

**YOU'RE A CROOK, CAPTAIN HOOK:  
CRIMINAL LIABILITY FOR MARITIME DISASTERS CAUSING  
DEATH IN AUSTRALIAN TERRITORIAL WATERS**

ALEXANDER M McVEY

This thesis is presented for the Honours degree of Bachelor of Laws of Murdoch University. The author hereby declares that it is his own account of his research.

15,149 words (excluding title pages, table of contents, footnotes and bibliography)

2015

*To Linda, who encouraged my curious mind, and to Matt and Leanne who still do.*

*I am truly grateful to my supervisor, Dr Kate Lewins, for her guidance and support.*

## ABSTRACT

*The world is seeing more maritime disasters every year, in a variety of jurisdictions around the world. Many of these disasters cause a large number of deaths. As a result of those deaths, there is often pressure on the relevant authorities to prosecute the parties responsible. The master of the vessel may be the most obvious party to charge, but there may have been other parties responsible for the operation and management of the vessel whose negligent or reckless conduct contributed to the vessel's demise. Despite the contributions of other parties, the master of a vessel may become a scapegoat, and, as a result, bear the brunt of any prosecution. There are several reasons why the master may receive the most blame in these situations. One of those may be that the law in force within the relevant jurisdiction does not provide particular criminal charges that apply to parties other than the master. This paper asks whether Australian law encourages prosecuting bodies to scapegoat the master of a vessel and whether this is demonstrative of the wider problem of seafarer criminalisation worldwide.*

*Criminal law will be fit for its intended purpose if it provides prosecuting authorities with the means to prosecute those truly responsible for damage caused, and to prosecute those parties in an appropriate manner. In 2012, the Australian government spearheaded sweeping changes to domestic maritime law. Those changes brought several new criminal charges relevant to maritime disasters causing death, and amended previous charges. This paper looks to the law in Australia applicable to maritime disasters causing death and asks whether the laws are fit for their intended purpose. The research conducted is doctrinal, focussing particularly on the Navigation Act 2012 (Cth), the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth), and the Crimes at Sea Act 2000 (Cth).*

## TABLE OF CONTENTS

<b>I</b>	<b>INTRODUCTION</b>	
A	Criminalisation	1
B	The Difficulty for Seafarers	3
C	What This Thesis Will Do	4
D	People Smuggling and Maritime Disasters Causing Pollution	5
<b>II</b>	<b>JURISDICTIONAL CONTEXT</b>	
A	International Law	6
B	The Crimes at Sea Scheme	9
<b>III</b>	<b>THE PURPOSES OF CRIMINAL LAW</b>	
A	Responsibility and Criminal Conduct	13
B	Criminal Negligence and Criminal Recklessness	15
C	Penalties	22
<b>IV</b>	<b>THE RELEVANT LAW</b>	
A	State Criminal Law	23
B	Navigation Act	27
C	National Law (current)	34
D	National Law (Future)	39
E	Other Commonwealth Statute Law	41
<b>V</b>	<b>CASE STUDIES</b>	
A	Determining Liability in General	44
B	The Costa Concordia Disaster	46
C	Lamma IV Collision	49
D	The Sewol Disaster	51
E	The Princess Ashika Disaster	53
<b>VI</b>	<b>CONCLUSION</b>	
A	Issue for the Future	57
C	Final Comments	58

## I INTRODUCTION

By their very nature, maritime disasters can claim many lives. Between the beginning of 2014 and the middle of 2015, nearly 1,000 lives were lost in maritime incidents affecting domestic voyages.<sup>1</sup> The legal responses to these disasters vary greatly. Some disasters causing death are the subject of prosecutions, others see civil suits, and some see no legal action whatsoever. To illustrate this issue, it may be useful to consider some examples. In January 2012, the Costa Concordia disaster in Italy claimed the lives of at least 30 passengers and crewmembers, out of a total of 4,229 persons on board the vessel at the time of the incident.<sup>2</sup> The master of the vessel was charged with manslaughter and sentenced to sixteen years imprisonment.<sup>3</sup> In that case of the Sewol ferry disaster in South Korea, 304 of 476 passengers died. The captain of the Sewol disaster faced the death penalty from prosecuting authorities, but was later sentenced to imprisonment.<sup>4</sup> These cases may be contrasted with the case of the Filipino ferry Doña Paz. In December 1987, the MV Doña Paz collided with the MT Vector, causing 4,386 deaths and leaving only 24 survivors. Though there was a civil suit for the deaths caused, there were no criminal prosecutions whatsoever. These examples demonstrate how variable prosecutions for maritime disasters causing death may be. The question is: why is there such variation?

