
Who is Liable for Marine Pollution? Personal Liability for Ship-sourced Oil Spills in Four Australian Jurisdictions ¹

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This article examines the basis on which criminal liability is imposed on different persons, both corporate and individual, for the discharge of oil from a ship under legislation passed in four Australian jurisdictions. Amendments in 2001 and 2002 to legislation in three Australian jurisdictions (New South Wales, Queensland and the Commonwealth - all of which purport to implement the same international Convention), have introduced important distinctions as to when and on whom criminal liability will fall.

This article seeks to understand why these amendments were considered necessary, how they might be interpreted and what implications might flow from them. Criticism is made of the failure to maintain legislative uniformity.

The position in Victoria is put as an example of the former uniform provisions which remain in Western Australia, South Australia and Tasmania.

Introduction

Criminal liability for ship-sourced oil pollution of Australian marine waters is grounded in legislation which is based on the International Convention for the Prevention of Pollution from Ships, 1973 and its amending Protocol of 1978 (MARPOL).

Initially, the implementation of MARPOL in Australia's domestic legislation was pursued through the drafting of uniform legislation which was passed (slowly) by all relevant jurisdictions. However, amendments to the MARPOL Acts of three jurisdictions (NSW, Queensland and the Commonwealth) in 2001 and 2002 have destroyed this uniformity and it is primarily with these amendments that this article is concerned.

This article seeks to understand why these amendments were considered necessary, how they might be interpreted and what implications might flow from them.

Criticism is made of the failure of the States and Commonwealth to maintain legislative uniformity and of the resulting legislative 'patchwork quilt' that imposes different types of liabilities and different levels of penalties for the discharge of oil from a ship into Australian waters.

MARPOL and its Australian Implementation

General Background to MARPOL

MARPOL's original drafting included twenty Articles, two Protocols and five annexes, of which two (Annex I – Oil and Annex II – Noxious Liquid Substances) are mandatory and entered into force on 2 October 1983.³ They currently cover just over 97% of the world's shipping.⁴

¹ The law is stated as at 10 July 2005. A previous version of this article was presented for assessment as part of a Master of Public and International Law at the University of Melbourne. The author thanks Dr Michael White QC for his helpful comments on an earlier version of this paper. All errors remain his own.

² Senior Associate, Russell Kennedy, Melbourne.

³ <www.imo.org>, "Status of Conventions – Summary", viewed 10 July 2005.

⁴ Note 3 above.

The remaining original annexes (Annex III – Harmful Substances in Packaged Form; Annex IV – Sewage and Annex V – Garbage) are all in force internationally.⁵ An additional annex, Annex VI, which relates to air emissions from ships, was added to MARPOL in 1997 and came into force on 19 May 2005. MARPOL has been accurately described as consisting of two distinct “sub-regimes”:⁶

- (a) the discharge sub-regime which limits operational discharges of pollutants into the sea to specified limits;⁷ and
- (b) the equipment sub-regime which sets out extensive design and construction criteria, depending on the size and type of the vessel, compliance with which is designed to minimise accidental discharges of pollutants.⁸

It is the discharge sub-regime with which this article is concerned, specifically MARPOL’s prohibition of the discharge of oil from ships except in certain circumstances.

Regulation 9 of Annex I⁹ to MARPOL provides:

Subject to the provisions of regulations 10 and 11 of this annex and paragraph (2) of this regulation, any discharge into the sea of oil or oily mixtures from ships to which this Annex applies shall be prohibited except when all the following conditions are satisfied...

The ships “to which this Annex applies” include oil tankers and non oil tanker ships that are greater than 400 tons gross tonnage.

Regulation 9 of Annex I then sets out the conditions which, if met by an oil tanker, exempt a discharge from the general prohibition. The conditions require that the discharge must:

- (a) not occur in a “special area”;¹⁰
- (b) not occur less than a certain distance from shore;
- (c) occur en route;
- (d) occur at a rate of discharge that does not exceed prescribed limits;
- (e) not amount to a total volume discharged greater than prescribed limits; and
- (f) not occur unless an oil discharge monitoring system is in operation.

Note that each condition must be met before the discharge will be excused.

Regulation 11 of Annex I to MARPOL provides for exceptions to the prohibition set out in regulation 9 if an otherwise prohibited discharge occurred:

- (a) for the purpose of securing the safety of a ship or saving life at sea;
- (b) as a result of damage to a ship or its equipment:¹¹
 - a. provided that all reasonable precautions were taken after the occurrence of the damage or the discovery of the discharge to prevent or minimise the discharge; and

⁵ Annex III came into effect on 1 July 1992. Annex V came into effect on 31 December 1988. Annex IV came into effect on 27 September 2003.

⁶ R Mitchell, “Regime design matters: intentional oil pollution and treaty compliance” (1994) 3 *International Organisation* 48, 430-435.

⁷ Note 6 above, 431-433.

⁸ Note 6 above, 433-435.

⁹ Regulation 9 of Annex I to MARPOL also provides a similar, but less stringent, set of conditions for ships that are not oil tankers but are greater than 400 tons gross tonnage.

¹⁰ A term defined in regulation 10 of Annex I to MARPOL.

¹¹ In 2002, the High Court had cause to interpret the meaning of “damage” in *Morrison v Peacock* (2002) 210 CLR 274. For a helpful overview of the case, see G Walker, “Quiet achievements...” (2003) 20 *Environment and Planning Law Journal* 12. This case, the findings of the High Court and its relevance to the subject of this paper are further discussed below.

- b. except if the Master or owner of the vessel acted either with intent to cause such damage or acted recklessly and with knowledge that damage would probably result; or
- (c) for the purpose of combating specific pollution incidents in order to minimize the damage from that pollution.¹²

Implementation in Australia

Offshore Constitutional Settlement

The history of the implementation of MARPOL in Australia is tortuous, not least because of the complicated jurisdictional issues that plague marine pollution regulation in this country arising from its federal constitutional structure.

In the aftermath of *New South Wales v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Case) the Commonwealth and States negotiated the “offshore constitutional settlement” which largely sought to ensure that jurisdictional arrangements in place before the Seas and Submerged Lands Case remained in place despite that decision.¹³

Arising out of the settlement was the *Coastal Waters (State Powers) Act* 1980 (Cth), s.5 of which provides for the extension of the legislative powers of the States from the low water mark (which the High Court, in the Seas and Submerged Lands Case, had determined to be the extent of the State’s jurisdictional limit) to their coastal waters, being offshore waters within three nautical miles of a State.¹⁴

However, the *Coastal Waters (State Powers) Act* 1980 (Cth) does not confer *exclusive* legislative power on the relevant State in relation to the three nautical mile limit; the Commonwealth retains jurisdiction if it wishes to exercise it, raising the issue of s.109 of the Commonwealth Constitution and its effect on a State law that purports to operate over an area that is the subject of a Commonwealth Act.

Decision to Ratify MARPOL and its Implementation in Australia

Following the decision to ratify MARPOL,¹⁵ the Standing Committee of Attorneys-General prepared legislation that sought to avoid the Constitutional issues raised above.¹⁶

To achieve this, it was agreed that ‘complementary’ legislation would provide for Commonwealth jurisdiction over the area between the low water mark and the three nautical mile limit unless the relevant State or Territory chose to exercise its right to legislate over that area. The result is a series of ‘roll-back’ provisions in the relevant Commonwealth legislation “so that the Commonwealth jurisdiction initially applies from the low water mark but rolls back to the three mile limit of the State or Territory passing similar legislation”.¹⁷ This ‘roll-back’ of Commonwealth legislation is predicated on the relevant State legislation “giving effect to” the relevant provisions of MARPOL.¹⁸

¹² This defence allows the use of hydrocarbon-based oil dispersants in response to an oil pollution incident in relevant waters without the risk of incurring criminal liability.

