
Enforcement of Maritime Legislation in Queensland: A New Focus

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Introduction

Maritime Safety Queensland (MSQ) is the Queensland government agency¹ charged with responsibility for the administration and enforcement of Queensland's maritime legislation: the *Transport Operations (Marine Safety) Act 1994* (TOMSA) and the *Transport Operations (Marine Pollution) Act 1995* (TOMPA).²

TOMSA represents a significant departure from the preceding *Marine Act 1958* (Qld), in that it is performance-based legislation, rather than prescriptive. The relevant standard of performance is usually expressed to be 'safe'; whether it be in relation to the construction or operation of ships. TOMSA's principal performance-based provisions are referred to as 'General Safety Obligations' (GSO's). GSO's are imposed upon owners, masters, marine industry professionals and other persons involved with the operation of ships; the obligation is to perform their responsibilities safely. The objective of TOMSA is to regulate the maritime industry to ensure marine safety and enable the effectiveness and efficiency of the Queensland maritime industry to be further developed.³

TOMPA is also a relatively new piece of legislation, and represents the incorporation into Queensland law of the *International Convention for the Prevention of Pollution from Ships 1973/78* (MARPOL). In contrast to TOMSA, TOMPA is highly prescriptive and contains a number of strict liability offences prohibiting the discharge of pollutants from ships. The objective of TOMPA is to protect Queensland's marine and coastal environment by minimising deliberate and negligent discharges of ship-sourced pollutants into coastal waters.⁴

Since the introduction of TOMSA and TOMPA, MSQ⁵ has relied upon a combination of regional service delivery and external service providers to enforce compliance with maritime legislation. The services of the Queensland Police Service,⁶ the Queensland Boating and Fisheries Patrol⁷ and Queensland Transport's Prosecution are utilised, leaving MSQ to concentrate on its core business of promoting a positive

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¹ The Maritime Safety Agency of Queensland was established by the *Maritime Safety Queensland Act 2002* (Qld). Section 8 of the Act sets out the functions and powers of MSQ, which include handling the investigation process into marine incidents under TOMSA, and dealing with the discharge of ship-sourced pollutants into coastal waters under TOMPA.

² Collectively referred to in this paper as 'maritime legislation'.

³ *Transport Operations (Marine Safety) Act 1994* (Qld) s 3(1).

⁴ *Transport Operations (Marine Pollution) Act 1995* (Qld) s 3(1).

⁵ Prior to MSQ's establishment in October 2002, Queensland Transport's Maritime Division was the responsible agency.

⁶ In particular, the Queensland Water Police, a unit within the Specialist Services Branch of the Queensland Police Service.

⁷ The Queensland Boating and Fisheries Patrol is a unit of the Queensland Fisheries Service, which is in turn a division of the Department of Primary Industries and Fisheries.

safety culture in Queensland's maritime industry and preventing and responding to ship-sourced marine pollution.

Essentially, the external service providers deliver "on-water" enforcement for relatively straightforward offences such as exceeding speed limits,⁸ registration,⁹ licensing¹⁰ and safety equipment.¹¹ Such offences are generally dealt with by the issue of a marine infringement notice or 'MIN'. A MIN is issued under the *State Penalties Enforcement Act 1999* (Qld) and the *State Penalties Enforcement Regulation 2000* (Qld) and is akin to a 'speeding ticket' that can either be paid or an election made to contest the MIN in the Queensland Magistrates' Court.

However, where the offences relate to contravention of the General Safety Obligation, such as the GSO against operating a ship unsafely,¹² more difficulty is encountered in interpreting and applying the requirement. Some police officers have expressed to the author their lack of confidence in the GSO's, instead preferring to rely upon provisions under the Queensland Criminal Code,¹³ where ample precedent exists.

Further, some areas of MSQ's regulatory responsibility have not been effectively enforced. For instance, the use of a recreational ship for commercial activities is not the subject of an offence for which a MIN can be issued.¹⁴ Consequently, despite frequent and even flagrant use of recreational ships for commercial activities by some members of Queensland's maritime community, the practice was effectively unchecked.

These issues represent a significant challenge to the effective administration of maritime safety and the prevention of marine pollution in Queensland. The direct response has been to establish an Investigations Unit within MSQ that is directly responsible for achieving compliance with maritime legislation. The Investigations Unit is charged with, amongst other things, creating precedent on the application of the GSO's and addressing some of the identified shortcomings in the enforcement of maritime legislation.

This article discusses:

- The formation and role of MSQ's Investigations Unit;
- Some of the significant provisions of TOMSA and TOMPA; and
- Recent important prosecutions conducted under TOMSA and TOMPA by the Investigations Unit, including the *Karma* case.

Investigations Unit

The Investigations Unit was created in January 2004 to resolve the identified problems of inconsistent and incomplete enforcement of maritime legislation. The Investigations Unit provides MSQ with a specialist capability to investigate and prosecute contraventions of maritime legislation, and currently consists of a manager, two specialist investigators and a prosecution's officer. The Investigations Unit is at present trialling an on-water enforcement team, tasked exclusively to the safe operation

⁸ *Transport Operations (Marine Safety) Act 1994* s 206A.

⁹ *Transport Operations (Marine Safety) Act 1994* s 57.

¹⁰ *Transport Operations (Marine Safety) Act 1994* s 61.

¹¹ *Transport Operations (Marine Safety) Act 1994* s 44.

¹² *Transport Operations (Marine Safety) Act 1994* s 43.

¹³ Such as s 328A *Criminal Code Act 1899* (Qld), Dangerous Operation of a Vessel.

¹⁴ The *Transport Operations (Marine Safety) Act 1994* (Qld) s 61 requires only that a ship should be registered, not that a ship should be "appropriately" registered.

of personal water craft.¹⁵ The Investigations Unit empowers MSQ to enforce its own legislation in areas of its responsibility where the Queensland Police Service or the Queensland Boating and Fisheries Patrol do not have a mandate.

The Investigations Unit has been in operation for approximately 18 months, and in that time has conducted a number of prosecutions under both TOMPA and TOMSA. This article shortly describes the more significant prosecutions conducted during 2004 and early 2005.

All the prosecutions described in this article were dealt with summarily in the Queensland Magistrates' Court pursuant to Part 6 of the *Justices Act 1886* (Qld). The offences under TOMSA were not indictable. By contrast, the discharge offences under TOMPA¹⁶ are indictable,¹⁷ but were taken by way of a summary proceeding at the prosecution's election.¹⁸

TOMSA

TOMSA represents a significant departure from the administration of marine safety in Queensland, and indeed in Australia.

Traditionally, marine safety in Australia has been administered by a system of prescriptive requirements. For ships, annual survey by government surveyors, coupled with a registration requirement, ensured that all commercial ships met a minimum safety standard. For seafarers, licensing and examination was conducted in order to ensure a minimum level of skill and knowledge.