### A *Criminalisation*

Despite the variability of outcomes, what is clear is that prosecuting bodies have become more willing to prosecute for maritime disasters over the last 30 years.<sup>5</sup>

---

<sup>1</sup> Koji Sekimizu, 'Address of the Secretary-General' (Speech delivered at the Ninety-Fifth Session of the Maritime Safety Committee, International Maritime Organisation headquarters, 3 June 2015) <<http://www.imo.org/en/MediaCentre/SecretaryGeneral/Secretary-GeneralsSpeechesToMeetings/Pages/MSC-95-opening.aspx>>.

<sup>2</sup> Marine Casualties Investigative Body, Ministry of Infrastructures and Transports (Italy), *Costa Concordia: Report on the Safety Technical Investigation* (2013) 3-4.

<sup>3</sup> 'Costa Concordia Captain Schettino Guilty of Manslaughter' *BBC* (online), 11 February 2015 <<http://www.bbc.com/news/world-europe-31430998>>.

<sup>4</sup> Liz Fields, 'Sewol Ferry Captain Escapes Death Penalty in South Korea – Again', *Vice News* (online), 28 April 2015 <<https://news.vice.com/article/sewol-ferry-captain-escapes-death-penalty-in-south-korea-again>>.

<sup>5</sup> See Simon Daniels, *The Criminalisation of the Ship's Master: A New Approach for the New Millennium* (PhD Thesis, Southampton Solent University, 2012).

The greatest issue with this trend is that many prosecuting bodies seem to be prosecuting masters, even if they are not the only cause of the disaster or a cause of the disaster at all. The masters, quite simply, become the face of the maritime tragedy. Hart has explained this is a general risk faced by any individuals:

The danger to the individual is that he will be punished, or treated, for what he is or believed to be, rather than for what he has done. If his offense (sic) is minor but the possibility of his reformation is thought to be slight, the other side of the coin of mercy can become cruelty.<sup>6</sup>

There is great pressure placed on authorities to determine the guilty party or parties for a tragedy of large scale. The greatest source of this pressure is the media. Gold has said that '[t]he media adores maritime accidents',<sup>7</sup> and that adoration stems from the characters involved in the situation. A case in point is the Costa Concordia disaster where Captain Schettino represented 'an irresistible villain as the world sought someone to blame for the...disaster.'<sup>8</sup> This made him the focus of the prosecuting authorities and the general public alike.

The master is usually on the ground following a maritime disaster, assuming that they have survived. This means that the relevant authorities may detain the master with relative ease. If a vessel from one state falls victim to an incident in the jurisdictional waters of another state, the prosecuting body is likely to arrest the party to which they have access. This even appears to be the case in domestic maritime disasters. In the recent Eastern Star case, the media reported that the master and chief engineer of the vessel had been arrested by the Chinese authorities while simultaneously reporting that an investigating body had found

---

<sup>6</sup> Henry M Hart, 'The Aims of Criminal Law (1958) 23 *Law and Contemporary Problems* 401, 407.

<sup>7</sup> Edgar Gold, 'Learning from Disaster: Lessons in Regulatory Enforcement in the Maritime Sector' (1999) 8(1) *Reciel* 16, 16.

<sup>8</sup> Michael Day, 'Costa Concordia Trial: Was Captain Francesco Schettino really the Only One at Fault for the Disaster?', *The Independent* (online), 15 February 2015 <<http://www.independent.co.uk/news/world/europe/costa-concordia-trial-was-captain-francesco-schettino-really-the-only-one-at-fault-for-the-disaster-10046725.html>>.

that the vessel had capsized due only to particularly rough seas.<sup>9</sup> The unofficial policy regarding maritime disasters seems to be ‘arrest first, ask questions later’.

The maritime community is well aware of the issue of criminalisation. In 2012, the non-governmental organisation Seafarer’s Rights conducted a survey of seafarers on the topic of criminal law.<sup>10</sup> The survey found that 8.27% of seafarers had faced criminal charges and 23.33% of those faced criminal charges whilst serving as masters.<sup>11</sup> The community has voiced its serious concern about this trend.<sup>12</sup> Seafarer’s Rights recently released a video explaining to seafarers the issue of criminalisation and giving advice as to how seafarers may mitigate the chance of unfair prosecutions against them.<sup>13</sup> Unfair treatment by coastal states following a maritime disaster is one of the reasons that seafaring is becoming less attractive as a career option.<sup>14</sup>

## B *The Difficulty for Seafarers*

Prosecuting individuals for recklessness or negligence causing death is not particular to the maritime industry. It is applicable in a general transport context, particularly in driving cases. However, the leading cases on the topic, in both the United Kingdom and Australia, are cases of serious medical negligence.<sup>15</sup> The main difference between those situations in medicine and the maritime industry is that the former generally only causes a single (albeit tragic) death. Aviation

---

<sup>9</sup> Angela Meng, ‘Eastern Star Captain Says Ship Hit by Strong Gust and Capsized as it Turned to Face Wind’, *South China Morning Post* (online), 5 June 2015 <<http://www.scmp.com/news/china/society/article/1816951/eastern-star-captain-says-ship-hit-strong-gust-and-capsized-it>>.