¹³ M White, *Marine Pollution Laws of the Australasian Region* (1994) Sydney: Federation Press, 173.

¹⁴ J Mosley, “Oil Spills – State and Federal Legislative Conundrums” (1998) 15(3) EPLJ 212, 215. See generally M Davies and A Dickey, *Shipping Law*, 2nd ed., Sydney: LBC, 535 - 538 and White, note 13 above, 168-176.

¹⁵ Made at the ninth meeting of the Marine and Ports Council of Australia in May 1981.

¹⁶ Victoria, Parliamentary Debates, Legislative Assembly, 13 March 1986, 199.

¹⁷ Note 13 above, 175.

¹⁸ See, for example, s.9(1)(c)(i) of the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth).

Since the extension of the Australian territorial sea from three nautical miles to twelve nautical miles in 1990¹⁹, the Commonwealth legislation applies between the three nautical mile limit and the twelve nautical mile limit if a State passes relevant legislation and over the entire territorial sea (from the low water mark to the twelve nautical mile limit) if it does not.

This complementary legislation was also drafted to ensure uniformity across jurisdictions,²⁰ a vital issue in an industry such as shipping.²¹ That is, it was intended that all Australian jurisdictions would apply similar legislative regimes to ensure that similar controls apply to all of Australia's territorial sea regardless of whether the Commonwealth, a State or Territory was exercising its jurisdiction.

Model Legislation

Section 8(1) of the Victorian Act remains a good example of the relevant provisions of the "model legislation".

It imposes liability on the Master and the owner of a vessel that discharges oil or any oily substance into "State waters" as that term is defined in s.4 of the Victorian Act. It states:

Subject to sub-sections (2) and (4), if any discharge of oil or an oily mixture occurs from a ship into State waters, the Master and the owner of the ship are each guilty of an indictable offence...

Section 8(2) excludes certain discharges from the operation of section 8(1) in accordance with Regulation 11 of Annex I. Section 8(4) excludes discharges that comply with MARPOL discharge limits under Regulation 9 of Annex I.

Initial legislation passed by each of Queensland, NSW and the Commonwealth was of almost identical nature. The exception was the equivalent provision of the NSW Act (section 8), which has always provided for liability to be imposed on any person whose act caused the prohibited discharge in addition to liability imposed on the Master and owner of the vessel.

However, there have recently been significant amendments to the relevant provisions of the Commonwealth Act (section 9), the NSW Act (section 8) and less substantial (but nonetheless significant) amendments to the relevant provisions of the Queensland Act (section 26).

Brief Overview of Recent Amendments

For the purposes of this article, the relevant amendments to these Acts may be described as follows:

1. Section 26 of the Qld Act has been amended by provisions of the *Transport Legislation Amendment Act 2001 (Qld)*²² which came into effect on 21 December 2001;
2. Section 9 of the Commonwealth Act has been amended by the *International Maritime Conventions Legislation Amendment Act 2001 (Cth)*²³ which came into effect on 1 October 2001; and

¹⁹ Achieved by the exercise of a power granted to the Governor-General by s7 of the *Seas and Submerged Lands Act 1973 (Cth)* on 13 November 1991 with effect from 20 November 1990. See White, note 13 above, 175.

²⁰ Victoria, Parliamentary Debates, Legislative Assembly, 13 March 1986, 199.

²¹ Davies and Dickey, note 14 above, 536-537.

²² No 79 of 2001.

3. Section 8 of the NSW Act has been amended and section 8A inserted by the *Marine Legislation Amendment (Marine Pollution) Act 2002 (NSW)*²⁴ which came into effect on 1 November 2002.

Both the Queensland and Commonwealth amendments expand the liability imposed to include persons other than the Master and the owner of a ship from which oil or an oily mixture is discharged into relevant waters in quantities and in circumstances that breach regulation 9 of Annex I of MARPOL. Both continue to impose liability on the Master and the owner of the relevant ship.

For example, the amendments to s.9 of the Commonwealth Act impose liability on “a person (if that person) engages in conduct that causes a discharge of oil ... into the sea and the person is ‘reckless or negligent’...”²⁵ The Queensland Act imposes liability on a person whose conduct causes the discharge without requiring recklessness or negligence. An excuse is available where that person caused the discharge in compliance with orders from the Master or someone authorised by the Master to give that order.

The NSW Act has always imposed liability on the person whose act caused the discharge. The 2002 amendments expand that concept by including concepts of intent, recklessness and negligence.

Criticism of Recent Amendments

Departure from MARPOL

The amendment of the Commonwealth Act has drawn criticism in that it has “substantially departed from the provisions of MARPOL”.²⁶

The implication of a departure from the provisions of MARPOL may be significant. If a State Act substantially departs from the provisions of MARPOL it might be argued that the relevant section no longer “makes provision giving effect to” the relevant parts of MARPOL.

As noted above, the roll-back provisions in the Commonwealth Act use this phrase (“makes provision giving effect to” the relevant parts of MARPOL) to ensure that the relevant State Act is not deemed invalid by s109 of the Constitution. Failure to “give effect” to the relevant provisions of MARPOL therefore has the result of invalidating the relevant provision of the State Act.

The implications for the Commonwealth are equally serious although the threshold test of validity is far less strenuous. The Commonwealth Act relies on MARPOL for its constitutional validity pursuant to the “external affairs” power in s51(xxix) of the Commonwealth Constitution. To be a law “with respect to external affairs”, it has been held that the law must be reasonably capable of being considered appropriate and adapted to implementing the relevant convention.²⁷ However, the threshold is very low in that a law will not be held invalid unless:

...the deficiency is so substantial as to deny the law the character of a measure implementing the convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the convention.²⁸

²³ No 149 of 2001.

²⁴ No 75 of 2002.

²⁵ M White, “Marine Pollution from Ships” in Z Lipman and G Bates, (eds) *Pollution Law in Australia* (2002) Sydney: LexisNexis Butterworths, 406.

²⁶ White, note 25 above, 406.

²⁷ *State of Victoria v Commonwealth of Australia* (1996) 187 CLR 416.

²⁸ *State of Victoria v Commonwealth of Australia* (1996) 187 CLR 416, 489.

The criticism directed at the Commonwealth amendments did not suggest that they might be sufficient to render the Commonwealth Act unconstitutional and, it is submitted, they are insufficient to do so.

Indeed, it is submitted that even with the lower threshold test which applies to the State Acts, the recent amendments to the Queensland and NSW Acts are insufficient to render these Acts invalid under the roll-back provisions because they continue to “give effect to” Regulations 9 and 11 of Annex I of MARPOL.

This is so because those regulations are silent as to which persons are liable for discharges of oil that exceed the prescribed limits – MARPOL simply prohibits such discharges without identifying who should be liable.²⁹

It is worth noting the following. First, while the extension of liability to “third persons” may be said to differ from the strict terms of MARPOL, it is difficult to accept that the amendment of the relevant Acts in this manner endangers the “spirit” of MARPOL. Indeed, as will be shown below, s.8 of the NSW Act has, since its inception, imposed liability on persons other than the Master and the owner of the relevant vessel - a matter that appears (correctly, it is submitted) to have passed without comment or challenge.