The requirements were heavily prescriptive, with close reference to the Uniform Shipping Laws Code¹⁹ required for compliance.

TOMSA introduced a new focus on marine safety by imposing obligations on the participants in the marine industry to ensure that their operations are safe. Whilst some prescriptive elements remain (such as licensing and registration requirements), annual surveys were dispensed with, and the GSO's introduced.

There are 3 significant GSO's:

- the General Safety obligation of ship designers and builders and marine surveyors concerning the condition of ships, which provides that an accredited ship designer or builder or marine surveyor must ensure that each declaration made in a certificate of compliance is correct in every particular;²⁰
- the General Safety obligation of ship owners and masters concerning the condition of ships, which provides that the owner and master of a ship must not operate the ship unless the ship is safe. A ship is safe if it is seaworthy, and is appropriately equipped and crewed, to meet the ordinary perils of the voyage on which the ship is proceeding or about to proceed;²¹ and

¹⁵ In the dictionary to the Transport Operations (Marine Safety) Regulation 2004 (Qld), personal watercraft is defined to mean a powered ship that:

(a) has a fully enclosed hull that does not take on water if capsized; and
 (b) is designed to be operated by a person standing, crouching or kneeling on it or sitting astride it.
 These craft are commonly referred to as 'jet skis'.

¹⁶ *Transport Operations (Marine Pollution) Act 1995* (Qld) ss 26 & 61.

¹⁷ *Transport Operations (Marine Pollution) Act 1995* (Qld) s 123.

¹⁸ *Transport Operations (Marine Pollution) Act 1995* (Qld) s 124.

¹⁹ Australian Transport Council, (1993) Canberra: AGPS.

²⁰ Section 40 *Transport Operations (Marine Safety) Act 1994* (Qld).

²¹ Section 41 *Transport Operations (Marine Safety) Act 1994* (Qld).

- the General Safety obligation on persons involved with operation of ship to operate it safely, which provides that a person involved with the ship's operation must not cause the ship to be operated unsafely. The ship is operated unsafely if, amongst other things, it causes a marine incident or conditions of the ship's registration are contravened.²²

In place of annual surveys conducted by officers of MSQ, the obligation is now placed on the owners of ships to ensure a ship is seaworthy. The owners of ships can engage accredited persons by private contract to ascertain whether a ship is seaworthy. Further, the obligation is on the owner and master not to operate the ship unless the ship is safe, and if it is being operated, to make sure that the ship is being operated safely. MSQ's role is to monitor the activities of owners, masters and accredited persons to ensure that they are meeting their General Safety Obligations.

The maritime industry in Queensland has in some cases struggled to cope with the shift in emphasis from the prescriptive standard to a performance-based standard of compliance. It has also been difficult in some instances to enforce the legislation in the absence of precedent as to when a ship is "safe", and when a ship is being operated "unsafely".

An important function of the Investigations Unit has been to create precedent on the construction and application of the General Safety Obligations.

TOMPA

In sharp contrast to TOMSA, TOMPA is highly prescriptive.

TOMPA contains a range of offence provisions broadly in line with the provisions of MARPOL; indeed the full text of MARPOL is annexed to the Transport Operations (Marine Pollution) Regulation 1995 (Qld).

TOMPA prohibits the discharge of oil, noxious liquid substances, packaged harmful substances, sewage and garbage from ships but it only applies to discharges from ships that happen '*in the first 3 n miles of the territorial sea and other coastal waters subject to the ebb and flow of the tide*'.²³

As oil pollution is the most commonly reported and investigated offence, the most significant provisions are:

- the discharge of oil from a ship into coastal waters is prohibited, and the owner, master and crew member involved with the discharge each commit an offence.²⁴ The defences of intention²⁵ and mistake of fact²⁶ are expressly excluded, meaning the offence is one of strict liability; and
- the discharge of a pollutant into coastal waters during a transfer operation is prohibited, and the owner, master and crew member involved with the discharge each commit an offence.²⁷ This offence is also one of strict liability.

²² Section 43 *Transport Operations (Marine Safety) Act 1994* (Qld).

²³ S 11 TOMPA states that the '*body of law governing Australian waters is extremely complex and this section is intended to provide only a very general overview*'. In TOMPA's dictionary '*coastal waters*' are defined as '*coastal waters of the State*' but the *Acts Interpretation Act 1954 (Qld)* at s 36 defines Coastal waters as:

'(a) the parts of the territorial sea of Australian that are within the adjacent area in respect of the State, other than any part mentioned in the Coastal Waters (State Powers) Act 1980 (Cth), section 4(2); or
(b) any sea that is on the landward side of any part of the territorial sea of Australia and within the adjacent area in respect of the State, but not within the limits of the State'

²⁴ Section 26 *Transport Operations (Marine Pollution) Act 1994*.

²⁵ Section 23 *Criminal Code Act 1899* (Qld).

²⁶ Section 24 *Criminal Code Act 1899* (Qld).

²⁷ Section 61 *Transport Operations (Marine Pollution) Act 1994*.

Offences relating to discharge of noxious liquid substances,²⁸ jettisoning packaged harmful substances,²⁹ discharging sewage³⁰ and disposal of garbage³¹ are also offences of strict liability and carry a significant penalty of 3500 penalty units³² or up to five times that amount for corporations.³³

The level of penalty means that the discharge offences are indictable,³⁴ but can be taken by way of a summary proceeding at the prosecution's election.³⁵

Other important offences relate to the prevention of pollution after a marine accident. For instance, section 95 TOMPA empowers authorised officers to direct any person to take a stated reasonable action within a stated reasonable time. Non-compliance with such a direction is an offence unless the person has a reasonable excuse.³⁶

In sum, TOMPA prohibits the discharge of specified substances from ships into coastal waters and provides some powers to officers authorised under the act to prevent discharges from ships in circumstances where a discharge is likely or has already occurred.

The Investigations Unit role is to assist investigators with evidentiary requirements and to conduct prosecutions for alleged offences, primarily against sections 26 and 61 TOMPA.

Karma

*Lietzow v. Anthony Roy Wolfe*³⁷ arose out of the grounding and subsequent salvage of the ship *Karma* in November 2003. Mr Wolfe, who was the master and owner of the ship, was imprisoned for six months for offences under TOMSA, in particular, for breach of the General Safety Obligation relating to operating an unsafe ship. The facts and circumstances are of particular interest in that issues of marine pollution were involved, as well as more serious charges under TOMSA. No actual marine pollution occurred because the pollutants were effectively removed by MSQ before they could escape from the ruptured hull.

The grounding triggered pollution prevention and salvage responses coordinated by MSQ; costs exceeding \$420,000 were incurred.

