



OIL POLLUTION – SHIP DETENTION AUSTRALIA

It is well established that issues of oil pollution in Australia are determined pursuant to the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth)*.

The maximum penalty for a Corporation is now A\$17 million(100,000 penalty units) and for an individual A\$3.4 million(20,000 penalty units). Thus, as is the usual case, if both the owner of the vessel and the master are prosecuted then the potential fine is A\$20.4 million.

In a recent case, in South Australia, this issue of the maximum fines became a significant question involving a ship which was detained in a port in South Australia.

Facts

The Australian Maritime Safety Authority ("AMSA") attended on board the particular vessel and issued a Notice of Detention alleging that the vessel had discharged oil or an oily mixture into the sea. The detention was based upon AMSA receiving two videos which purportedly indicated such a discharge. However, the videos themselves were not made available to the shipowner's representatives. Instead still photographs were provided. It was clear that this evidence had been provided to AMSA by either a current or former member of the crew, ie a whistleblower.

AMSA took statements from various members of the crew and carried out a comprehensive investigation of the vessel, whilst the vessel remained under detention.

In addition AMSA indicated that they would release the vessel if security of A\$20.4 million was provided i.e. A\$17 million for the shipowner plus A\$3.4 million for the master.

Submissions were made to AMSA stating that in the view of owners, there was no evidence of a discharge into the sea, i.e. no "clear evidence" and, secondly, that the amount of security being sought was unreasonable and not in accordance with the provisions of the Act. These submissions were rejected by AMSA.

Accordingly, proceedings were issued in the Sydney Registry of the Federal Court at approximately 4.30 on the Wednesday. Justice Rares of the Federal Court agreed to hear the matter the following morning. However, in the meantime AMSA agreed to release the vessel and that release occurred on Wednesday evening.

Protection of the Sea (Prevention of Pollution from Ships) Act 1983

Detention of a Vessel

The vessel was detained by AMSA pursuant to Section 9(1B)(a) of the Act which reads as follows:

"9(1B) Subject to subsections (2) and (4), if:

(a) oil or an oily mixture is discharged from a ship into the sea: and

9(1C) An offence against subsection (1B) is an offence of strict liability."

AMSA then relied upon paragraph 27A of the Act, the relevant portion of which states:

"27A Detention of foreign ships in connection with pollution breaches

- (1) The authority may detain a foreign ship if:
 - (a) the ship is voluntarily at a port and there are **clear grounds** for believing that pollution breach has occurred as a result of acts or omissions in relation to the ship in the territorial sea or the exclusive economic zone;" (The emphasis is mine.)

I have emphasised the words "clear grounds" because they are the key words in this provision. They are not defined in the Act and therefore it is perhaps a moot point as to what criteria is required for AMSA to detain a vessel so as to satisfy this requirement of "clear grounds".

An obvious case of "clear grounds" would be establishing that there was an oily substance in the water and that, after samples were taken both from the water and the vessel, a match was obtained. In those circumstances there would, in my view, be clear grounds. However that process would take time, therefore the question is, would AMSA be entitled to detain the vessel whilst that testing is undertaken?

Perhaps a clearer situation would be if there was photographic evidence of a coloured liquid being discharged over the side of the ship into the water resulting in a slick.

This question was of great significance in the case at hand because the photographs produced did **not** show any discharge into the sea. The photographs did show a darkened substance on the deck apparently coming from a tank on the deck but there was no photograph which showed that the discharge went over the side of the vessel into the sea.

Accordingly, faced with that evidence, did AMSA act in accordance with the legislation, ie did they have "clear grounds" to detain this particular ship?

As indicated, submissions were made to AMSA that they did not have evidence of "clear grounds" and that therefore the detention was a wrongful detention and that the vessel should be released immediately. That submission being rejected by AMSA lead to the application before the Federal Court. However, because AMSA released the vessel prior to the court hearing that question was not judicially considered.

Security

Section 27A of the Act also deals with the issue of security. In particular Section 27A(4) of the Act which is as follows:

"27A Detention of foreign ships in connection with pollution breaches

- (4) Security referred to in paragraph (3)(a) must:
 - (a) be provided in a form acceptable to the Authority; and
 - (b) be an amount that, **in the Authority's opinion**, is equivalent to the maximum amount of all penalties, other amounts of money, costs and expenses that **could** be payable by the master and any other member of the crew of the ship and the owner of the ship in respect of the pollution breach." (The emphasis is mine.)

AMSA interpreted this provision as being a mandatory provision upon which they are obliged to seek the maximum amount of security that could be imposed pursuant to the Act, ie the amount of A\$20.4 million being the maximum amount for a corporation plus the maximum

amount for an individual. AMSA argued that they have no discretion pursuant to subsection (4) of Section 27A and that in all cases they are obliged to seek that amount or, in fact, potentially a higher amount if there is a suggestion of prosecuting individuals in addition to the master.

It is important to note that this amount of A\$20.4 million only refers to the potential fines. However, Section 27A(4) talks about other costs and expenses in addition to penalties which could include legal costs, clean up costs and other costs. Thus, if AMSA's interpretation is correct, then in most cases an amount in excess of A\$20.4 million will be sought so as to ensure that security is provided for costs over and above the potential penalties.

Again, a submission was put to AMSA that the above was a misinterpretation of the section. It was submitted that the maximum penalty provided for in the Act in respect of an offences only imposed where the particular contravention falls within the worst category of cases for which the penalty is prescribed. This is to be determined on the facts of the particular case.

It was further submitted that that this provision requires AMSA to make an assessment of the maximum potential fines that could be imposed on both owners and the master. In other words, it was put that in the particular circumstances of this case, particularly as no oil was seen in the water, there was no possibility whatsoever of maximum fines being imposed "could be payable" in relation to this alleged discharge.

Thus AMSA do have a discretion and that they need to take into consideration all of the facts, and in particular the size of the oil spill, in determining what amount "could be payable".

This issue was raised in the proceedings in the Federal Court. If the matter had proceeded then Justice Rares would have been asked to consider and interpret this provision. However, because the vessel was released before the court hearing, it was not so determined.

Costs and Damages

As the vessel was released, there was an attendance before Justice Rares on Thursday morning and the matter was adjourned so that owners could consider the question of claiming costs/damages. Advice was obtained from counsel as to whether there was a basis upon which owners could claim legal costs and any costs incurred as a result of the detention/delay to the vessel. Counsel's advice was that there was a basis for claiming both costs of the detention and legal costs. However, owners decided not to proceed with any such application.

Questions

1. *What evidence is required for AMSA to satisfy the requirement of "clear evidence"?* In my opinion, in the case at hand, there were not "clear grounds" and the vessel should not have been detained.
2. *What is the correct interpretation of Section 27A(4)?* It is my understanding that AMSA maintain their interpretation. In my view that is incorrect but it does raise the question of what criteria AMSA should use to make an assessment.
3. *If AMSA maintain their interpretation of Section 27A(4) then does a Federal Court judge have jurisdiction to interpret that subsection and in effect make a determination/assessment?*
4. *If a shipowner can establish that AMSA have wrongfully detained their vessel, are they entitled to claim losses incurred as a result of the detention and legal costs? In*

my opinion, which is supported by counsel's advice, there is a basis of claiming such costs and damages but that, of course, is yet to be tested.

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