

Criminalisation of Seafarers An Australian Perspective

Ernest van Buuren
Partner

IFSMA Conference – Melbourne - 16/17 April 2013



Criminalisation of Seafarers

1. Appropriate Policy Responses
2. Fair Treatment of Seafarers in Prosecutions

1. The Policy of Prosecution

- Targeting of seafarers for prosecution
- Reasons for increase in prosecutions
- An appropriate target? The failure to address management
- Regulatory landscape in Australia

1. The Policy of Prosecution

- Growing trend towards the imposition of custodial sentences.
- International conventions protecting seafarers:
 - MARPOL and UNCLOS, article 230.
- IMO Casualty Investigation Code

1. The Policy of Prosecution

- Circumvention of article 230 by imposition of “holding charges”
- Policy choice influenced by political tension
- Legislative scheme in Australia
 - *Navigation Act 2012* (Cth)
 - *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth)
 - *Crimes Act 1914* (Cth)
 - *Great Barrier Reef Marine Park Act 1975* (Cth)
 - *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
- *Sheng Neng 1* case

1. The Policy of Prosecution

- Interfering with the course of justice
 - “*Rena*”
 - *Crimes Act 1914* (Cth) s 43
 - Absolute liability offence
 - Section 11.1(1) of *Criminal Code 1995* (Cth)
- *Navigation Act 2012* (Cth)

1. The Policy of Prosecution

- Comparison with other regulatory frameworks
 - Workplace Occupational Health & Safety
 - Environmental Regulation

1. The Policy of Prosecution

- Recent international OH&S Developments: A Sign of Things to Come?
 - Harmonised work health and safety legislation
 - Duty on “person that conducts a business or undertaking” (PCBU) to do what is “reasonably practicable” to ensure health and safety.
 - Jowett’s case (UK decision) – recklessness – 6 months sentence
 - Australia up to 5 years imprisonment and penalties up to \$600,000.

1. The Policy of Prosecution

- Environment Protection Authority v Hanna [2013]
 - 3 month custodial sentence dumping waste containing asbestos
 - sentence suspended on basis of good behaviour bond
 - payment of EPA's costs

2. Fair Treatment in Prosecutions

- Recent survey results
- International responses - IMO *Guidelines*
- Protection needed
 - Legal representation and advice
 - Assistance provided by owners (sometimes)
 - Labour organisations – Nautilus (the union for maritime professionals)

Conclusion

- **Criminalisation common feature for seafarer risk**
 - Custodial sentences feature regularly despite prohibition article 230 UNCLOS
 - Aggravated offences
 - Sheng Neng 1
 - acts falling outside pollution offences - Crimes Act & Navigation Act perverting course of justice
 - Trends in other areas - harmonised OH&S laws
 - extend to persons who conduct a business or undertaking
 - “reasonably practicable” obligations (Jowett’s case on recklessness – 6 months imprisonment)
 - ISM Code and the “fat cats”
 - difficulty of causation
 - systemic root cause analysis of incidents - TAIC
 - **More to do**
 - ensure support for seafarers

Disclaimer

The purpose of this presentation is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of [Norton Rose Group Contracting Party] on the points of law discussed.

No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any constituent part of Norton Rose Group (whether or not such individual is described as a “partner”) accepts or assumes responsibility, or has any liability, to any person in respect of this presentation. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of, as the case may be, Norton Rose LLP or Norton Rose Australia or Norton Rose Canada LLP or Norton Rose South Africa (incorporated as Deneys Reitz Inc) or of one of their respective affiliates.

The logo consists of a brown, stylized upward-pointing arrowhead or roof shape positioned above the letter 'N'.

NORTON ROSE