On 14 November 2003, the 43 metre ex-river barge *Karma* ran aground adjacent to Deepwater National Park near to Agnes Water. The causes of the grounding were engine failure combined with inadequate ground tackle. At the time of the grounding, the ship was engaged on a voyage from Maryborough to Rockhampton. However, it was the master's intention to eventually sail the ship from Australia to the Philippines.

The defendant was the master and owner of the ship at the time it ran aground.³⁸ The ship was in generally poor condition and was ill-equipped. The main engine

²⁸ Section 35 *Transport Operations (Marine Pollution) Act 1994*.

²⁹ Section 42 *Transport Operations (Marine Pollution) Act 1994*.

³⁰ Section 47 *Transport Operations (Marine Pollution) Act 1994*.

³¹ Section 55 *Transport Operations (Marine Pollution) Act 1994*.

³² \$262,500.

³³ Section 181B *Penalties and Sentences Act 1992* (Qld)

³⁴ *Transport Operations (Marine Pollution) Act 1995* (Qld) s 123.

³⁵ *Transport Operations (Marine Pollution) Act 1995* (Qld) s 124.

³⁶ Section 95 (6) *Transport Operations (Marine Pollution) Act 1994*.

³⁷ Unreported, Bundaberg Magistrates' Court, Lavaring A/M, 8 & 9 March 2005.

³⁸ There were some genuine issues concerning title, with a number of persons either claiming or disclaiming an interest in the ship at various times. However, section 9 of the *Transport Operations (Marine Safety) Act 1994* (Qld) defines "owner" to include a person who operates the ship or causes or allows the ship to be

crankshaft was heavily pitted by corrosion and was always going to fail; it was just a matter of time. Further, the ground tackle (anchor and chain) was inadequate to hold the ship in a seaway. The original anchors had been removed some time in the past, and the anchors fitted had been supplied by the defendant.

The ship was not registered with the Commonwealth³⁹ or with Queensland.⁴⁰ The ship was also uninsured.⁴¹

MSQ gave a direction to the defendant to remove the pollutants from the ship under TOMPA,⁴² but he failed to comply. Consequently, MSQ responded to the likely pollution emergency and removed the pollutants at a total cost to the State in excess of \$60,000.⁴³

The defendant also failed to remove the ship from the beach, and so the ship was removed by a private salvage contractor at a total cost to the State in excess of \$300,000. The ship could not be saved by the salvor, and sank in deeper water on 24 December 2003.

Some of the legal issues that stem from the grounding of the *Karma* include:

- Whether the ship was on an interstate, intrastate or international voyage at the time of the grounding;
- Whether the ship was on a recreational or commercial voyage at the time of grounding; and
- Whether the *Shipping Registration Act 1981* (Cth) applied to the ship.

Interstate, intrastate or international voyage?

Mr Wolfe's ultimate intention was to sail the ship to the Philippines, where he intended to sell it to an interested buyer. Firstly though, he had to navigate the ship from Maryborough to Rockhampton, a voyage of some 400 nautical miles. At Rockhampton, Mr Wolfe intended to stop long enough to make temporary repairs and then sail the ship to the Philippines.

The first issue to be considered then is whether the voyage was interstate, intrastate or international in character. If interstate or international, then the *Navigation Act 1912* (Cth) might apply. If intrastate, then TOMSA would apply.

Section 2 *Navigation Act 1912* (Cth) provides that it 'does not apply' in certain situations. These include 'a trading ship proceeding ... other than an overseas voyage or an inter-State voyage'. An inter-State voyage is defined to include ports between a State and another State or Territory whether the ship travels to two or more ports in a particular State or Territory.⁴⁴ An overseas voyage is also defined as an Australian port or sea over the Australian continental shelf to a port or sea over the continental shelf of

operated by someone else. On the evidence, the defendant clearly fell within the scope of that definition and he did not contest the point.

³⁹ *Shipping Registration Act 1981* (Cth) s 12.

⁴⁰ *Transport Operations (Marine Safety) Act 1994* (Qld) s 61.

⁴¹ *Transport Operations (Marine Pollution) Act 1995* (Qld) s 67A requires all ships of greater than 35 metres in length to have liability insurance.

⁴² *Transport Operations (Marine Pollution) Act 1995* (Qld) s 95 permits an authorised officer to direct any person to take a stated reasonable action in a stated reasonable time if the authorised officer is satisfied on reasonable grounds that a discharge of pollutants into coastal waters is likely to happen and urgent action is necessary to prevent or minimise the discharge and its effect on Queensland's marine coastal environment.

⁴³ Onboard the *Karma* were a large number of pollutants, including more than 3000 litres of diesel fuel, 4000 litres of oily bilge water and 450 litres of lubricating oil. Also onboard were tins of paint, ethanol, gear oil, grease and batteries.

⁴⁴ *Navigation Act 1912* (Cth), s 6.

another country.⁴⁵ A trading ship is also defined as in connection with 'any business or commercial activity'.⁴⁶

By contrast, TOMSA applies to ships 'connected' with Queensland, on an 'intrastate' voyage or on an 'interstate' or 'overseas' voyage while they are in Queensland waters.⁴⁷ However, s 12 TOMSA then provides that TOMSA 'walks back' to the extent that the *Navigation Act 1912* (Cth) applies.

In sum, if the voyage was characterised as an international voyage from Maryborough to the Philippines via Rockhampton, and the ship was considered to be a trading ship, then the *Navigation Act* applied. The consequence of this would be that by operation of s 12 TOMSA, MSQ would have no jurisdiction.

However, if the voyage was characterised as an intrastate voyage from Maryborough to Rockhampton, ignoring the contingent and never commenced international voyage, then TOMSA clearly applied.

This issue was clearly a question of fact, not law, and could only be determined by the evidence put before the court. In the event, the Magistrate held that the ship was on an intrastate voyage from Maryborough to Rockhampton. The overseas voyage was contingent and prospective; no date had been set for it to commence, and the lay-over in Rockhampton was uncertain both in terms of duration and the scope of work to be performed.

Commercial or recreational voyage?

A related but distinct issue was whether the *Karma* was on a commercial or recreational voyage at the time of the grounding. If recreational⁴⁸ then the recreational standards under TOMSA applied. If commercial,⁴⁹ the more stringent commercial standards would apply.

As the ship was unregistered in Queensland at the time of the incident, the issue was at large. The *Karma* had most recently been registered in Queensland as a recreational ship,⁵⁰ but prior to 1998 she had been registered as a commercial ship. As a commercial ship, the *Karma* had been employed as a dredge on the Brisbane River by a cement manufacturing company.