Similarly, the narrowing of liability by the inclusion of qualifications in the relevant domestic legislation such as ‘negligence’ and ‘recklessness’ may also be said to be a departure from the strict provisions of MARPOL. However, the amendments which narrow liability do not do so to the exclusion of those provisions which impose strict (or absolute) liability on the owner and the Master. Rather, they are in addition to those provisions and as such do not detract from the spirit of MARPOL.

It is suggested that the danger in departing from the terms of MARPOL as set out above is not the risk of invalidity. Rather, the concern is the apparent willingness of Australian parliaments to create a patchwork quilt of legislation that imposes liability on different persons in different ways with the following consequences.

First, the different regimes impose unnecessary confusion and hardship on shipowners, Masters and crew by subjecting them to different standards and bases for liability within the same Australian journey.³⁰ Shipping is an international industry and it is most important that as much uniformity is maintained as is reasonably possible across jurisdictions. To have a range of different regimes within the one nation is difficult to justify despite the obvious right of each jurisdiction to protect its environment in the manner in which it sees fit.

Another consequence is that the extension of liability to third parties may create circumstances where individuals who might otherwise cooperate with regulatory authorities (for example, crew members reporting discharges) are unwilling to do so because of fear of personal liability.³¹ The ‘patchwork quilt’ of liability does not assist by making it unlikely that a crew member is aware of which regime applies where and consequently taking a more conservative approach and maintaining his or her silence.

²⁹ However, note that MARPOL does expressly refer to the Master and the owner in regulation 11(b) of Annex I when it requires that the ‘damage’ which triggers the defence set out in that regulation must not be caused by the intentional acts of the Master and the owner.

³⁰ G Kasoulides, “Global and Regional Port State Regimes” in H Ringbom, (ed) *Competing Norms in the Law of Marine Environmental Protection* (1997) The Hague: Kluwer Law International Ltd, 125.

³¹ The obligation of notification of discharges of oil under MARPOL (and repeated in all relevant legislation) does not extend to crew members. See, for example, s10 of the Victorian Act.

Penalty Differences

Similarly regrettable is the imposition of widely differing penalties under the different Australian regimes. The amendments to the NSW Act have increased the maximum penalty available to the courts to \$10,000,000 for a corporation and \$500,000 for an individual. These penalties are almost 2½ times the maximum penalty available to the courts in Victoria for an individual offender and more than 9½ times the maximum penalty for a corporate offender. In the case of a corporate offender, they are 9 times the maximum penalty available to the courts under the Commonwealth legislation where negligence or recklessness is present and 36 times the maximum penalty for an offence of strict liability.

These are massive differences in maximum penalties for what may be an identical spill. That an offender might be subject to such vastly different penalties depending on where a spill occurs within the same nation amounts to a substantial injustice. Furthermore, it might be argued that different penalties may even encourage differing standards of behaviour by crews familiar with Australian regulatory regimes. A coordinated approach in this case must outweigh any short term political point scoring.

Possible Explanations for Recent Amendments

The Damage Defence

One prompt for the amendments to the NSW and Commonwealth Acts was the decision of the Land and Environment Court in *Morrison v Peacock & Roslyndale Shipping Company* [1999] NSWLEC 182 (confirmed by the NSW Court of Criminal Appeal in *Morrison v Peacock & Roslyndale Shipping Company* [2000] NSWCCA 452) which held that the defence provided by s.8(2) of the NSW Act (which implements regulation 11(b) of Annex I to MARPOL) applies even if the damage to the ship or its equipment which caused the relevant discharge was caused by the failure to maintain that ship or equipment.

In that case, hydraulic oil was spilled from a crane used in the unloading of cargo from the ship *Sitka II* onto Lord Howe Island. During the unloading operation a hose ruptured as the result of “abrasion and chafing at the base of the steel sleeve in the crane column”.³² About 5 litres of the oil made its way from the deck, onto which the oil spilled from the crane hose, into port waters.

Those decisions, since overturned in the High Court decision in *Morrison v Peacock* (2002) 210 CLR 274, held that both the Master and the owner were entitled to rely on the damage defence notwithstanding that the hose ruptured as the result of wear and tear. Both the lower courts held that the meaning of ‘damage’ in the NSW Act could not be read down from its ordinary meaning which included damage caused by wear and tear.³³ By contrast, the High Court held that ‘damage’ will only support a defence if it is “a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some external or internal event”.³⁴

³² *Morrison v Peacock & Roslyndale Shipping Company* [1999] NSWLEC 182, [7] – [10].

³³ *Morrison v Peacock & Roslyndale Shipping Company* [1999] NSWLEC 182, [18]. *Morrison v Peacock & Roslyndale Shipping Company* [2000] NSWCCA 452, [21] – [44].

³⁴ *Morrison v Peacock* (2002) 210 CLR 274, 281.

The earlier decisions of the Land and Environment Court and the Court of Criminal Appeal clearly motivated amendments to both the NSW Act³⁵ and the Commonwealth Act³⁶ which narrow the defence by excluding various causes of damage.

The extent to which the decisions of the lower courts also prompted the amendments with which this article is concerned is less obvious but apparent nonetheless.

As will be seen below, the Commonwealth and NSW amendments that impose liability on any person whose negligent, reckless or (in the NSW case) intentional act caused the prohibited discharge are not subject to any of the three defence provisions provided by regulation 11 of Annex I to MARPOL.

The reasons are self-evident in the case of the defences provided by regulations 11(a) and 11(c) which are inconsistent with offences of negligence or *mens rea*.

However, the exclusion of the damage defence provided by regulation 11(b) from application in such matters is much more significant if that defence includes damage caused by the failure to maintain equipment, as was determined by the decisions of the lower courts in the case of the *Sitka II* described above.

The task of the prosecutor is made untenable where a defendant is liable either absolutely (in the Commonwealth example – see below) or strictly (in NSW – see below) for any discharge but is provided with a defence in cases where the cause of the discharge is damage to the ship or equipment caused by a failure to adequately maintain it. It is therefore unsurprising that the new offence provisions are not subject to the damage defence.

However, the decision of the High Court in *Morrison v Peacock* means that the exclusion of the damage defence from application in cases of negligence or *mens rea* offences is now of little significance in this context and will not be taken any further.

Imposition of Liability on Owner and Master

Another possible explanation for the recent amendments that are the subject of this article arise as the result of the traditionally narrow restriction of liability to the Master and owner of the relevant vessel.

While none of the Acts (or their Second Reading Speeches³⁷) attempt to justify or explain the limitation of criminal liability for an illegal discharge of oil from a ship to that imposed on the Master and the owner, the courts have accepted the rationale to be as follows:

The object of making the owners liable is to discourage them from taking a tolerant attitude towards a Master who causes pollution. The object of making the Master personally liable is to ensure that he will do everything thing he can to avoid pollution.³⁸

³⁵ Item 8 of Schedule 1 to the *Marine Legislation Amendment (Marine Pollution) Act 2002* (NSW) deleted s.8(3) of the NSW Act and replaced it with a new sub-section which excludes certain types of damage from the defence.

³⁶ Item 10 of Schedule 3 to the *International Maritime Conventions Legislation Amendment Act 2001* (Cth) deleted s.9(3) of the Commonwealth Act and inserted new sections 9(3) and 9(3A) which, together with amendments to s.9(2)(d) make the necessary changes to the damage defence.

³⁷Victoria, Parliamentary Debates, Legislative Assembly, 13 March 1986,198; New South Wales, Parliamentary Debates, Legislative Council, 24 November 1987, 17141; Queensland, Parliamentary Debates, Legislative Assembly, 19 October 1994, 9680; Commonwealth, Parliamentary Debates, House of Representatives, 21 October 1982, 2390.