<sup>10</sup> Seafarer’s Rights International, *SRI Survey: Seafarers and the Criminal Law* (2<sup>nd</sup> ed, 2013).

<sup>11</sup> *Ibid* 6.

<sup>12</sup> The area is also gaining academic focus. See, eg, Simon Daniels, *The Criminalisation of the Ship’s Master: A New Approach for the New Millennium* (PhD Thesis, Southampton Solent University, 2012).

<sup>13</sup> Seafarer’s Rights International, *Criminalization of Seafarer’s* (5 September 2015) YouTube <[https://www.youtube.com/watch?v=ZhgHD\\_MEB00](https://www.youtube.com/watch?v=ZhgHD_MEB00)>.

<sup>14</sup> Edgar Gold, ‘Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie’ (2005) 24 *University of Queensland Law Journal* 251, 258.

<sup>15</sup> See *R v Adomako* [1995] 1 AC 171; *R v Lavender* (2005) 222 CLR 67.

disasters perhaps provide a better analogy for maritime disasters, as they are likely to cause a comparable numbers of deaths. The main difference, however, is that pilots do not often survive an airspace tragedy and, therefore, are not prosecuted. The particular qualities of a maritime disaster make it difficult to compare to other situations of negligence or recklessness causing death.

Criminal law varies from country to country, yet ships sail across jurisdictions on a regular basis. This feature of shipping means that a master and their crew are constantly unaware of the different criminal liability regimes to which they may be exposed at any given time. White has said that '[i]t is important to operators of all types of vessels to know which set of laws apply to it, for what purposes and in what circumstances.'<sup>16</sup> While international conventions seek to regulate certain aspects of ship management and operation, they do not specifically extend to criminalisation. Seafarers who are constantly travelling through many jurisdictions as part of their employment are subject to different criminal laws every time they enter a new maritime jurisdiction. It would be impossible for those seafarers to understand in detail the extent of their liability in each jurisdiction. Criminal liability in Australia, as with most other jurisdictions, is based on the well-understood maxim that ignorance of the law is not a defence.<sup>17</sup>

### C *What This Thesis Will Do*

The criminalisation of seafarers is a serious issue, and one to which there is no simple solution. One thing that countries around the world can do to alleviate the issues faced by seafarers, is to ensure that their criminal laws applicable to seafarers are fit for their intended purposes. If the laws are fit for purpose, then the application of those laws will be less difficult, and seafarers will be treated by criminal law clearly, fairly and effectively.

Australia is very fortunate not to have suffered many large-scale maritime disasters causing death; however, the nation may not be so fortunate in future. Were that situation to occur, would Australian law be fit for purpose? This paper

---

<sup>16</sup> Michael White, *Australian Maritime Law* (Federation Press, 3<sup>rd</sup> ed, 2014) 343.

<sup>17</sup> See, eg, *Criminal Code Act 1995* (Cth) ss 9.3, 9.4.



will analyse the laws in Australia applicable to maritime disasters causing death. The analysis will focus on maritime disasters which occur within territorial waters, and not beyond that limit. The analysis will extend to the *Crimes at Sea Act 2000* (Cth), the *Navigation Act 2012* (Cth) (the ‘Navigation Act’) and the legislation corresponding to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) (the ‘National Law’). Each piece of legislation has been relatively untested, so the analysis will approach the law using parliamentary materials, academic commentary, legislation and case studies.

In chapter one, this paper will analyse the extent to which Australia seeks to legislate and apply criminal law within Australian territorial waters and the area beyond. In chapter two, this paper will analyse the main purposes of criminal law from the perspective of maritime disasters causing death. In chapter three, this paper will analyse the relevant criminal offences under the *Navigation Act 2012* (Cth), the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth), and state criminal law.<sup>18</sup> In chapter four, this paper will analyse several case studies to determine whether, in the event of a maritime disaster, the law in Australia would serve its intended purpose.

#### D *People Smuggling and Maritime Disasters Causing Pollution*

Maritime disasters usually take one of two forms: loss of life or pollution damage. The laws relating to pollution have their own complex set of ethical issues relating to the criminalisation of environment-harming conduct.<sup>19</sup> Although there are issues common to all maritime disasters, marine pollution disasters will not be the subject of this paper. Further, loss of life disasters usually take the form of commercial vessel disasters or people smuggling disasters. As there is a specific offence relevant to people smuggling disasters causing death under the *Migration Act 1958* (Cth),<sup>20</sup> those instances will, too, not be the subject of this paper.

---

<sup>18</sup> Any reference to ‘state’ includes the Northern Territory.