Mr Wolfe argued that the nature of the voyage from Maryborough to Rockhampton was for private recreation, as he was the owner of the ship, and he was simply relocating the ship from one port to another. Mr Wolfe also pointed to his personal friendship with his 'crew' and that the ship was most recently registered in Queensland as a recreational ship. Mr Wolfe had even taken steps to register the ship as a recreational ship, but had failed to personally lodge the application at a Queensland Transport office prior to commencing the fateful voyage.

The prosecution argued that the ship was being used commercially given Mr Wolfe's admitted ultimate commercial purpose of sale for profit in the Philippines. The prosecution also submitted that the character of the ship (a hopper dredge) and that it

⁴⁵ Note 45 above.

⁴⁶ Note 45 above.

⁴⁷ S 12(1) TOMSA. A voyage is under way on one voyage to getting underway for another voyage s 12(3).

⁴⁸ Schedule 11 of the Transport Operations (Marine Safety) Regulation 1995 (Qld), provide that a recreational ship means a ship being used 'exclusively for private recreation.'

⁴⁹ Schedule 11 of the Transport Operations (Marine Safety) Regulation 1995 (Qld), provide that a commercial ship means a ship that is neither a recreational or fishing ship.

⁵⁰ By two different owners over the period from 2000 to 2002. The registration eventually expired when it was not renewed and the fee not paid.

was registered for 20 years as a commercial ship meant that it was not being used recreationally.

The upshot was that the Magistrate held that the ship was on a commercial voyage. His Worship referred in particular to the size of the ship and its character as a dredge as important factors militating against a recreational use.

Shipping Registration Act 1981 (Cth)

The Commonwealth Shipping Register was established by the *Shipping Registration Act 1981 (Cth)*⁵¹ and acts as a title register for Australian-owned ships. Interests in ships are divided into 64 shares,⁵² ship mortgages can be registered⁵³ and caveats lodged.⁵⁴

The *Karma* was not registered on the Commonwealth Shipping Register, and so the legal title was not readily ascertainable and Mr Wolfe's title to the ship was defeasible.

The *Shipping Registration Act 1981* requires that 'every Australian-owned ship' shall be registered unless it is exempt.⁵⁵ An Australian-owned ship is exempt if it is less than 24 metres in tonnage-length.⁵⁶ Whilst the precise tonnage length of the *Karma* was not taken, given that the length overall was in excess of 42 metres, it appears beyond argument that the ship fell outside the exemption from registration based on length.

'Australian-owned' is defined in the Act in terms of ownership by one or more 'Australian nationals', who in turn are defined in terms of 'Australian citizen' or a body corporate registered in Australia.⁵⁷ Whilst the title to the ship was not without difficulty, Mr Wolfe did not dispute that he owned the ship, nor did he dispute that he was an Australian citizen.

It follows that the ship was required to be registered on the Commonwealth Shipping Register, and that an offence may have been committed under that Act.

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In the event, the defendant was charged with the following offences:

- operating an unsafe ship against section 41 *Transport Operations (Marine Safety) Act 1994 (Qld)*;
- operating a ship that was not equipped with safety equipment against section 44 *Transport Operations (Marine Safety) Act 1994 (Qld)* (2 charges)⁵⁸;
- operating a ship that was unregistered against section 57 TOMSA;
- operating a ship whilst unlicensed against section 61 TOMSA; and
- failure to comply with an authorised officer's direction under section 95 TOMPA.

⁵¹ *Shipping Registration Act 1981 (Cth)*, s 56 (1).

⁵² *Shipping Registration Act 1981 (Cth)*, s 11 (1) (a).

⁵³ *Shipping Registration Act 1981 (Cth)*, s 38.

⁵⁴ *Shipping Registration Act 1981 (Cth)*, s 47 (a).

⁵⁵ *Shipping Registration Act 1981 (Cth)*, s 12(1) and s 13.

⁵⁶ Shipping Registration Regulations 1981 (Cth), Reg 6A, which provides that the tonnage length is 96% of the length of the ship at the waterline.

⁵⁷ *Shipping Registration Act 1981 (Cth)*, s.8 and s 3.

⁵⁸ The two separate charges arose out of the subordinate legislation that applied to the ship. One charge related to the absence of an Emergency Position Indicating Radio Beacon (EPIRB) as required under Regulation 6 of the Transport Operations (Marine Safety) Regulation 1995 (Qld). The second charge related to the lack of safety equipment required by Regulation 7 of the Transport Operations (Marine Safety) Regulation 1995 (Qld), mainly relating to fire fighting equipment, lifeboats, lifebuoys and distress signals. The latter safety equipment is set out in the Uniform Shipping Laws Code adopted by the Territory, State and Commonwealth Ministers for Transport as the Australian Transport Council.

The three charges under section 41 and 44 TOMSA carried a maximum penalty of \$37,500 or imprisonment for one year. The other three charges only carried a pecuniary penalty. The matter went to trial over two days, and a total of 11 witnesses testified for the prosecution. The defendant, representing himself, did not call a witness. Mr Lavaring, Acting Magistrate, found the defendant guilty on all charges.

It was submitted on behalf of the complainant that a pecuniary penalty would not be an appropriate punishment in this case, given the defendant's already significant fines for previous offences⁵⁹ that had not been paid. The defendant was repaying those fines at \$20 per fortnight, and at that rate, it would take him more than 269 years to repay them.

Mr Lavaring ordered Mr Wolfe to serve six months imprisonment on the first three counts⁶⁰ to be served concurrently and imposed no further punishment on counts 4, 5 and 6.⁶¹

In sentencing, Mr Lavaring made the following remarks:

- that nine months imprisonment was appropriate in the circumstances, and that six months was the least punishment that should be imposed;
- more than \$1 million had been paid by Queensland taxpayers in rectification and cleanup of Mr Wolfe's shipwrecks;
- he showed a disregard of the law;
- a fine would not be sufficient and would not be a deterrent especially in relation to count 1 (operate an unsafe ship);
- that both Mr Wolfe and his passengers could have died if the ship had sunk; and
- that charges 2 and 3 were almost as equally serious as charge number 1 and that they all carried up to one year's imprisonment.

This case was a landmark decision for Queensland, representing the first occasion to the author's knowledge where a person has been imprisoned for offences against marine legislation.

TOMSA prosecutions

A number of important issues were explored for the first time in the prosecutions conducted under TOMSA in 2004, including:

- Whether a shipowner can be held criminally responsible for the operation of a ship when the owner was not on board; and
- Whether a recreationally registered ship can be considered 'unsafe' when it is being used as a commercial ship.

The particular cases are discussed in more detail below.

