Act* re-write to protect, at minimum, designated PSSAs in its territorial waters:

- (1) Compulsory pilotage for all vessels greater than a particular size, and for all vessels transporting any hazardous substances, transiting PSSAs, whether such transit originates or terminates at an Australian port or transits such PSSAs without actually originating or terminating at an Australian port;
- (2) Extending mandatory ship reporting and radar surveillance systems including radar, Automatic Identification System (“AIS”), Automated Position Reporting via Inmarsat C (“APR”), and VHF Reporting, synonymous with the “Reef Vessel Traffic Service” (“REEFVTS”) utilized in northern portions of the Great Barrier Reef, to the fullest extent of any areas that have been designated as a PSSA;
- (3) Establishing well-demarcated, mandatory shipping lanes transiting PSSAs in Australian territorial waters and waters located in the Exclusive Economic Zone (“EEZ”);
- (4) Establishing funding mechanisms to substantially cover the likely cost of responding to and remediating the release or discharge of pollutants and hazardous or noxious substances into Australia’s territorial waters, and to compensate for personal or property damages proximately caused by the release or discharge of pollutants and hazardous or noxious substances into Australian territorial waters and to support operation of the regulatory regime associated with items (1) – (3) above; and
- (5) Denying vessels failing to comply with the requirements set forth in (1) - (4) above from entering Australian ports.

**1. Requiring Compulsory Pilotage Throughout Designated PSSAs in Australian Waters, Such as the Great Barrier Reef, is Consistent with Australian and International Law.**

Requiring compulsory pilotage throughout designated PSSAs in Australian waters is clearly consistent with both Australian and international law. The *Navigation Act* has already served as the basis for extending compulsory pilotage requirements through the northern waters of the Great Barrier Reef, as well as the Torres Strait. Section 186H of the *Navigation Act* expressly provides for the making of regulations dealing with compulsory pilotage and was the provision the government relied on when introducing compulsory pilotage within the Torres Strait in 2006. Similarly, section 186I of the *Navigation Act* makes it an offence to navigate without a licensed pilot within a compulsory pilotage area, subject to several limited defences set forth in section 186L of the law.

EDO-NQ sees no reason why the same provisions that have been utilised by the Commonwealth government to subject maritime traffic in the Torres Strait and northern portions of the Great Barrier Reef to compulsory pilotage cannot be utilised

as the basis for imposing such a regulatory regime to any waters within designated PSSAs. On this point it is worth emphasising that the Navigation Act re-write should be broad enough to make waters included in PSSAs designated in the future subject to the same compulsory pilotage regime applicable in the Great Barrier Reef and Torres Strait.

**2. Extending Mandatory Ship Reporting and Radar Surveillance Systems Throughout Designated PSSAs in Australian Waters is Consistent with Australian and International Law.**

On 18 April 2010, the Australian Maritime Safety Authority (“AMSA”) released a report it had provided to the Minister, entitled “Improving Safe Navigation in the Great Barrier Reef” and which makes four recommendations to enhance vessel safety and protection of the marine environment in the Great Barrier Reef Marine Park area. These recommendations include:

- (1) Extending the current coverage of the REEFVTS to the southern limits of the Great Barrier Reef PSSA;
- (2) Strengthening regulatory arrangements;
- (3) Enhancing navigational aids; and
- (4) Developing a range of other government management options.<sup>26</sup>

In response to this report, the Minister has announced that the Australian government will submit a proposal to the International Maritime Organization (“IMO”), seeking to extend the REEFVTS as recommended.

Generally speaking, EDO-NQ supports AMSA’s recommendations and the Minister’s announced intention to pursue at least some of these measures. That said, EDO-NQ suggests that the bulk of AMSA’s recommendations should be taken up in the debate surrounding the re-write of the Navigation Act. Moreover, EDO-NQ believes that any safety and environmental protection regime adopted in accordance with AMSA’s recommendations should be extended to any portion of Australia’s territorial waters that may, in the future, be designated a PSSA – in addition to the Great Barrier Reef.

**3. Establishing Well-Demarcated, Mandatory Shipping Lanes Transiting PSSAs in Australian territorial waters and its EEZ is Likewise Permitted Under Australian and International Law.**

UNCLOS articles 17-19 provide that the ships of all states enjoy the right of “innocent passage” within a state’s territorial seas.<sup>27</sup> The right of innocent passage extends not only to vessels passing through the territorial sea without entering internal waters or stopping, but also to vessels entering internal waters in order to enter a port. Likewise, outbound ships are entitled to innocent passage through Australia’s territorial seas on their departure from port.

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<sup>26</sup> AMSA, “Improving Safe Navigation in the Great Barrier Reef,” pp. 4-5 (April 2010).

<sup>27</sup> See UNCLOS, Arts. 17-19.