<sup>19</sup> See, eg, Olagunju F Anthony, ‘Criminalization of Seafarers for Accidental Discharge of Oil: Is There Justification in International Law for Criminal Sanction for Negligent or Accidental Pollution of the Sea?’ (2006) 37(2) *Journal of Maritime Law and Commerce* 219.

<sup>20</sup> *Migration Act 1958* (Cth) s 233B.

## II JURISDICTIONAL CONTEXT

Before analysing the effectiveness of Australian criminal law to prosecute for maritime disasters causing death, it is first prudent to discuss the maritime jurisdiction of Australia's criminal law. International law provides the external boundaries of Australia's maritime jurisdiction, and domestic law regulates the seas from the baseline of Australia to that outer limit. Though this division of jurisdiction appears to be clear, there are issues posed by the limit drawn and by the way in which Australia regulates everything within that limit. This chapter will discuss the purpose of Australia's splits in its maritime jurisdiction and the problems that they cause.

### A *International Law*

The United Nations Convention on the Law of the Sea ('*UNCLOS*') entered in force in Australia on 16 November 1994 and governs global relationships with the high seas. It has 157 signatories, including Australia.

As stated in the preamble, the purpose of *UNCLOS* is, *inter alia*, '[to establish]...with due regard for the sovereignty of all States, a legal order for the seas and oceans which will...promote the peaceful use of the seas and oceans'.<sup>21</sup> *UNCLOS*, in effect, provides the international framework that defines the extent to which each signatory can legislate in their own maritime jurisdiction. In doing this, *UNCLOS* divides the seas into three main sections; the high seas, the exclusive economic zone (the 'EEZ'), and the territorial waters.

The high seas, which are also known as 'international waters', are considered to be the part of the sea which is beyond 200nm from the baseline of any coastal state.<sup>22</sup> An exercise of jurisdiction in that area is dependent on several factors, including the flag state of the vessel.<sup>23</sup>

---

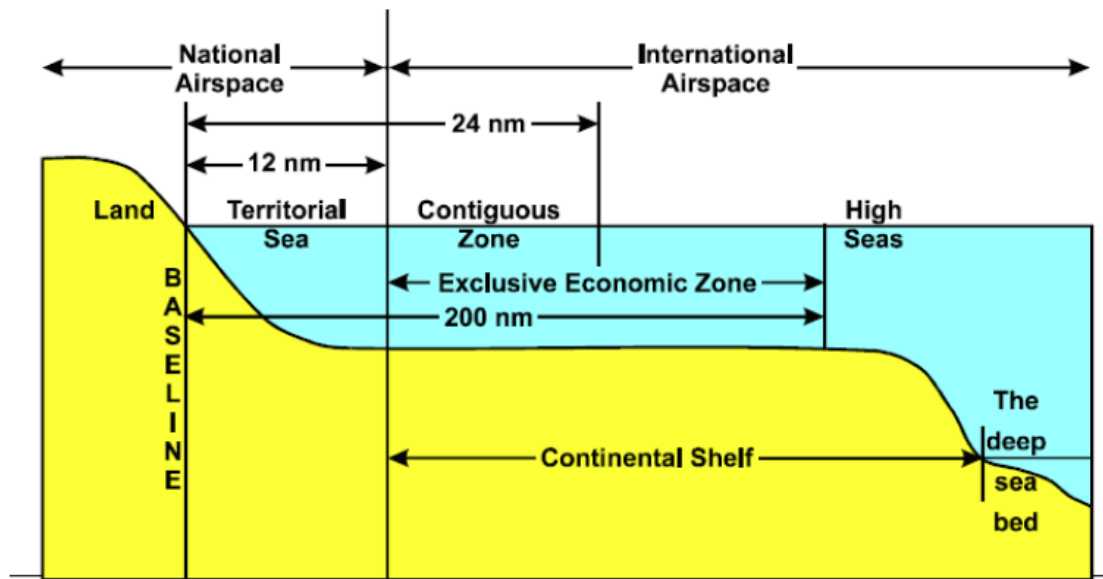
<sup>21</sup> *United Nations Convention of the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*').

<sup>22</sup> The high seas are the waters beyond the outer limit of the EEZ. See *UNCLOS* art 57.

<sup>23</sup> See Kate Lewins and Nick Gaskell, 'Jurisdiction over Criminal Acts on Cruise Ships: Perhaps, Perhaps, Perhaps?' (2013) 37 *Criminal Law Journal* 221 ('*Jurisdiction over Criminal Acts on Cruise Ships*').