³⁸*Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] All ER 97, 115 per Lord Salmon. See also *Thorneloe v Filipowski* (2001) 52 NSWLR 60, 73.

Problems Arising from the Model Legislation

The Queensland Experience

In relation to the owner of the polluting vessel, Lord Salmon's explanation fails to take into account certain long-standing practices of the shipping industry, such as the practice of 'demise charter', by which a charterer takes 'ownership' of a vessel and has responsibility for employing its Master and crew. This issue will be explored elsewhere.

In relation to the Master of the polluting vessel, Lord Salmon's rationale appears to be undermined by the common practice in Queensland (at least in the years to the 2001 amendments) of bringing charges under the Queensland Act for an illegal discharge against the owner of the vessel only.³⁹

One possible interpretation might be that the Queensland Department of Transport, as the prosecuting authority, has exercised its prosecutorial discretion not to prosecute a Master where it was not satisfied that the Master could be said, in some way, to be personally responsible or culpable for the discharge.

The NSW Experience

The NSW situation provides a neat counterpoint to that of Queensland.

As a result of difficulties under previous legislation in prosecuting the individual whom the prosecuting agency saw as 'responsible' for the unlawful discharge, the NSW Act has, since its inception, provided for liability to be imposed on a person responsible for causing the discharge as well as the owner and the Master of the relevant vessel. Prior to its 2002 amendment, s.8(1) stated:

Subject to subsections (2) and (4), if any discharge of oil or of an oily mixture occurs from (a ship into State waters), the Master and the owner of the ship, *and any other person whose act caused the discharge*, are each guilty of an offence... (*emphasis added*)

The NSW Act's Second Reading Speech explains:

...The bill closes a major loophole in the prevention of Pollution of Navigable Waters Act (which implemented OILPOL 54), which allowed for the prosecution only of the Master and or the owner of the vessel...Where the discharge results from damage caused by a third party... the (prosecuting agency) has been unable to prosecute in the past...The Maritime Pollution Bill specifies that any third party whose wrongful action causes the discharge will be guilty of the offence... (*words in brackets added*)⁴⁰

The underlined words have, it is suggested, added to the intensity of consideration of the courts when considering liability under s.8 of the NSW Act.

In *Thorneloe v Filipowski* (2001) 52 NSWLR 6, NSWCCA 213 (30 July 2001)⁴¹, the NSW Court of Criminal Appeal was asked to determine whether it was appropriate to convict and punish a Master where it was not possible to apportion any blame on him personally.

It was accepted by the Court that "(t)he discharge of unleaded petrol to deck was clearly caused by the failure of the Chief Officer to adequately monitor a ...gauge"⁴² during a loading operation and that, once spilled onto the deck, the fuel "escaped from

³⁹ Personal communication from Mr Jeffrey Hardy, Senior Legal Officer (Maritime), Legal and Legislation Branch, Queensland Transport, 23 July 2002.

⁴⁰ New South Wales Parliamentary Debates, Legislative Council, 24 November 1987, 17141.

⁴¹ The media neutral citation is given because the reported version omits several key paragraphs which are referred to below.

⁴² *Thorneloe v Filipowski* (2001) 52 NSWLR 60, 65.

the deck through a scupper plug which had not been fully re-tightened after it had been loosened to let rain water escape”.⁴³

The Chief Officer was not charged, despite the finding that it was his failure to act upon the advice of the Second Officer that the gauge in question had been “sticking” during the unloading operation.

Charges were brought under s27 of the NSW Act, a provision which deals with discharges of oil (amongst other things) to State waters during transfer operations between a ship and the shore.

The owner pleaded guilty and was convicted and fined \$38,000. The Master sought the benefit of s10 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) which allows a court to dismiss a charge despite a finding of guilt. Instead, the Master was found guilty and fined \$7,000.

In reviewing the decision of Talbot J, the Court of Criminal Appeal had regard to 15 cases in which the Master of a ship from which material had been discharged into state waters had been prosecuted under sections 8, 18⁴⁴ and 27 of the NSW Act.⁴⁵

After reviewing these decisions, Spigelman CJ (with whom Howie J agreed) found that:

113 “...the (Land and Environment) Court consistently stated that there is no practice for a ‘blameless’ Master to be discharged without conviction, whenever the company (the owner) is convicted... Each case requires the exercise of a discretion on the basis of the whole of the circumstances.

...

115 The authorities indicate that the Master is not discharged under s10 in cases where the discharge has been caused by a failure in the operations on board, save where another senior employee with direct responsibility has been convicted.”⁴⁶ (*Material in brackets added, citations omitted*)

The Court went on to find that the circumstances in the present case were sufficient for the exercise of the discretion to dismiss the charge against the Master. In doing so, Hulme J referred to the above quotation and stated that:

...I should acknowledge the practice of the Land and Environment Court to which the Chief Justice has referred of holding the Master responsible (and not applying s10) save where the senior officer directly responsible is convicted. Clearly the conviction and punishment of another senior officer (and/or the owner) as a vindication of the policy behind the legislation and perhaps as sufficient retribution for the commission of the offence may be relevant to the exercise of the discretion under s10. However, it would be quite wrong to regard the happening of such events as pre-conditions for the exercise of the discretion.⁴⁷

Put simply, the discretion apparently exercised in Queensland in favour of a ‘blameless’ Master is not so exercised by prosecuting authorities in NSW where the legislation provides for the person responsible (if he or she is known) to be charged. Rather, any such discretion is left with the courts which have taken the view that:

⁴³ *Thorneloe v Filipowski* (2001) 52 NSWLR 60, 64.

⁴⁴ Section 18 of the NSW Act concerns the discharge of prohibited liquid substances and is drafted in very similar terms to s.8 as it was prior to the 2002 amendments.

⁴⁵ The reported version of the case does not include this discussion which takes place, [54] – [122] inclusive.

⁴⁶ *Thorneloe v Filipowski* [2001] NSWCCA 213, [113 - 115].

⁴⁷ *Thorneloe v Filipowski* (2001) 52 NSWLR 60, 81.

- (a) Where the cause of the discharge is unknown, the Master must be held personally liable and “an argument that no punishment should be visited on a Master, unless personal fault is established, is clearly untenable.”⁴⁸
- (b) The owner should be punished regardless of the cause of the discharge.
- (c) Where the owner and the person responsible for the discharge have both been punished then there may be no good reason to also substantially penalise the Master who, on the facts, may then be able to persuade the court that the charge should be dismissed under s10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).⁴⁹

Some Possible Conclusions

None of the relevant Second Reading Speeches⁵⁰ provides any clarification as to why each of Queensland, NSW and the Commonwealth felt it necessary to move away from the terms of the “model legislation”.

In the absence of any such explanation, it is suggested that the matters set out above are illustrative of the types of issues considered by those drafting such amendments. That is, prosecuting agencies and courts have both struggled to deal with the restricted scope of the model legislation which restricts criminal liability in such circumstances to the Master and the owner of the relevant vessel.

As such, while they may be said to fail to achieve a desirable level of uniformity, the Queensland and Commonwealth amendments may be said to be motivated by the need to provide a legislative framework that allows sufficient flexibility to deal with the complexities in the area while still retaining appropriate levels of liability for the Master and owner to ensure that discharges of unknown source do not go unpunished.

