

Oil Pollution in Australia – Charterers Now Strictly Liable; Penalties Increased

Nathan Cecil, Partner

New Commonwealth laws have come into effect which extend strict liability for oil pollution to Charterers and increase penalties fortyfold.

Recent amendments to the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) (“the Act”) extend the present strict liability offence for the discharge of oil or an oily mixture from a ship into the sea from the Master and Owner of a ship to the Charterer of a ship. Under current common law, this will most likely extend to bareboat, time and voyage charterers.

The extension of strict liability to the Charterer of a ship represents a novel departure from the existing and well settled law in Australia. Previously and in conformity with the position in many similar jurisdictions, Australian law provided for strict liability of the Master and Owner in the event of a discharge of oil or oily mixture from a ship. The offence is a criminal offence and will be found regardless of any actual fault on the part of the Master or Owner.

Although not expressly addressed in the Act or its second reading speech, the Courts have described the rationale for making the Master and Owner of a ship strictly liable for any oil pollution 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.”¹

Discussion of the rationale for extending this strict liability to the Charterer of a ship is conspicuously absent from the second reading speech and discussion papers surrounding the amendments to the Act.

¹ *Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] All ER 97 at 115 per Lord Salmon; see also *Thorneloe v Filipowski* (2001) 52 NSWLR 60 at 73.

From the second reading speech and surrounding discussion papers, it may be inferred that the rationale behind the extension is simply to expand the class of persons who can be prosecuted and held liable in respect of oil pollution, thereby presumably acting as a general deterrent against pollution.

No great consideration appears to have been given to the fact that, apart from issuing voyage orders and perhaps directing the place of taking on board bunkers or the method and manner of cargo operations, time or voyage Charterers are unlikely to have any degree of control over the day-to-day operations on board a ship from which oil pollution incidents may occur.

Those responsible for the amendments also appear to have overlooked the fact that counterpart legislation in many Australian States and Territories already provides for the liability of persons other than the Master and Owner. For example, the corresponding legislation in NSW provides that any crew member or person involved in the operation or maintenance of the ship *whose act causes* a discharge is guilty of an offence and new proposed provisions will extend that to include any person *responsible* for a discharge.² What's more, earlier versions of the Act also contained similar provisions.³

In our view, the above provisions are more appropriately directed at deterrence, by seeking to impose liability on those who have some real and relevant connection with the act or event which causes a discharge of oil.

At present, we are not aware of the intention of any of the States or Territories to make similar amendments. For now, the new offence for Charterers will only apply to oil pollution incidents occurring in Commonwealth waters outside of 3 Nm from Australia's coastline.

The amendments also increase the penalties for oil pollution, from A\$275,000 to A\$11 million for a corporation. Although the increase at first appears rather severe, it should be noted that the increase now brings the penalties for the discharge of oil in Commonwealth waters into line with those applicable to the discharge of oil in the waters of most States.

² *Marine Pollution Act 1987* (NSW), s8A(1); *Marine Pollution Bill 2011* (NSW), ss16(1) and (2), 17.

³ The old section 9(1).

Conclusion

Prior to the amendments, Australian law provided that the Master and Owner of a ship were liable for the discharge of oil, regardless of any fault on their part. Australian law further provided that any crew member or other person involved in the operation or maintenance of a ship and whose act caused a discharge was also liable.

The amendments add the Charterer to the class of persons liable for oil pollution, regardless of any fault on the Charterer's part. The amendments do not appear to be supported by a proper consideration of the aims of MARPOL or general considerations of deterrence, given that, for the most part, Charterers will have little if any control over the operations and actions which may result in oil pollution.

Accordingly, overnight Charterers face an increased liability profile from A\$0 to A\$11 million. It is therefore essential that all Charterers operating in Australian waters review their insurance arrangements; risk management practices, including screening of Owners, operators and manning agents responsible for chartered vessels; and consider drafting additional charterparty clauses to deal with this new exposure.

* * *

If you have any queries or require further information, please contact:

Contact

Robert Wilson
Partner

+61 2 9230 9475

robert.wilson@nortonwhite.com

Nathan Cecil
Partner

+61 2 9230 9450

nathan.cecil@nortonwhite.com

Claire Morgan
Foreign Registered Solicitor

+61 2 9230 9412

claire.morgan@nortonwhite.com