Coastal state jurisdiction within the EEZ does not extend to criminal conduct. UNCLOS restricts the coastal state's sovereign rights over the EEZ to 'economic activity, marine scientific research and environmental matters'.<sup>24</sup> As such, any vessels within the EEZ of Australia are unlikely to be subject to the criminal laws of the coastal state.<sup>25</sup>

Figure 1. Maritime and airspace zones and jurisdictions.<sup>26</sup>



According to UNCLOS, a coastal state has jurisdiction over its territorial waters, subject to some restrictions. In particular, article 27 restricts a coastal state from exercising its jurisdiction to crimes committed on board a foreign ship which is

<sup>24</sup> See S Kaye, 'Threats from the Global Commons: Problems of Jurisdiction and Enforcement' (2007) *Melbourne Journal of International Law* 185, 186, referring to UNCLOS art 56.

<sup>25</sup> Unless there is another ground other than physical jurisdiction on which the coastal state may base its jurisdictional claim. Though not the subject of this paper, it may be possible for a coastal state to impose criminal liability for environmental damage as that may fall within the scope of 'protection and preservation of the marine environment' in UNCLOS art 56. See S Kaye, 'Threats from the Global Commons: Problems of Jurisdiction and Enforcement' (2007) *Melbourne Journal of International Law* 185, 186 and K Lewins and N Gaskell, 'Jurisdiction Over Criminal Acts on Cruise Ships: Perhaps, Perhaps, Perhaps?' (2013) 37 *Criminal Law Journal* 221.

<sup>26</sup> Clive Schofield, 'Maritime Zones and Jurisdictions' (Lecture delivered for School of Surveying and Spatial Information, University of New South Wales) <[http://www.iho.int/mtg\\_docs/com\\_wg/ABLOS/ABLOS\\_Conf3/SESSION3.PDF](http://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf3/SESSION3.PDF)>.

merely passing through the state's territorial waters. Article 27 appears to be the only section relevant to a state's jurisdiction over maritime disasters causing death. It states:<sup>27</sup>

The criminal jurisdiction of [a] coastal state should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

- a) If the consequences of the crime extend to the coastal State;
- b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- c) If the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- d) If such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

The coastal state will have jurisdiction of foreign vessels which are leaving internal waters at the time of the criminal offence or at the time of the discovery of the criminal offence.<sup>28</sup> The coastal state will also not be allowed to exercise its criminal jurisdiction if the criminal conduct that occurred on the vessel did so occur prior to the vessel entering territorial waters at all, or if the vessel is merely passing through territorial waters without entering internal waters.<sup>29</sup>

In any event, Article 27 applies to the exercise of criminal jurisdiction *on board a foreign ship*. This makes the provision more relevant to incidents involving pollution,<sup>30</sup> or criminal acts committed on board the vessel.<sup>31</sup> If there were a maritime disaster in Australian waters, it is likely that the effect of the disaster would be felt by Australia (through rescue efforts and such). Therefore, the exercise of criminal jurisdiction is unlikely to be disputed. Further, there are few

---

<sup>27</sup> UNCLOS art 27.

<sup>28</sup> UNCLOS art 27(2).

<sup>29</sup> UNCLOS art 27(5).

<sup>30</sup> See A Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation* (Martinus Nijhoff Publishers, 2012), 96-100.

<sup>31</sup> See Kate Lewins and Nick Gaskell, 'Jurisdiction Over Criminal Acts on Cruise Ships: Perhaps, Perhaps, Perhaps?' (2013) 37 *Criminal Law Journal* 221.

other countries close enough to Australian territorial waters that are likely to be affected equally.

### *B The Crimes at Sea Scheme*

At the turn of the 21<sup>st</sup> century, the Commonwealth parliament passed the *Crimes at Sea Act 2000* (Cth) (the ‘CSA’). The CSA serves three main roles. Firstly, it divides Australia’s geographical maritime jurisdiction into two distinct parts and, secondly, it outlines the legal jurisdiction applicable to those parts. The CSA also provides for the substantive laws of the Australian Capital Territory to apply the Australian vessels that are outside of the geographical limit of the CSA.<sup>32</sup> However, this jurisdiction will not be the focus of this paper.

Schedule 1 of the CSA sets out the cooperative scheme for each state (and the Northern Territory) to pass as statute (the ‘Cooperative Scheme’).<sup>33</sup> Each state has done this.<sup>34</sup> The two geographical areas provided for by the Cooperative Scheme are the ‘inner adjacent area’ and the ‘outer adjacent area’.<sup>35</sup> The Cooperative Scheme defines the inner adjacent area as including the area from the coastal baseline to 12nm into the ocean. This area is the territorial sea of the Commonwealth, as defined in UNCLOS. The outer adjacent area spans from the 12nm limit of the inner adjacent area to 200nm. This reflects the EEZ.

Clause 2 of the Cooperative Scheme deals with allocating criminal jurisdiction within these two areas. Subsection (1) states:

The substantive criminal law of a State, as in force from time to time, applies, by force of the law of the State, throughout the inner adjacent area for the State.<sup>36</sup>

---

<sup>32</sup> The CSA provides for the substantive laws of the Jervis Bay Territory to apply to Australian ships outside of the adjacent area. See *Crimes at Sea Act 2000* (Cth) (the ‘CSA’) s 6. The laws of the ACT are in force in the Jervis Bay Territory. See *Jervis Bay Territory Acceptance Act 1915* (Cth) s 4A.