However, the proposed NSW amendments demonstrate that that flexibility, by itself, is not sufficient. The *Thorneloe* case shows that the ability to charge ‘third parties’ may well create uncertainty unless that ability is constrained within well defined limits.

The Legislative Amendments

The Commonwealth Amendments

Prior to the 2001 amendments to the Commonwealth Act, sections 9(1), (1A) and (1B) of that Act imposed liability for the discharge of oil or an oily mixture on the Master and the owner of the offending vessel.

These sections were deleted by Item 5 of Schedule 3 to the *International Maritime Conventions Legislation Amendment Act 2001* (Cth) and section 9 now provides:

- (1) If:
 - (a) a person engages in conduct that causes a discharge of oil or of an oily mixture from a ship into the sea; and
 - (b) the person is reckless or negligent as to causing the discharge by that conduct; and
 - (c) one of the following subparagraphs applies:
 - (i) the discharge occurs into the sea near a State, the Jervis Bay Territory or an external Territory and there is no law of that State or Territory that makes provision giving effect to Regulations 9 and 11 of Annex I to the Convention in relation to that sea;

⁴⁸ *Guiseppe Valle v Anthony Patrick Morrison*, NSW CCA, 22 November 1995 BC9501912, 7 and 8.

⁴⁹ *Thorneloe v Filipowski* (2001) 52 NSWLR 60.

⁵⁰ Queensland, Parliamentary Debates, Legislative Assembly, 16 October 2001, 2788 (Hon S.D. Bredhauer), Commonwealth, Parliamentary Debates, Senate 23 August 2004, 26497 (Senator Kerry O’Brien), New South Wales, Parliamentary Debates, Legislative Assembly, 28 June 2002, 4166 (Hon Mr Gaudry).

- (ii) the discharge occurs into the sea in the exclusive economic zone;
 - (iii) the discharge occurs into the sea beyond the exclusive economic zone and the ship is an Australian ship;
- the person commits an offence punishable, on conviction, by a fine not exceeding 2,000 penalty units.
- (1A) In subsection (1):
engage in conduct has the same meaning as in the Criminal Code.
- (1B) Subject to subsections (2) and (4), if:
- (a) oil or an oily mixture is discharged from a ship into the sea; and
 - (b) one of the following subparagraphs applies:
 - (i) the discharge occurs into the sea near a State, the Jervis Bay Territory or an external Territory and there is no law of that State or Territory that makes provision giving effect to Regulations 9 and 11 of Annex I to the Convention in relation to that sea;
 - (ii) the discharge occurs into the sea in the exclusive economic zone;
 - (iii) the discharge occurs into the sea beyond the exclusive economic zone and the ship is an Australian ship;
- the Master and the owner of the ship each commit an offence punishable, on conviction, by a fine not exceeding 500 penalty units.
- (1C) An offence against subsection (1B) is an offence of strict liability.
- (2)...

A discussion of these new provisions follows.

Liability of Master and Owner – Section 9(1B)

In essence, the amendments create a new sub-section s.9(1), as further defined by s.9(1A). Section 9(1B) is similar to previous sections 9(1), (1A) and (1B) but, as provided by new sub-section 9(1C), the offence by the Master and owner of the ship is an offence of strict liability.

Strict Liability

Section 9(1C) of the Commonwealth Act insists that offences under section 9(1B) are offences of strict liability. The sub-section was inserted as a result of 2001 legislation that applies the Commonwealth Criminal Code to the Commonwealth Act⁵¹:

The result of the application of the Criminal Code is that, in the absence of s.9(1C) of the Commonwealth Act, the new offences created by s.9(1B) would be offences in which the prosecution would be required to prove that the defendant, at the time of the offence, possessed the necessary *mens rea*.

The previous s.9(1) was held, by a single judge of the Victorian County Court, to create an offence of absolute liability,⁵² a decision with which the authors of *Shipping Law* appear to agree without referring to it.⁵³ Section 9(1C) therefore represents a deliberate choice by the drafters of the amending Act to impose an offence of strict liability rather than absolute liability.

⁵¹ *Transport and Regional Services Legislation Amendment (Application of Criminal Code) Act 2001* which took effect on 2 October 2001.

⁵² *The Queen v Caltex Tanker Co (Aust) and Phillip James Hickey*, unrep. Victorian County Court, Judge O'Shea, 18 June 1993.

⁵³ Note 14 above, pp. 539-540. See also Mosley, note 14 above, pp. 217ff.

An offence of strict liability carries with it the availability of the defence of honest and reasonable mistake of fact.⁵⁴ That defence is modified by item 9.2 of the Criminal Code that provides:

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:
 - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and
 - (b) had those facts existed, the conduct would not have constituted an offence.
- (2) A person may be regarded as having considered whether or not facts existed if:
 - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and
 - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

This may have significant implications for the Master who directs a junior crew-member to undertake a routine task. Having provided training to that junior crew-member and satisfied himself that the crew-member had carried out the task successfully on previous occasions, the Master may, arguably, be entitled to rely on the defence of honest and reasonable mistake where that junior crew-member then fails to carry out the routine task sufficiently to prevent a discharge of oil.

Arguably the same answer follows if the Master failed to supervise that junior crew-member during the incident in question. Having supervised the junior crew-member in the past, the honest and reasonable mistake defence afforded by s.9(1C) suggests that the Master might successfully argue that he had ‘considered’ that the junior crew-member was able to carry out the task without supervision.

Liability of “any person” – Section 9(1)

Section 9(1) of the Commonwealth Act creates a new offence. The offence is committed by any person (regardless of whether they are the owner, the Master or a third person) who “engages in action” that “causes” the discharge of oil from a ship into relevant waters if that person is “reckless or negligent as to causing the discharge by that conduct”.

“Cause”

The leading case as to the meaning of “cause” in environmental protection legislation is that of *Alphacell Ltd v Woodward* [1972] AC 824, a House of Lords decision which has been repeatedly applied in Australia and the United Kingdom.⁵⁵

In that case, manufacturing waste waters were directed into two settling tanks from which pumps withdrew the waters for reuse after recirculation. The tanks overflowed into a nearby river when the pumps failed due to the build up of ferns and leaves. The defendants were charged with “*causing or knowingly permitting to enter a stream any ...polluting matter.*”

⁵⁴ *Proudman v Dayman* (1941) 67 CLR 536, 540-541; *He Kaw Teh* (1985) 157 CLR 532

⁵⁵ See *National Rivers Authority v Yorkshire Water Services Ltd* [1995] 1 AC 444; [1995] 1 All ER 225, [1994] 3 WLR 1202; *Majury v Sunbeam Corporation Ltd* [1974] 1 NSWLR 659; *Cooper v ICI Australia Operations Pty Ltd* (1987) 64 LGERA 58; *Environmental Protection Authority v Multiplex Constructions Pty Ltd* (2000) 112 LGERA 1; *Window v The Phosphate Co-operative Co of Australia Ltd* [1983] 2 VR 287, (1983) 50 LGERA 10; *Olex Cables v Howden* Unrep, Victorian SC, Murphy J, 8 May 1978.

Each of the Lord Justices held that the appellants had “caused” the polluting matter to enter the stream. They did so on the basis that the overflow of the settling tanks was the direct result of the appellant’s intentional acts and could not be directly attributed to the act of a third party or to an act of God.