Anaconda III

In *Ward v. David Ian Walker*⁶² (the *Anaconda III*) the owner of a commercial ship was convicted for contravening section 43 of the *Transport Operations (Marine Safety) Act 1994* (Qld).⁶³

⁵⁹ In excess of \$140,000, including fines imposed for offences against the *Transport Operations (Marine Pollution) Act 1995* (Qld) ss 26 and 95. Those charges arose out of the capsizing and subsequent discharge of oil from the ship *Ji Chong Lee* in the Fitzroy River near Rockhampton in 2001.

⁶⁰ *Transport Operations (Marine Safety) Act 1994* (Qld) ss 41 & 44.

⁶¹ *Transport Operations (Marine Safety) Act 1994* (Qld) ss 57 & 61, *Transport Operations (Marine Pollution) Act 1995* (Qld) s 95.

⁶² Unreported, Proserpine Magistrates' Court, Muirhead M, 15 November 2004.

The substantive legal issue was whether the owner of the ship could be found criminally responsible for '*causing a ship to be operated unsafely*' when he was not physically onboard the ship and had purported to delegate responsibility for all aspects of the operation of the ship to the master and crew.

The *Anaconda III* is a 29.8 metre long monohull yacht that conducts snorkel and scuba diving charters to the Great Barrier Reef and Whitsunday Islands. Its home port is Airlie Beach.

The *Anaconda III* utilises small rigid inflatable boats (RIB's) as rescue and recovery boats for the ship's passengers, who are engaged in snorkel and scuba diving activities. The RIB's are not registered as separate ships, but are marked as tenders to the mother ship.

Seven months prior to the incident that was the subject of this prosecution, a diver from the *Anaconda III* was injured when struck by the propeller of a tender from another ship. As a result of this, the defendant was sent a letter by MSQ making two recommendations:

- that propeller guards be fitted to the outboard engines of the tender vessels (RIBs); and
- that the mother ship (*Anaconda III*) carry documented procedures for the operation of tenders near divers and snorkellers.

The defendant failed to implement either recommendation.

On 1 May 2003, an RIB from the *Anaconda III* struck a snorkel diver at Bait Reef on the Great Barrier Reef off the Whitsunday coast. The RIB was being operated by a crewman from the *Anaconda III*, who was dispatched from the *Anaconda III* by its master to retrieve a passenger from the water. The propeller of the tender struck the passenger in the left leg, causing serious lacerations. The injured snorkel diver was a Dutch national in Australia on holidays.

The crewman did not hold a Recreational Shipmasters Licence, and was subsequently issued a Marine Infringement Notice⁶⁴.

At the time of the incident, there were no propeller guards fitted to the RIBs and no written procedures for the tender operation were carried on board the *Anaconda III*.

⁶³ Section 43 of TOMSA relevantly provides:

43.(1) *A person involved with a ship's operation (including the owner, master, pilot and crew members) must not cause the ship to be operated unsafely.*

Maximum penalty-500 penalty units or imprisonment for 1 year.

without limiting subsection (1) a person causes a ship to be operated unsafely if the person causes the ship to be operated in a way that-

causes a marine incident; or

contravenes-

conditions of the ship's registration about safety; or

a provision of a regulation that is declared by regulation to be a provision to which this section applies.

However, if the contravention of subsection (1) causes the death of, or grievous bodily harm to, a person, the owner, Master, pilot, crew member or other person commits an indictable offence and is liable to a maximum penalty of 5000 penalty units or imprisonment for two years.

A person does not contravene the section because of subsection (2) (8) if the only basis for holding that a marine incident has been caused is his lawful damage to, or danger of lawful damage to, property which the person is the sole owner.

In this section-

"lawful damage" means damage that is not unlawful under the Criminal Code, section 469.

⁶⁴ For operating a ship as its master without the appropriate license against s 61 (1) of *Transport Operations (Marine Safety) Act 1994* (Qld).

In the event, the defendant pleaded guilty to the charge of operating a ship unsafely as its owner. The particulars of the charge were that the defendant had operated the ship unsafely by failing to fit propeller guards to the tenders to the ship and by also failing to properly instruct the crew on the appropriate way to operate the tenders whilst in the proximity of snorkellers and scuba divers.

The defendant was convicted and fined \$3,000, and ordered to pay more than \$300 in legal expenses and court costs. A conviction was recorded.

The acting magistrate, Mr Ron Muirhead SM, observed that it was a serious offence and that the maximum penalty was \$37,500. The Magistrate noted that it was an early plea and that there were no prior convictions. The Magistrate also said that if propeller guards had been fitted then the injuries would not have occurred.

This was an important result that recognises that all persons involved with the operation of a ship, including the owner, are caught by the obligations imposed by s 43 TOMSA. Such obligations carry particular weight when the owner is on notice of particular unsafe conduct and fails to rectify it.

Atlanta

In *Ward v. Bruno Robert Zonta*⁶⁵ (the *Atlanta*) the owner of a recreational ship that was being used for commercial purposes was convicted for contravening section 41 of the *Transport Operations (Marine Safety) Act 1994*.⁶⁶

The substantive legal issue was determining the standard of seaworthiness, equipment and crewing that ought to be applied in the circumstances. The ship was registered as a recreational ship in Queensland, and so the defendant argued that recreational standards applied. If so, the ship was arguably seaworthy and section 41 TOMSA had not been contravened. The prosecution alleged that the ship was being used for commercial purposes, and so the more stringent commercial standards of seaworthiness, equipment and crewing ought to be applied to the ship, notwithstanding its recreational registration. If the commercial standards applied, then the ship clearly did not comply, and section 41 had been contravened.⁶⁷

The ship is a 19 metre long fibreglass monohull cruiser, registered as a recreational ship in Queensland. The ship has never been registered as a commercial ship in Queensland.

On 12 September 2003, a Coastwatch (Australian Customs) aircraft detected and photographed the ship anchored at a reef on the Great Barrier Reef. The ship was photographed with persons onboard engaged in fishing activities. It was alleged that:

- there were 13 persons aboard the ship;
- the master was the Defendant;
- very few of these passengers knew each other, nor did they know the defendant;

⁶⁵ Unreported, Tully Magistrates' Court, Sarra M, 25 November 2004.

⁶⁶ Section 41 of the *Transport Operations (Marine Safety) Act 1994 (Qld)* relevantly provides:

41 (1) The owner and a master of a ship must not operate the ship unless the ship is safe.

Maximum penalty-500 penalty units or imprisonment for one year.

...

(3) For the purposes of this section, a ship is safe if it is seaworthy, and is appropriately equipped and crewed, to meet the ordinary perils of the voyage on which the ship is proceeding or about to proceed.

⁶⁷ For instance, the requirement to hold a licence in section 60 of the *Transport Operations (Marine Safety) Act 1994* depends upon the registration of the ship being operated. Regulation 88 of the *Transport Operations (Marine Safety) Regulation 2004 (Qld)* sets out the licensing requirements for commercial ships with reference to the Uniform Shipping Laws Code. Regulation 95 of the *Transport Operations (Marine Safety) Regulation 2004 (Qld)* sets out the licensing requirements for recreational ships.