<sup>33</sup> CSA sch 1 (the ‘Cooperative Scheme’).

<sup>34</sup> See *Crimes at Sea Act 1999* (Tas); *Crimes at Sea Act 2000* (WA); *Crimes at Sea Act 1998* (SA); *Crimes at Sea Act 2001* (Qld); *Crimes at Sea Act 1999* (Vic); *Crimes at Sea Act 1998* (NSW); *Crimes at Sea Act* (NT).

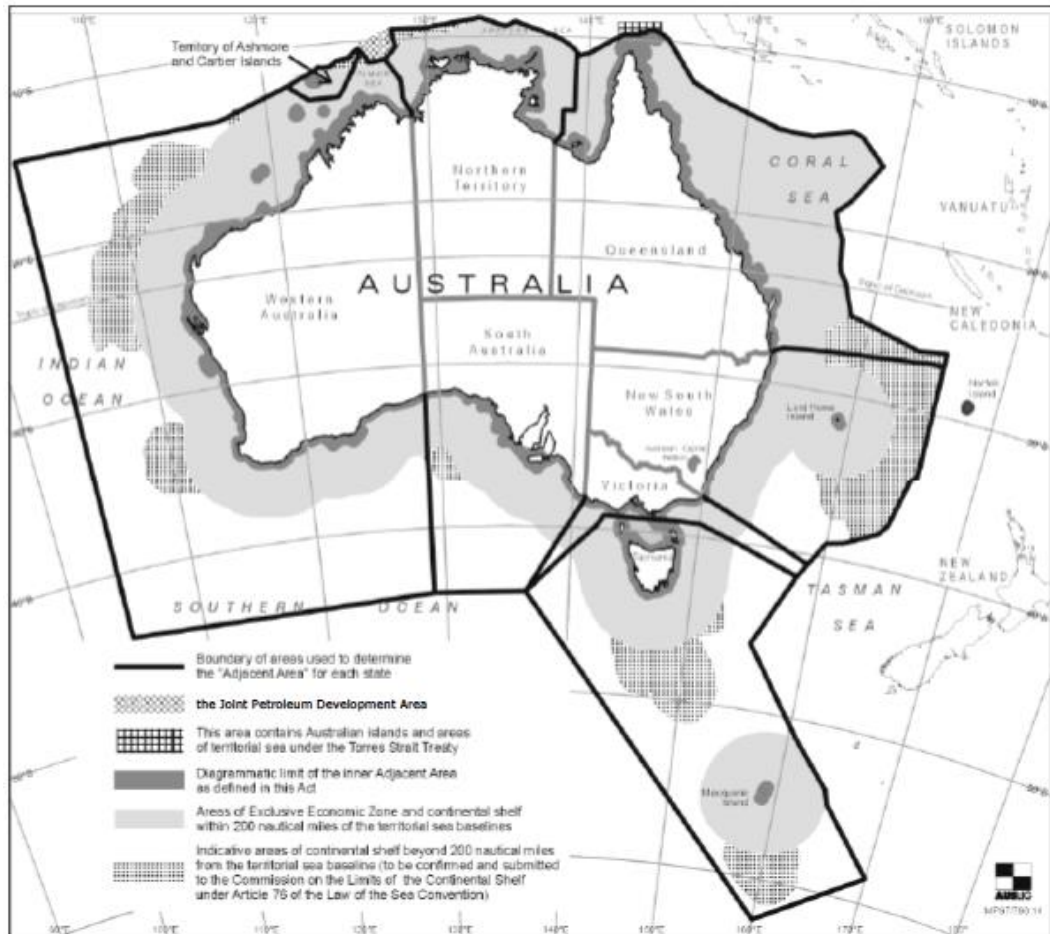
<sup>35</sup> The CSA also deals with the Joint Petroleum Development area. See CSA s 6A.

<sup>36</sup> Cooperative Scheme c 2(1).

Subsection (2) states:

The provisions of the substantive criminal law of a State, as in force from time to time, apply, by force of the law of the Commonwealth, throughout the outer adjacent area for the State.<sup>37</sup>

Figure 2. Division of Jurisdiction under the Crimes at Sea Scheme.<sup>38</sup>



This means that, according to the CSA, the substantive law of each state will be applicable to all crimes committed from the baseline to the edge of the EEZ. The only difference between the two jurisdictions is the authority which enforces the law. As it is merely dividing the jurisdictional limits of domestic criminal law, the CSA scheme purports to apply to all vessels, Australian or foreign.

<sup>37</sup> Cooperative Scheme c 2(2).

<sup>38</sup> CSA app 1.