The following passage from Viscount Dilhorne perhaps best summarises the judgement:

What, then, is meant by the word "caused" in the subsection? If a man, intending to secure a particular result, does an act which brings that about, he causes that result. If he deliberately and intentionally does certain acts of which the natural consequence is that certain results ensue, may he not also be said to have caused those results even though they may not have been intended by him.⁵⁶

As such, the failure by the Chief Engineer to implement an appropriate system to prevent the discharge of oil can be said to be engaging in conduct that *caused* the discharge of oil because it is the logical consequence of acts or omissions intentionally performed by the defendant.

Such a result must be seen as appropriate given the obvious purpose of the legislation to ensure that all crew-members of a ship, but particularly senior members such as the Chief Engineer, ensure the creation and implementation of appropriate systems to prevent oil discharges.

Permit

“Permit” is a term that commonly accompanies “cause” in pollution control legislation and, for reasons that follow, its omission from section 9(1) of the Commonwealth Act is regrettable.

In *Owen v Willtara Construction Pty Limited* (1998) 103 LGERA 137⁵⁷, Bignold J, in defining the term “allow”, determined that it is analogous to the term “permit” which “has been the subject of even greater judicial consideration (than ‘allow’) over the years”. His Honour concludes that the relevant authorities show:

...that permission may be held to have been given by a person in circumstances of ‘omission or indifference’ by that person where he has knowledge of the act of another and the power to prevent the doing of the act, but fails to prevent it.⁵⁸

Likewise, in *Environment Protection Authority v Multiplex Constructions Pty Ltd* (2000) 112 LGERA 1, Lloyd J, found that:

The Australian authorities, like the English authorities...support the view that the word “knowingly” (when it appears before the term “permits”) is otiose and also construe the term “permits” as meaning “to intentionally allow.”...In *Miller v Williams Cox J* said ...that there does not have to be actual knowledge – ‘a belief that a contravention is highly likely or probably will suffice.’⁵⁹ (*Material in brackets added, references omitted*)

It is submitted that to omit the term “permit” is a grave oversight on the part of the drafters as it allows senior crew members to avoid liability despite turning a “Nelson’s eye” to the deliberate discharge of oil by junior crew.

⁵⁶ *Alphacell Ltd v Woodward* [1972] AC 824, 839-840.

⁵⁷ A subsequent appeal to the Court of Criminal Appeal on the issue of costs was dismissed – *Willtara Construction Pty Limited v Owen* [1999] NSWCCA 390 (23/11/1999).

⁵⁸ *Owen v Willtara Construction Pty Limited* (1998) 103 LGERA 137, 156. See also *Olex Cables v Howden*, unrep, Victorian SC, Murphy J, 8 May 1978.

⁵⁹ *EPA v Multiplex Constructions Pty Ltd* (2000) 112 LGERA 1, 54.

In such a case the prosecution of junior crew members is unlikely to yield a useful result – the only way that an appropriate message is sent to the industry is to ensure that supervisors of suitable rank are held responsible. So, while a senior crew member such as the Chief Engineer may be held to ‘cause’ a discharge if that discharge is the logical conclusion of his failure to ensure appropriate systems are in place,⁶⁰ that same officer may not be liable for failing to prevent a deliberate discharge as to do so amounts to “permitting” the discharge rather than “causing” it.

Such a result cannot be within the intended purpose of the Act and it is hoped that the necessary minor amendment is made sooner rather than later.

“Reckless”

Recklessness is a term with which the criminal law is quite familiar and provisions of the Criminal Code confirm the accepted judicial interpretation of the term as one that requires that the defendant turn his or her mind to the fact that the harm which occurred was likely (or probably would) occur. That is, the defendant must have foreseen that the harm that did result would ‘probably’ result because of his or her acts or omissions. It is not sufficient for the defendant to have considered that the harm might ‘possibly’ have occurred.⁶¹

Having found that the defendant had the requisite mental element, the tribunal of fact must assess whether the fact that the defendant continued to act, notwithstanding his or her advertence to risk, was justified.⁶² That is, the tribunal of fact must assess the degree of likelihood of the harm actually occurring and the magnitude of the harm, should it occur. Having weighed those matters, the tribunal of fact will look to the benefit, if any, of the actions of the defendant and determine whether those benefits outweighed the risk of harm as described.⁶³

It is difficult to envisage any acts or omissions that might justify the risk of a discharge of oil from a ship that are outside the defences provided by section 9(2) of the Commonwealth Act. It would be an extraordinary case that did not satisfy s.9(2) but was held to amount to ‘justification’ of what is otherwise reckless behaviour. It is therefore somewhat extraordinary that s.9(1) is not subject to (at least some of) the defences provided by s.9(2) which would have provided an ideal set of criteria by which to judge whether otherwise reckless behaviour was ‘justifiable’.

“Negligence”

Item 5.5 of the Criminal Code notes, in respect of negligence:

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- (a) Such a great falling short of the standard of care that a reasonable person would exercise in the circumstance; and
- (b) Such high risk that the physical element exists or will exist; and
- (c) that the conduct merits criminal punishment for the offence.

The focus of an enquiry into whether the defendant was or was not negligent is therefore the physical act or omission – the *actus reus*. The mental element of the defendant – the *mens rea* – is irrelevant.

⁶⁰ See, for example, *Alphacell v Woodward* [1972] AC824, 839-840.

⁶¹ P Gillies, *Criminal Law* (1995) Sydney: LBC, p. 55.

⁶² Gillies, note 61 above, pp. 57, 492.

⁶³ Gillies, note 62 above.

The question posed is therefore whether, on an objective standard, the *actus reus*:

- (a) falls so short of the standard that a reasonable person, in the circumstances of the defendant would exercise; and
- (b) involves such a great risk of the danger that did in fact eventuate, that criminal sanction is warranted.⁶⁴

There is no need for an enquiry by the court as to whether the defendant adverted to the risk in his or her own mind. Indeed, it is this distinction that divides ‘recklessness’ which requires advertence to that risk, from ‘negligence’ where such advertence is not required.⁶⁵

Criminal negligence as a concept is not well utilised by the common law which requires, as a basic premise, that criminal liability will not be imposed on a defendant unless s/he committed the *actus reus* with the necessary *mens rea*.⁶⁶

As such, the jurisprudence on the subject is limited to either the interpretation of statutes which use the term ‘negligence’ or common law manslaughter cases in which the courts require varying ‘degrees’ of negligence before the charge will be made out.⁶⁷

It is this issue of the standard of negligence required to attract criminal liability which is of most interest. At one extreme is the civil test of negligence which requires no more than that the person concerned failed to exercise the standard of care which a reasonable person in that position would have exercised.⁶⁸ At the other extreme is the crime of manslaughter which, clearly, will require a very high degree of negligence. In Victoria, the leading manslaughter case is *Nydam v R* [1977] VR 430 where the court held that the behaviour of the defendant must have been perpetrated in circumstances involving:

such a great falling short of the standard of care which a reasonable man would have exercised and which involves such a high degree of risk that death or grievous bodily harm would follow that the doing of the act merit(s) criminal punishment.⁶⁹

The passage quoted above is almost identical to that set out in Item 5.5 of the Criminal Code which, it is suggested, indicates an intention on the part of the drafters of the legislation to impose a very high threshold test for negligence.

However, it is submitted that s.9(1) of the Commonwealth Act does not require negligence of the same standard as the courts require in manslaughter cases to be found before criminal liability will be found.

Rather, Item 5.5 requires that the relevant standard of negligence required to ground criminal liability will be determined according to the mischief against which the relevant statute is directed.

This is clear from both 5.5(a) which refers to the circumstances in which the defendant found him or herself and 5.5(b) which refers to the physical element in question – in this case the discharge of oil.