- the passengers had paid significant amounts of money, ranging between \$140 to \$200 each, to participate in the fishing trip; and
- several of the passengers considered the trip to be a 'charter'.

The prosecution alleged that conducting voyages of this character meant that the ship was not a recreational ship within the definition provided for in schedule 11 of the Transport Operations (Marine Safety) Regulation 1995 (Qld), as the ship was not being used '*exclusively for private recreation*.'

In particular, it was alleged that the use of the ship was not '*private*', in that the persons on board the ship had paid significant sums of money to be there and that they did not know the defendant prior to the commencement of the voyage.⁶⁸

In the event, the defendant elected to plead guilty on the basis that elements of the ship were unseaworthy regardless of whether the recreational or commercial standard was applied. Consequently, the substantive issue of whether the commercial standard could be applied to a recreationally registered ship was not tested. Nevertheless, the defendant gave an undertaking in open court, confirmed by the Magistrate, Mr Zak Sarra M, that he would not use his ship for anything other than private recreational uses in the future.

The defendant was placed on a \$5,000 recognisance for a period of 18 months, and was ordered to pay more than \$3,000 in professional costs, witness expenses, Crown expenses and Court costs.

In sentencing, Mr Sarra M said that:

- offshore seas are a perilous environment and that vessel owners and masters can imperil their passengers by travelling offshore;
- section 41 requires owners and masters to ensure that their ships are seaworthy and are appropriately equipped and crewed to meet the ordinary perils of the voyage on which the ship is proceeding;
- owners and masters must ensure that their ships are safe. Whilst MSQ offers a great deal of education, the onus is placed on owners and masters to be responsible for safety;
- engine room vent flaps⁶⁹ are a tried and tested method of minimising fire, and may help prevent death or injury; and
- there is an obvious and apparent need for emergency steering when venturing offshore.

The case gave guidance on the construction of section 41 of TOMSA for recreational ships, although the issue of whether the recreational or commercial standard should be applied in like circumstances has yet to be tested.

TOMPA Prosecutions

The principal offences pursued under the *Transport Operations (Marine Pollution) Act 1995* (Qld) are breaches of section 26⁷⁰ and section 61⁷¹.

⁶⁸ On the evidence, it appeared that the defendant utilised a number of intermediaries who scouted for potential passengers and who also received payment from those passengers. The defendant did not receive any money directly from the passengers. The defendant stated that he only ever received expenses for fuel and the intermediaries were the persons who organised the trips.

⁶⁹ On the evidence, the ship was not equipped with flaps on the engine room air vents. The practical consequence was that, in the event of a fire in the engine room, the space could not be sealed. When fitted, flaps on air vents can be closed and so starve an engine room fire of oxygen.

⁷⁰ Section 26 *Transport Operations (Marine Pollution) Act 1995* (Qld) relevantly provides:

A summary of the facts of each case and the sentencing remarks of the magistrate are set out below.

The cases are of some factual interest, but the legal principles associated with discharges of oil from ships are well understood. Like every other jurisdiction in Australia, the Queensland marine pollution legislation is based on the *International Convention for the Prevention of Pollution from Ships 1973/1978* (MARPOL).

The central controversy associated with discharge offences under MARPOL is the scope of the main defence, that is, where the discharge of oil results from damage to the ship or its equipment. The meaning of 'damage' as a defence to a discharge offence was considered by the High Court in the *Sitka II*.⁷² In a joint judgment, the court held⁷³ that, in the MARPOL context, the word 'damage' means a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some event, whether the event was external or internal to the ship or its equipment.

In response to the uncertainty of the scope of the damage defence, and in anticipation of the High Court's decision, the meaning of damage was addressed in Queensland by a definition of 'damage' being inserted into the schedule of TOMPA⁷⁴. The new definition expressly excludes a pre-existing defect, and is broadly consistent with the High Court's formulation. The damage point often arises in Queensland when derelict ships sink at their moorings; whether the sinking was due to a pre-existing defect or was an instantaneous consequence of some event is squarely raised in those circumstances.

The damage defence was probably open to the defendant in a couple of cases discussed below, in particular the *Friendship R*.

It should also be noted that:

- the prosecution elected in each instance described to proceed summarily in the Magistrates Court, even though the offences were indictable.⁷⁵ This is due to a policy decision that only significant spills be taken on indictment; and
- unlike other jurisdictions, such as NSW, marine pollution cases in Queensland are not heard by a specialist court. The Queensland Land Court⁷⁶ does not hear marine pollution or other environmental matters.

Bellarine

On 30 May 2003, a discharge of oil occurred from the tug *Bellarine* into the waters of Weipa harbour during a waste oil transfer operation.

26.(1) if oil is discharged from a ship into coastal waters, the ship's owner and master each commit an offence.

Maximum penalty-3500 penalty units.

(2) Subsection (1) applies despite the Criminal Code, sections 23 and 24.

⁷¹ Section 61 *Transport Operations (Marine Pollution) Act 1995* (Qld) relevantly provides:

61.(1) if a pollutant is discharged into coastal waters during a transfer operation, the ship's owner and master each commit an offence.

Maximum penalty- 3500 penalty units.

(2) subsection (1) applies despite the Criminal Code, sections 23 and 24.

⁷² *Morrison v Peacock* [2002] HCA 44 (9 October 2002).

⁷³ Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ.

⁷⁴ Section 4 *Transport Legislation Amendment Act 2000* (Qld), which provided: *insert—*

‘**“damage”**, in an express reference to damage to a ship or its equipment, does not include any existing defect in the ship or its equipment resulting from an event, a lack of maintenance or anything else.’.

⁷⁵ *Transport Operations (Marine Pollution) Act 1995* (Qld) ss 123 & 124.

⁷⁶ Established by the *Land Court Act 2000* (Qld).

The tug was secured port side to the Humbug Wharf in the Port of Weipa for the purpose of pumping waste engine lubricating oil from a holding tank on board to a "Cleanaway" tanker type truck.

A few minutes after the pumping operation commenced one of the deckhands smelled oil. He looked over the port side of the tug (the wharf side) and observed oil being discharged under pressure from an outlet on the port side of the tug, just above the waterline. He yelled to stop pumping, and the engineer stopped the pump.

The crew then involved themselves in deploying absorbent pads or "sausages" into the water directly over the spill. The master also alerted the managers at the tug's base. The driver of the tanker truck also attempted to use the suction of the hose to suck oily water into his truck. A short time later, an emergency crew arrived and assisted the crew in deploying more oil absorbent booms around the spill site.