Under the UNCLOS, vessels engaged in innocent passage are not to be subject to any acts by the coastal state that would “hamper” such passage except in accordance with the convention’s provisions.<sup>28</sup> While the UNCLOS generally does not expand upon the notion of what coastal state acts would “hamper” vessels’ exercise of their right of innocent passage, it does expressly identify 2 things that coastal state laws and regulations must not do. Under Article 24, coastal states must not:

- (1) impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage; nor
- (2) discriminate in form or in fact against the ships of any state or against ships carrying cargoes, to or on behalf of any state.<sup>29</sup>

Requiring all vessels transiting Australian PSSAs – regardless of nationality or flag – to navigate through designated routes only do not appear to violate the UNCLOS’ provisions protecting vessels’ right of innocent passage. Such requirements would clearly be supportable on the basis that they advance Australia’s interest in promoting both maritime safety and prevention of marine pollution. The UNCLOS recognizes the legitimacy of both goals. Nor would imposing routing requirements discriminate in any way since the requirements would be applicable to all vessels.

**4. Establishing Adequate Funding Mechanisms to Substantially Cover Response, Remediation and Compensation Costs Proximately Caused by the Release or Discharge of Pollutants and Hazardous or Noxious Substances Into Australia’s Territorial Waters is Consistent with Australian and International Law.**

EDO-NQ recommends that, in conjunction with the *Navigation Act’s* re-write, the Minister consider establishing adequate funding mechanisms to substantially cover the likely response, remediation and compensation costs proximately caused by the release or discharge of pollutants and hazardous or noxious substances into Australia’s territorial waters. In addition, such funding mechanisms should be sufficient to support operation of the regulatory regime associated with compulsory pilotage, extension of mandatory ship reporting and radar surveillance systems and designation of mandatory shipping lanes. Such funding mechanisms would, in EDO-NQ’s opinion, be consistent with the UNCLOS and would not violate Article 24’s provisions regarding safeguarding vessels right of “innocent passage”.

At the outset, EDO-NQ notes that there are already a number of funding mechanisms applicable to some maritime traffic in Australia’s waters. However, those mechanisms are generally limited to vessels transiting Australian waters on which oil is present, either as fuel or as cargo. The funds do not address the host of other hazardous or noxious substances that vessels may be carrying as they transit Australian waters and that present a significant risk of harm to the marine environment in those waters. Moreover, it is a matter of debate whether the existing funding mechanisms related to oil are themselves adequate to cover the likely costs of response, remediation and compensation.

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<sup>28</sup> UNCLOS Art. 24(1).

<sup>29</sup> *Id.*, Art. 24(1)(a) & (b).

For example, the IMO has developed a system of limited liability for pollution damage caused by oil from oil tankers, whether that oil is held as fuel or cargo.<sup>30</sup> This convention is implemented by the *Protection of the Sea (Civil Liability) Act 1981* (Cth). Under this regulatory regime:

- Tanker owners are strictly liable to pay compensation;
- Tanker owners of tankers have limited liability;<sup>31</sup>
- Owners of tankers that carry more than 2,000 tonnes of persistent oil as cargo are required to have insurance; and
- Claimants for oil pollution damage may claim directly against the insurer.

In addition to this regime, a second-tier compensatory fund has been established in the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992*. Under this scheme, claimants who are unable to obtain full compensation under the *Civil Liability for Oil Pollution Damage Convention* are able to be more fully compensated. This fund is financed by levies on entities that have received over 150,000 tonnes of persistent oil following sea transport per calendar year. The total aggregate amount available to compensate for one incident is 203 million SDR. This convention is implemented in Australia by several pieces of legislation.<sup>32</sup> A third-tier fund, similar to this fund, is also available. However, an obvious limitation to this scheme is that it applies only to damage from oil pollution caused by oil tankers, to the exclusion of all other hazardous substances and all other vessels.

In addition, ship owners have limited liability for pollution caused by bunker oil in Australia.<sup>33</sup> This legislation does not apply to oil pollution damage from an oil tanker, however, such as is covered in other legislation.<sup>34</sup> Nor is pollution caused by bunker oil subject to the international compensation and clean-up scheme for oil tankers discussed above. The regulatory scheme for bunker oil is inadequate for at least 2

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<sup>30</sup> *International Convention on Civil Liability for Oil Pollution Damage, 1992*.

<sup>31</sup> The limitation of liability is determined by reference to the size of the tanker:

- For tankers with a gross tonnage of up to 5,000 tonnes: 4.51 million Special Drawing Rights (“SDR”).
- For tankers with a gross tonnage of between 5,000 and 140,000 tonnes: 4.51 million SDR plus 631 SDR for each gross tonne in excess of 5,000.
- For tankers with a gross tonnage of 140,000 or greater: 89.77 million SDR.

<sup>32</sup> See *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (Cth); *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Funds - Customs) Act 1993* (Cth); *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Funds - Excise) Act 1993* (Cth); and *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Funds - General) Act 1993* (Cth).

<sup>33</sup> See *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth). Section 11 of this act implements Articles 3, 5, 6, 7(20) and 8 of the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*.

<sup>34</sup> See *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth), §8.

other reasons. First, it fails to address pollution damage caused by substances other than oil, such as fertilisers, pesticides, and other hazardous substances. Second, although not constrained by the type of vessel and cargo as is the case for damage from oil tanker pollution, the compensation scheme for bunker oil is not nearly as extensive as for oil tankers and there is no second-tier compensation fund.