As such, the court is left as the arbiter of whether the act or omission in question warrants criminal sanction. In this regard, while Item 5.5 goes further that most criminal statutes to clarify the ‘standard’ of negligence required to ground criminal liability, it

⁶⁴ In the environment protection context, see also *NSW Sugar Milling Co-operative Ltd v EPA* (1992) 59 A Crim R 6, 11 and *EPA v Waight [No. 3]* [2001] NSWLEC 126, [276].

⁶⁵ Gillies, note 61 above, 34.

⁶⁶ *Sweet v Parsley* [1970] AC 132, 152.

⁶⁷ Gillies, note 61 above, 35.

⁶⁸ Gillies, note 67 above.

⁶⁹ *Nydam v R* [1977] 430, 445.

still leaves a great deal of uncertainty that is unlikely to be resolved by courts which are unlikely to fetter their future discretion by decisions that narrowly define the concept.⁷⁰

The Queensland Amendments

By comparison with the amendments to the Commonwealth Act, the recent amendment of the Queensland Act is relatively straightforward.

Prior to the amendment, section 26 of the Qld Act provided as follows:

- (1) If oil is discharged from a ship into coastal waters, the ship's owner and Master each commit an offence.
- (2) Subsection (1) applies despite sections 23 and 24 of the Criminal Code.

Section 26(1) of the Queensland Act was deleted by s45 of the *Transport Legislation Amendment Act 2002* (Qld) and replaced by the following:

- (1) If oil is discharged from a ship into coastal waters, the following persons each commit an offence –
 - (a) the ship's owner;
 - (b) the ship's Master; and
 - (c) another member of the ship's crew whose act caused or contributed to the discharge, unless the member was complying with an instruction from the Master or of someone authorised by the Master to give the instruction.

The comparison with the current drafting of section 8 of the NSW Act, which the drafters appear to have used as a model, is obvious.

That is, the section continues to impose absolute liability on the ship's Master and the owner, regardless of the cause of the discharge. In this way, s.26(1)(a) and (b) continue to reflect the terms of the model legislation.

Three matters require comment.

“Contribute”

At first blush, the use of the term ‘contribute’ in s.26(1)(c) merely allows more than one person to be liable for a discharge when it is not possible to attribute sole responsibility for the discharge to any single person.

However, given the broad judicial interpretation of the term ‘cause’⁷¹, in a situation where several individuals collectively ‘cause’ a discharge each must be liable for the discharge as, in fact, each caused it. That is, where the Chief Engineer fails to create and maintain an appropriate system in his engine room and as a result of that lack of a system, a junior engineer misuses the bilge tank which overflows, then each may be said to have ‘caused’ the discharge even though the Chief Engineer’s omissions were not the proximate cause.

It is suggested that the use of the term is an exercise in caution rather than necessity. In some situations where the discharge occurred as a result of an act of God or by way of vandalism or where the proximate cause is simply unknown⁷² it might be argued that acts or omissions that could not be said to have *caused* the discharge, nonetheless might be argued to have *contributed* to it. Such examples are difficult to conceive if the

⁷⁰ See also the discussion of *Ampol v EPA* (1993) 81 LGERA 433 in the context of the NSW Act below.

⁷¹ Which insists that deliberate and intentional acts, the natural result of which is the harm that ensued are the acts that “caused” the harm, even if the result was unintended. See Viscount Dilhorne in *Alphacell v Woodward* [1972] AC 824, 839-840.

⁷² For an example of a case where no one was able to explain the cause of the discharge see *Webb v Chung & Ors* [2002] NSWLEC 135.

Alphacell principles are kept in mind, especially if the causation of an event is thought of as a 'net' rather than a 'chain'.⁷³

The 'Excuse' afforded by s26(1)(c)

Section 26(1)(c) provides a third party, such as a junior crew member, with a defence which, at first blush, might be viewed as providing an 'easy' excuse by allowing blame to lie with someone already liable – the Master pursuant to s.26(1)(b). However, the fact is that the penalty imposed on a Master who is liable *ex officio* and a Master who gave orders for the discharge of oil are likely to be substantially different.

One benefit of the excuse is that it absolves from liability a crew member who might otherwise be reluctant to come forward with evidence against the Master of a ship from which a discharge has occurred. To that extent the section appears to be directed to good purpose.

Absolute Liability

Finally, it is worth noting that s.26(2) of the Queensland Act, by insisting that liability is imposed "*despite the Criminal Code, sections 23 and 24*" creates an offence of absolute liability.

Section 24 of the Criminal Code provides:

- (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
- (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

That is, s24(2) of the Criminal Code allows s26(2) of the Queensland Act to override s24(1) of the Code (which would otherwise provide the defence of honest and reasonable mistake of fact). As was noted above in relation to the Commonwealth Act, such exclusion creates an offence of "absolute liability".⁷⁴

The NSW Amendments

The effect of the *Marine Legislation Amendment (Marine Pollution) Act 2002* (NSW) is to delete the words "and any other person whose act caused the discharge" from section 8(1) and insert a new section 8A which expands the concept deleted from s.8. Section 8A provides:

- (1) If any discharge of oil or oily mixture occurs from a ship into State waters, each crew member of the ship, and each person involved in the operation or maintenance of the ship, whose act caused the discharge is guilty of an offence...
- (2) In proceedings for an offence under subsection (1), it is sufficient for the prosecution to allege and prove that a discharge of oil or an oily mixture occurred from a ship into State waters and the crew member or person involved in the operation or maintenance of the ship committed an act that caused the discharge.
- (3) If any discharge of oil or an oily mixture occurs from a ship into State waters, each person responsible for the discharge is guilty of an offence...

⁷³ *Window v The Phosphate Co-operative Co of Australian Ltd* Unrep, Victorian SC, Murphy J, 28 April 1983 quoting Lord Shaw of Dunfermline in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, 369.

⁷⁴ Davies and Dickey, note 14 above, p. 539, n 26.

- (4) For the purposes of subsection (3) a person is responsible for the discharge if that person, or another person acting under the direction of that person, committed an act that cause the discharge and the person committed the act:
- (a) with intent to cause the discharge;
 - (b) recklessly and with the knowledge that a discharge would probably result; or
 - (c) negligently.
- (5) ...

The new section is clumsily worded and the precision of the amending Act's Explanatory Note is therefore most helpful. It describes s.8A as follows:

The ... provision contains two offences, the first offence is a strict liability offence against any crew member of the ship or person involved in the operation or maintenance of the ship whose act causes the discharge. For the offence to be made out the prosecution need only allege and prove that a discharge of oil ... occurred from a ship into State waters and the crew member or person involved... caused the discharge. The second offence applies to each person responsible for the discharge. A person is responsible for the discharge if that person, or another person acting under the direction of that person, commits an act that causes the discharge and the act is committed with intent to cause the discharge, recklessly with the knowledge that a discharge would probably result or negligently.

The following points are worth noting.

Strict Liability

First, the Explanatory Note assumes that the provisions of s8A(1) and (2) impose strict, rather than absolute, liability. This reflects the practice of the courts which have found that offences under the NSW Act are offences of strict liability.⁷⁵

As has previously been noted in the context of NSW and Victorian pollution control legislation, "the different interpretations of criminal liability under what are essentially identical provisions... is hardly a satisfactory development in the law".⁷⁶

"Recklessness" and "Negligently"

For the reasons set out above in the discussion of the term "recklessness" in the context of the Commonwealth Act, the words "and with the knowledge that a discharge would probably result" that follow the term "recklessness" in s8A(4)(b) of the amended NSW Act probably add little to the meaning or interpretation of that term.