There are two main concerns about the operation of the CSA. Firstly, the Cooperative Scheme is silent as to whether the substantive law of the state applies within the inner adjacent area to the exclusion of any Commonwealth law. During the Second Reading Speech for the Crimes at Sea Bill, it was said that ‘[i]f the offences are both a state offence and a Commonwealth offence, the investigating authority will follow the more stringent regime or procedures.’<sup>39</sup> The Australian Federal Police say that there is not ‘sole set’ of criminal law applicable in Australian territorial waters.<sup>40</sup> The purpose of the legislation is defeated if Commonwealth criminal law can apply in addition to the state criminal law, as clarity for seafarers is lost.

The CSA provides an Intergovernmental Agreement, which is signed by the Commonwealth Attorney-General and a representative of each state.<sup>41</sup> It divides the responsibility for administering and enforcing the law within the scheme. Though it is not specified as such within the Intergovernmental Agreement, it appears that only the Commonwealth DPP may enforce Commonwealth regulatory laws.<sup>42</sup> If the state prosecuting authority is pursuing a charge, it may only charge for breaches of state law. With this, it appears that part of the decision as to which authority will prosecute will affect the charges that may be laid, despite the uniform system that the CSA purports to provide.

The second issue relates to the application of state criminal law within the outer adjacent area. According to the UNCLOS, a coastal state does not have the jurisdiction to enforce its own criminal law within the EEZ. As such, it appears that an exercise of criminal jurisdiction ‘conferred’ by the CSA could be in breach of Australia’s obligations under UNCLOS. However, a maritime disaster may present a different situation. Lewins and Gaskell have said that, though UNCLOS

---

<sup>39</sup> Second Reading Speech, Crimes at Sea Bill 1999 (Cth).

<sup>40</sup> Australian Federal Police, *Aide Memoire on Crimes at Sea* (Endorsed on 16 September 2013), 2.

<sup>41</sup> Commonwealth of Australia Gazette, *Intergovernmental Agreement – Crimes at Sea* 2000, No GN 49, 12 December 2001.

<sup>42</sup> Australia Maritime Safety Authority, *Compliance and Enforcement Protocol: Navigation Act 2012* < <https://www.amsa.gov.au/forms-and-publications/Publications/AMSA354-CEP-NavAct.pdf>>, 12.

may prevent criminal jurisdiction over crimes committed *on board* a foreign vessel in the outer adjacent area, it may allow for criminal jurisdiction of *its activities*.<sup>43</sup>

### C Conclusion

In summary, Australia's maritime jurisdiction is bordered by UNCLOS, but is itself regulated by the CSA Scheme. The CSA Scheme does not seem to confer exclusive jurisdiction on the states and the Northern Territory, but it does provide that state law will underlie any maritime disasters causing death within Australia's territorial waters. There is question as to the extension of that jurisdiction into the EEZ, but that will not be the focus of this paper. The current CSA system may be an improvement on the situation as it was previously, but it is by no means ideal.

Under the CSA Scheme, there is still variance of criminal law application from state-to-state. This means that seafarers navigating around the coast of the continent are constantly subjected to varying laws. Further to this, seafarers are subject to two sets of law at any one time. When traversing Australia's territorial waters, seafarers are expected to know, understand and comply with a set of state criminal law, as well as any overlaying Commonwealth regulatory criminal law.

---

<sup>43</sup> Kate Lewins and Nick Gaskell, 'Jurisdiction Over Criminal Acts on Cruise Ships: Perhaps, Perhaps, Perhaps?' (2013) 37 *Criminal Law Journal* 221, 232.



### III THE PURPOSES OF CRIMINAL LAW

According to Gold, the main problem with the criminalisation of seafarers is not the fact that coastal states are enforcing their criminal law, 'but rather how it is being used or misused'.<sup>44</sup> In order to analyse the Australian laws applicable to maritime disasters causing death, it is important to consider the purpose for which criminal liability exists. This chapter will consider the overarching purposes of criminal law and analyse them within a maritime context.

#### A *Responsibility and Criminal Conduct*

Criminal law is universal within its jurisdiction and is inherently linked to morality and blameworthiness. Hart says that criminal conduct is 'conduct which, if duly shown to have taken place, will incur a formal penalty and solemn pronouncement of the moral condemnation of the community.'<sup>45</sup> As such, criminal law must do to things in order to be considered effective. Firstly, it must apply to all people and, secondly, it must punish blameworthy conduct.

##### 1 *The Chain of Responsibility*

Within several industries, particular those of high technical skill, there are a number of parties responsible for the safety of the work that is completed. In medicine, for example, this may include the doctor, any nurses, the anaesthetist, the hospital administrators, and the manufacturers of medical supplies. For any criminal law, it is important for a prosecuting body to have the ability to properly prosecute the parties responsible for damage. In the maritime industry, the master and crew may be present on the vessel at the time of a disaster; however, there are many other parties that contribute to success (or failure) of a voyage. Any of these parties may be responsible for a maritime disaster causing death.