There does exist an as-yet unimplemented convention, internationally and domestically, which concerns marine pollution from hazardous and noxious substances.<sup>35</sup> Under the scheme proposed in this convention, ship owners have limited liability for pollution damage from such substances and there is a two-tier scheme for clean-up and compensation, the first tier being mandatory insurance and the second tier being a fund that operates in much the same way as fund for oil pollution damage caused by oil tankers. Under this scheme for hazardous and noxious substances, an individual ship owner's liability is limited to no more than 100 million SDR.

Finally, ships carrying oil are required to pay a levy to AMSA to help cover the expenses of the National Plan, pursuant to which various entities are able to respond to marine pollution damage from oil and other noxious or hazardous substances spilled into the sea. Under this scheme, ships of more than 24 metres length that have, at any time during a quarter, been in an Australian port and had on board a quantity of oil exceeding 10 tonnes (inclusive) must pay the requisite levy – subject to several exemptions.<sup>36</sup> The National Plan levy scheme, unfortunately, is likewise inadequate. While the National Plan is designed to respond to a variety of ship sourced marine pollution, not merely oil pollution, the levy is imposed only against ships that carry oil. This is too narrow a focus and the scope of vessels subject to the levy ought to be expanded. Expansion of the levy, as EDO-NQ recommends, is warranted since the 2008/09 AMSA Annual Report of the National Plan shows that there was a \$700,000 budget deficit for that period. EDO-NQ suggests that the National Plan levy scheme should be expanded to include all vessels that have the potential to cause damage to the marine environment.

The inadequacies with the funding mechanisms and insurance provisions of the foregoing schemes could be addressed in the context of the Navigation Act's re-write. Alternately, the Minister should consider replacing the multitude of funding and insurance provisions established in a variety of statutes with one comprehensive funding mechanism that would apply to all vessels transiting Australia's territorial seas that carry, either as cargo, fuel or otherwise incorporate as part of their structure (*e.g.*, vessels whose hull paint includes TBT as a component), any oil or hazardous or noxious substances. EDO-NQ recommends that the levy or fee associated with this funding mechanism should vary based not only on the tonnage of the vessel but also on the type and quantity of oil or hazardous or noxious substances at issue. This would allow the burden of imposition to be commensurate with the threat to marine ecosystems.

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<sup>35</sup> See *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*.

<sup>36</sup> See *Protection of the Sea (Shipping Levy) Act 1981 (Cth)* and *Protection of the Sea (Shipping Levy Collection) Act 1981 (Cth)*.

Furthermore, that such funding mechanisms are consistent with international law and do not violate the “innocent passage” requirements of Article 24 of UNCLOS is demonstrated by the fact that such mechanisms are currently in place in Australia and other states, and indeed are implemented in various international conventions. Moreover, Article 26 of the UNCLOS should not be considered an impediment to the charging of a levy or fee so long as such levies or fees can be considered as levied for specific services rendered to the ship – such as pilotage, tracking systems such as REEFVTS, maintenance and patrolling of safe and secure sea lanes and personnel and facilities need to adequately respond to and remediate damages stemming from maritime incidents.

**5. Prohibiting Vessels That Fail to Comply With Such Measures From Entering Australian Ports is Consistent with Australian and International Law.**

Prohibiting vessels that fail to comply with the measures recommended herein from entering Australian ports should not be considered to violate UNCLOS Article 24’s guarantee of the right of innocent passage, so long as such measures are non-discriminatory and providing that they make allowance for vessels in distress or *force majeure* events. Much of the rationale why such mechanisms are consistent with international law are set forth above.

More generally, while coastal states are not to hamper foreign vessels engaged in innocent passage, the UNCLOS does not prohibit coastal states from applying their laws and regulations to ships engaged in innocent passage through the territorial sea. UNCLOS Article 21(1)(a), for example, makes particular reference to the safety of navigation and regulation of maritime traffic, while Article 21(1)(f) refers to the preservation of the coastal state’s environment and the prevention, reduction and control of pollution.<sup>37</sup> These provisions provide a foundation for coastal state laws and regulations that would have a particular impact upon shipping transiting Australian PSSAs via its territorial seas. In addition, Article 22 of UNCLOS permits such things as designation of specific sea lanes and traffic separation schemes within a coastal state’s territorial scheme, “where necessary having regard to the safety of navigation”.<sup>38</sup>

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<sup>37</sup> See UNCLOS Arts. 21(1)(a) & (1)(f).

<sup>38</sup> See *id.*, Art. 22.

**F. CONCLUSION**

EDO-NQ appreciates the opportunity to submit the foregoing comments in response to the Minister's call for submissions related to the proposed "root and branch" rewrite of the *Navigation Act*, and looks forward to having an opportunity to participate in the debate regarding the scope of changes to Australia's maritime laws in the future.

Sincerely yours,  
**EDO-NQ**

A handwritten signature in blue ink, appearing to read "Patrick Pearman". The signature is fluid and cursive, with a long horizontal stroke at the end.

**PATRICK PEARLMAN**  
**Principal Solicitor**