The discussion of the term "negligence" in the context of the Commonwealth Act is also relevant as background to a discussion of the term in the NSW context. However, the absence of the Criminal Code as an influence in NSW may result in a slightly different interpretation of the term.

While it has been criticised as failing to provide the required clarification of the meaning of "negligence",⁷⁷ the decision of the NSW Court of Criminal Appeal in *EPA v Ampol Ltd* (1993) 81 LGERA 433 assists substantially in the definition of "negligence" in the context of s8A of the NSW Act.

That decision concerned the meaning of "negligence" under s6(2) of the *Environmental Offences and Penalties Act 1989* (NSW) ("*the EO&P Act*") which provides that the owner of land is guilty of an offence if it negligently caused or

⁷⁵ *Thorneloe v Filipowski* (2001) 52 NSWLR 60, 70.

⁷⁶ N Brunton, "Water Pollution Law in NSW and Victoria: Current Status and Future Trends" (1994) *Environment and Planning Law Journal* 39, 55.

⁷⁷ Z Lipman and L Roots, "Protecting the Environment through Criminal Sanctions: the Environmental Offences and Penalties Act 1989 (NSW)" (1995) *Environment and Planning Law Journal* 16, 20.

contributed to the conditions which gave rise to an offence under s6(1) which occurred on that land. Section 6(1) imposes liability on a person who negligently causes a substance to leak, spill or otherwise escape from premises in a manner which is likely to harm the environment.

Ampol was the lessor of a service station on which an employee of the lessee allowed an underground storage tank to overflow. Ampol was charged under s6(2) of the EO&P Act with the particulars of the charge being that Ampol failed to provide suitable systems (bundling, drainage, shut-off system, tank alarm, and so forth) and in doing so contributed to the commission of the offence.

The system used by Ampol was one commonly used in the industry and it was accepted by Pearlman J (after the decision of the Court of Criminal Appeal, the matter was referred back to the Land and Environment Court)⁷⁸ that it complied with industry codes, standards and practices including the *Dangerous Goods Act 1975* (NSW) and the *Dangerous Goods Regulations 1978* (NSW).⁷⁹

On that basis, Ampol argued that it had satisfied its obligations under s6(2) of the EO&P Act because the prosecution was required to show “gross negligence” and not merely the civil standard.⁸⁰

At the conclusion of the hearing, the question of the standard of negligence required to ground criminal liability under s6(2) of the EO&P Act was put to the Court of Criminal Appeal. Mahoney JA, with whom the rest of the court agreed, held that:

1. “negligence”, where specified as an element of an offence, may merely indicate that the act, or omission to act, need not have been done intentionally;
2. “negligence” must be assessed having regard to all of the circumstances of the case including the other elements of the provision allegedly contravened, the seriousness of the consequences of the alleged offence and the purpose and intent of the relevant Act;
3. “negligence” need not be a “gross” departure from the appropriate standard of care. The omission of a precautionary act would be negligent if on an assessment of all the facts the failure to take that precaution warrants criminal punishment.⁸¹

The first of the three principles set down above is irrelevant in the present context as the terms of s8A(3) clearly distinguish between offences of intent, recklessness and negligence. As such, there can be no suggestion that the use of the term “negligence” merely requires a lack of intent before liability will be imposed.

Neither is the third principle terribly useful as Mahoney JA appears to go out of his way to avoid distinguishing between “negligence” and “gross negligence” insisting instead that the only distinction is whether the court concludes that the act or omission “warrants criminal punishment. I do not think that the matter can be formalised beyond that.”⁸²

The effect of the second principle is that the court is placed in the position of determining whether the defendant’s behaviour justifies criminal sanction. That decision is to be made by taking into account the terms of the individual statute, the

⁷⁸ *EPA v Ampol Ltd* (1994) 82 LGERA 247.

⁷⁹ *EPA v Ampol Ltd* (1994) 82 LGERA 247, 255.

⁸⁰ N Brunton, “Water Pollution Law in NSW and Victoria: Current Status and Future Trends” (1994) *EPLJ* 39, 54.

⁸¹ *EPA v Ampol Ltd* (1993) 81 LGERA 433, 438-439 as summarised in J Johnson, “Leaks, Spills or Escapes Likely to Harm the Environment” (1994) *Law Society Journal* 39, 41.

⁸² *EPA v Ampol Ltd* (1993) 81 LGERA 433, 439.

harm which the statute seeks to prevent and the circumstances in which the defendant found him or herself at the time of the incident.

It is suggested that the inclusion of these factors in the matrix of matters to be considered by the court does not progress the argument very far as they are matters that should probably be included in all such judicial determinations.

The effect of the decision is to ensure that the courts retain a very high level of discretion to determine whether an act is sufficiently “careless” to warrant criminal sanction. Such a decision is understandable given the breadth of possible factual circumstances that might require application but it is not terribly helpful in providing advice to a defendant.

Intent and Penalty

Section 8A(4)(a) of the amended NSW Act requires proof of an act committed with intent to cause the discharge before a finding of guilt will follow.

It is common for legislation to provide for *mens rea* offences to carry maximum penalties that are (often substantially) higher than offences of strict or absolute liability. Indeed, the maximum penalty of the offence was one of the factors noted by the High Court in *He Kaw Teh* as relevant to the proper categorisation of an offence.⁸³

It is therefore interesting that the amended NSW Act provides for the same maximum penalty under s8A(1) – strict liability – and s8A(3) – which requires a mental element or negligence to be proven. This is regrettable. Different standards of liability should be supported by levels of maximum penalty that reflect the relevant level of opprobrium that the community reserves for that behaviour.

“Act” and “Omission”

Thirdly, the discussion set out above in relation to the meaning of “cause” in the context of the Commonwealth Act is also relevant in the context of the strict liability provisions of s8A(1) and (2) of the amended NSW Act. However, it is worth noting that while the Commonwealth Act refers (through the Criminal Code) expressly to an omission (“omit to perform an act”), s8A(2) of the NSW Act states that a person is only liable if they “committed an act that caused the discharge”.

Given that so many discharges appear to be caused not by a positive act but by the failure to perform an act, it is submitted that:

- (a) the courts are likely to either interpret the term “act” to include an omission or, alternatively, interpret what might be declared ‘an omission’ to be “an act”. An example of the latter case might be the failure to check an overfilling gauge when pumping the bilges to the bilge tank – is the “cause” of the discharge the failure to check the gauge (an omission) or the filling of the tank (an act)?
- (b) to avoid confusion and the need for such interpretation, the legislation should be expanded to expressly include a failure to act.

Conclusion

The amendments in 2001 and 2002 to the Queensland, NSW and Commonwealth Acts provide significant departures from the terms of the model legislation. They may also be described as departing from the terms of MARPOL itself.

⁸³ *He Kaw Teh v Queen* (1985) 157 CLR 523, 536 (per Gibbs CJ) and 597 (per Dawson J).

However, the significance of that departure is far less than the significance which attaches to the loss of uniformity which characterised the drafting of the original MARPOL Acts in the aftermath of Australia's ratification of the convention.

In relation to the discharge sub-regime of MARPOL, that uniformity has now been replaced with a patchwork quilt across jurisdictions which impose different standards of liability on various different persons, accompanied by vastly different penalties.

Justice demands that individuals be subject to the same type of liability and the same maximum penalty for the same act or omission regardless of where that act or omission occurs in Australian water. Currently, that justice is absent in the Australian implementation of MARPOL.