The crew estimate that 30 litres of oil was discharged overboard and that approximately 80 percent of this was collected by the pads and booms. The balance of the discharged oil flowed astern of the tug with the ebbing tide, and continued to flow west until the oil dispersed into the environment. An MSQ officer later attended the tug and obtained samples from the absorbent pads, the engine room bilge and slops tank. These samples were analysed and their contents fell within the meaning of 'oil' for the purposes of TOMPA and MARPOL.

On 16 December 2004, the owner of the tug was convicted in the Weipa Magistrates' Court of discharging oil from a ship into coastal waters during a transfer operation against s 61 of TOMPA. The owner was fined \$10,000 and ordered to pay almost \$3,000 in professional costs, discharge expenses and court costs. No conviction was recorded.

In summing up, the Magistrate, Mr Tom Braes, made the following comments:

- any discharge of oil has the potential to impact on the environment, and in this case, could potentially impact nearby sea grass beds, as well as the local fishing and trawling industries;
- the owner has a responsibility to the local community to avoid environmental harm;
- even small amounts of oil have the potential to cause environmental harm;
- oil transfers are a regular event and there should have been a system in place to ensure this was done in a safe manner;
- the defendant has satisfactorily explained to the court what happened and has taken steps to ensure that this will not happen again;
- the defendant has conceded negligence, and that there was a modification made by the engineer that the owner did not know about, and that this deprived the owner of the opportunity to put a system in place to ensure safe transfer operations;
- the crew was well trained, containment equipment was quickly deployed and the spill was contained;
- only 6 litres escaped into the environment as 80% of the spilled oil was recovered; and
- the defendant pleaded guilty at an early stage, showed good cooperation with authorities, notified the authorities quickly, and cleaned up the spill so that only a small amount escaped.

The case is a useful reminder, if one was needed, that even well-run ships with well-trained crews can have accidents, and that owners will be fined for the discharge.

Hamdon Star

On 13 December 2004, the master and owner of the ship *Hamdon Star* were convicted in the Mackay Magistrates' Court of offences for discharging oil into coastal waters against s 26 TOMPA.

The *Hamdon Star* is a Queensland registered fishing vessel. About mid-morning on 5 August 2002, the *Hamdon Star* was conducting manoeuvres within the confines of Mackay Harbour. A slick of diesel appeared on the surface of the water behind her as she made way through the water. She was the only vessel moving about the harbour at the time the slick appeared.

One of the witnesses manoeuvred another vessel off the *Hamdon Star*'s port side whilst she was still making way within the harbour. He called out to the master and told him that she was discharging diesel. The *Hamdon Star* stopped and a bluish coloured slick of diesel formed all around the stern of the vessel. The strong smell of diesel emanated from the slick.

The quantity of diesel discharged remains unknown but the slick covered a significant area of the harbour.

It appears that the discharge occurred when an auto electrician, who was performing work on the vessel at the time, accidentally activated an auxiliary engine room bilge pump, causing diesel to be pumped overboard.

The owner of the ship was convicted and fined \$5,000 and ordered to pay almost \$750 in professional costs, discharge expenses and court costs. The master of the ship was convicted and fined \$1,500 and ordered to pay almost \$750 in professional costs, discharge expenses and court costs. No conviction was recorded against either defendant.

When handing down sentence, Mr Risson M said words to the effect that:

- the oil spill was of a serious nature;
- diesel oil was one of the more toxic pollutants, especially because it dissolves into the water;
- the spill occurred in close proximity to the Great Barrier Reef Marine Park;
- the spill was in the order of 15 to 35 litres of diesel fuel, and the slick covered an area of approximately 20m x 500m;
- there had been further discharge from the ship after the master had been notified of the discharge, but that the master would not have been so foolish as to continue to discharge after being notified of the spill;
- the defendants had been generally cooperative;
- the ship was engaged in a commercial operation; and
- no actual environmental damage was alleged, but there was potential for serious environmental harm.

Pacific Pioneer

On 21 September 2002, the vessel *Pacific Pioneer* was moored alongside the Evans Landing fuelling wharf in Weipa.

The *Pacific Pioneer* is a 47.61 metre long oil rig supply vessel that was employed as a 'mother ship' for a fleet of fishing vessels. She is registered on the Australian Ship Register and her home port is Sydney.

On 21 September 2002, the *Pacific Pioneer* was engaged in a diesel fuel transfer operation at the Evans Landing fuel wharf. Diesel fuel was being pumped from a shore facility on the Evans Landing wharf through a flexible hose and onto the *Pacific Pioneer*. The hose was connected to her manifold, and from the manifold the fuel was

distributed to tanks inside the ship by the manipulation of various valves by the chief engineer.

At approximately 1125 hours, fuel began to escape from No 11 starboard tank breather, located on the starboard side forward of the vessel. The breather is a pipe attachment on the deck of a ship allowing air to escape from the tank when filling it. The fuel quickly overflowed from the vessel, escaping over the side through the forward freeing ports on the starboard side. The ship's crew had fitted 'booms' to cover the freeing ports on the after deck, but had not covered the forward freeing ports.

A crew member of the *Pacific Pioneer* raised the initial alarm when he observed the fuel escaping from No 11 breather pipe. The shore side pump was stopped by means of the emergency stop mechanism within an estimated ten seconds of the alarm being raised by the crew. However, it appears that fuel continued to escape from the breather for some time due to the pressure in the lines.

It was estimated that 200 litres of diesel fuel escaped from the ship into the water, creating an oil slick some 2000 metres long and 200 metres wide.

It appears the spill was caused by the valve for No 11 starboard fuel tank being slightly open. The tank was already full with 20,000 litres of diesel, so when a quantity of diesel fuel was forced through the partially open valve, the tank began to overflow through the breather pipe. The fuel escaped the tank from the breather pipe, onto the deck of the ship and then through a freeing port into the waters of Weipa harbour.

The crew reacted quickly to limit the spill, and cleaned the oil contained on board the ship by using a combination of diatomaceous earth and oil dispersant chemicals.

This matter was dealt with at Weipa Magistrates Court on 22 July 2004, with Mr Ken Lynn, SM hearing the matter.

In handing down his decision, Mr Lynn noted:

- the defendant entered a guilty plea and co-operated with the investigation, and acknowledged liability;
- that fuel spills were a world wide problem and that prosecutions will be brought whenever possible where the facts support it;
- the potential for damage to the Weipa marine environment included mangroves, seagrass beds, dugongs, the recreational and commercial fisheries, and the Indigenous Community's reliance on the waters for day to day food;
- there was no actual damage resulting from the spill, but the potential for diesel to cause more toxicity to marine growth is more than previously understood; and
- the potential for a greater volume of diesel spilled was high, and in spite of the apparent dispersal, there are going to be lingering amounts of fuel in biosystems.

Mr Lynn fined the corporate owner \$23,000, and awarded almost \$3,500 professional costs, court costs and analyst fees. No conviction was recorded.

Friendship Cruises

Overnight on 28 and 29 April 2003, the passenger ship *Friendship R* sank up to its wheelhouse on the upper level whilst moored at its berth in Rosslyn Bay Boat Harbour near Yeppoon. There was no crew aboard the vessel when she sank. A quantity of diesel fuel was discharged into the waters of the boat harbour and a large slick was observed flowing out of the harbour on the ebb tide. The slick covered almost the entire eastern shore of the harbour.

The *Friendship R* is an 18.29 metre long timber passenger ship, registered in Queensland. Her home port is Rosslyn Bay, Yeppoon.

Booms and absorbent pads were deployed around the sunken ship as well as across the downstream flow of the ebb current which was moving the slick towards the harbour entrance. Some of these pads were collected as samples.

The salvage of the *Friendship R* was completed on 29 April 2003. Subsequent inspection revealed that the cause of the sinking was due to the failure of its electric bilge pump. The state of disrepair of the ship's hull meant that there was a constant seepage of water through the hull planking. The failure of the bilge pump resulted in the hull slowly filling with water, and the ship sank.

The amount of diesel fuel lost from the ship is not known but its fuel tanks (port and starboard) were half full when raised and each had a maximum capacity of 1200 litres. It was estimated that the maximum amount of diesel fuel that could have been lost from the ship was about 1200 litres, but it could have been as low as 200 to 300 litres.

At the time of the incident, there was neither appointed master nor crew; therefore, the sole responsible person for the ship was the owner and director of the corporate defendant.

Ms Hennessy SM noted that the owner entered a plea of guilty at the earliest opportunity, had no prior convictions, gave reasonable cooperation to investigators and assisted in containing the spill. She also noted that the owners do not intend to place this vessel back into service but will remove it permanently from the water.

Ms Hennessy also observed that the cause of the spill was the extremely poor supervision of the vessel and the lack of maintenance. She said that whilst there was no apparent or visual damage to the environment, there would certainly be some residual effect of the diesel dispersing into the water column and sea bed, especially considering the close proximity of marine conservation zones outside the marina.

Ms Hennessy indicated that the penalty would be in the higher range of the scale due to it being a corporate defendant, and convicted and fined the company \$20,000, awarding almost \$3,500 in analyst costs, professional costs and court costs.

Taobruo

On 25 November 2004, the owner/master and deckhand of the *Taobruo*, a commercial fishing vessel, were convicted and fined for discharging oil into coastal waters. Proceedings were commenced in the Yeppoon Magistrates Court against the deckhand and the owner/master for an offence under section 26 of TOMPA.

About 1500 hours on 5 January 2003, the *Taobruo* was moored alongside Queensland Transport's finger jetty in the Rosslyn Bay Boat Harbour. The only crew aboard the vessel at the time was the deckhand. The *Taobruo* is a 14.9 metre long fibreglass trawler, registered in Queensland. Its home port is Rosslyn Bay, Yeppoon.

The deckhand had just completed degreasing the main engine and the engine room of the *Taobruo* when he accidentally knocked the main engine's salt water intake hose, breaking it away from the intake valve. This caused the ingress of sea water into the engine room. He then went up to the wheelhouse and switched on the engine room bilge pump, which commenced to pump the contents of the engine room bilge overboard.

The deckhand returned to the engine room with a hose clamp to re-attach the salt water intake hose. The bilge pump was still running at this time. After returning topside, the deckhand noticed that the bilge water being pumped out had created an oily discharge, which floated on the surface of the water between the vessel's overboard discharge outlet to an area alongside the vessel. The deckhand returned to the

wheelhouse and switched off the bilge pump. He also engaged the ship's hose and directed the spray into the oily discharge in an attempt to disperse it.

The quantity of bilge contents discharged overboard could not be estimated. The contents were a mixture of salt water, fresh water, oil and degreaser. The deckhand was aboard the *Taobruo* on the date of the incident without the knowledge of the owner/master. Furthermore, the owner/master had left no instructions for the deckhand to undertake this task that day. Whilst engine room duties are not a particular requirement of a deckhand's duties, he was in the habit of being a general assistant to the owner/master in all duties, including engine room duties.

Both men pleaded guilty to the offence and were fined \$3,500 and \$800 respectively. The master/owner was also ordered to pay costs in excess of \$2,000.

In sentencing, the magistrate Mrs Hennessy M said that:

- the discharge from the *Taoburo* was one of the more toxic forms of oil pollution;
- the proximity of the Great Barrier Reef Marine Park rendered it vulnerable to contamination;
- the cumulative effects of oil pollution incidents on inshore areas impact on fish and crustaceans, ironically the same resources from which owners of fishing ships like the *Taobruo* earn their livelihood; and
- toxic hazards to the environment should be treated seriously.

Mrs Hennessy said that the discharge was an accidental discharge caused by the action of the deckhand. She acknowledged the defendants' cooperation with investigators and the early plea of guilty which saved the expense of a trial.

Mrs Hennessy also said that the ultimate responsibility for the discharge lay with the master/owner despite the fact that he had no physical control over the event and that he was not aware of the deckhand's presence on the ship. She said that the master/owner should have exercised better supervision of his employee and that there was a poor delineation of tasks between the master and crew.

The case is significant in demonstrating that, even where a crew member is acting without instructions, the owner of the ship can be held responsible for the discharge.

Conclusion

This article has briefly described:

- The formation and role of MSQ's Investigations Unit;
- Some of the significant provisions of TOMSA and TOMPA; and
- Recent important prosecutions conducted under TOMSA and TOMPA by the Investigations Unit, including the *Karma* case.

The formation of the Investigations Unit has resulted in a significant shift in the enforcement of maritime legislation in Queensland. In particular, important precedents have been set in respect of the performance-based General Safety Obligations imposed by TOMSA. Cases such as the *Karma*, *Anaconda III* and *Atlanta* provide important guidance to owners and masters of ships on the nature of their obligation to only operate safe ships and to operate ships safely.

The definitions of 'commercial' and 'recreational' use of ships have also been explored, particularly with reference to the relevant standards of construction, licensing and safety equipment that follow. Importantly, as the *Karma* case shows, the character of the ship and not just its use is relevant to a proper consideration of whether a ship is recreational or commercial.

The Investigations Unit has also successfully continued MSQ's pollution prevention role under TOMPA, bringing a range of prosecutions against the owners of commercial and fishing ships for discharging oil into Queensland coastal waters. As the facts of the cases demonstrate, owners and masters of ships will be held responsible for discharges by the courts even when the cause of the spill is beyond their knowledge or control, where the spill is caused by the negligence of a crew member and when the quantity of oil involved is very small.