---

<sup>44</sup> Edgar Gold, 'Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie' (2005) 24 *University of Queensland Law Journal* 251, 257.

<sup>45</sup> Henry M. Hart Jr, 'The Aims of Criminal Law' (1958) 23 *Law and Contemporary Problems* 401, 405.

Foley says that the term ‘safety chain’ is used throughout the maritime industry to represent this concept.<sup>46</sup> According to the International Maritime Organisation’s International Safety Management Code (the ‘ISM Code’):<sup>47</sup>

The cornerstone of good safety management is commitment from the top. In matters of safety and pollution prevention it is the commitment, competence, attitudes and motivation of individuals at all levels that determines the end result.

The parties within a maritime safety chain includes, but is not limited to, the owner, the master, the crew, the charterer, the manufacturer of the vessel, the designer of the vessel, and the classification society.

Crainger explains that, the senior management of a vessel has the highest level of responsibility for the actions of a vessel at sea. He says that, with management, ‘the safety ‘buck’ starts as well as stops’.<sup>48</sup> This view, however, does not seem to be shared by the authorities that have been responsible for prosecuting some of the world’s most serious maritime disasters.

The reason that senior management appear to avoid liability is that the apparent desire to determine a ‘culprit’ is fulfilled when the master is targeted. When a maritime disaster occurs, the scapegoat is ‘left to take the full brunt of the administrative frustrations of the port or coastal state’.<sup>49</sup>

---

<sup>46</sup> Vincent J Foley and Christopher R Nolan, ‘The Erika Judgment – Environmental Liability and Places of Refuge: A Sea Change in Civil and Criminal Responsibility that the Maritime Community Must Heed’ 33 *Tulane Maritime Law Journal* 41, 41. This concept is also used in other disciplines. See, eg, Kathleen L McFadden, Stephanie C Henegan, and Charles R Gowen, ‘The Patient Safety Chain: Transformational Leadership’s Effect on Patient Safety Culture, Initiatives, and Outcomes’ (2009) 27(5) *Journal of Operations Management* 1.

<sup>47</sup> Phil Anderson, *International Maritime Organisation, ‘International Safety Management Code (ISM Code) and Guidelines on the Implementation of the ISM Code* (International Maritime Organisation, 1997) app 1.

<sup>48</sup> Stuart Crainger, *Zeebrugge – Learning from Disaster: Lessons in Corporate Responsibility* (Herald Charitable Trust, 1993) xiii.

<sup>49</sup> Edgar Gold, ‘Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie’ (2005) 24 *University of Queensland Law Journal* 251, 256.

Criminal law will be effective if it can attribute liability for damage to the person who caused that damage, absent some defence. If the applicable criminal law is to be fit for its intended purpose, it must provide avenues for criminal liability to be appropriately allocated. If this purpose is accepted, then, in the case of maritime disasters causing death, an effective criminal law will provide the ability to prosecute each responsible member of the safety chain.

### B *Criminal Negligence and Criminal Recklessness*

John Lang, trustee director for Nautilus International, has said of the issue of seafarer criminalisation that ‘masters are being crucified for what would have been regarded in other circumstances as an accident’.<sup>50</sup> Maritime disasters are often referred to as ‘accidents’ as the outcome was not an intended cause of the conduct. That is, that the disaster was an ‘accident’ in the colloquial sense. The term ‘accident’, however, is a misnomer in a legal sense for these kinds of situations. Although the outcome may have been unintended, that does not mean that the person (or persons) responsible may escape criminal liability. One purpose of criminal law is to provide sanctions for behaviours that the community views as deserving punishment.

Investigations of maritime disaster often reveal that the loss of death was the result of negligence or recklessness. In law, negligence and recklessness may have different meanings dependent on the context in which they are used. As criminalised conduct, the meaning of the terms is still variable. ‘Criminal negligence’ and ‘criminal recklessness’ are broad terms, both in their colloquial use and in a legal sense. They are not particular to one jurisdiction, or even one offence. While the concept of negligence is well-understood and mostly agreed to, there is controversy as to whether conduct lacking criminal intention should be criminalised. Hart is particularly concerned with the criminalisation of conduct which does not rely on a ‘guilty mind’.<sup>51</sup>

---

<sup>50</sup> Nautilus International, ‘Criminalisation Concern Raised’ *Nautilus Telegraph* (online), February 2015 < [http://issuu.com/redactive/docs/tel\\_feb\\_2015](http://issuu.com/redactive/docs/tel_feb_2015)>.

<sup>51</sup> See H L A Hart, ‘Negligence, Mens Rea, and Criminal Responsibility’ in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2<sup>nd</sup> ed, 2008). This controversy extends to offences against occupational health and safety legislation. See N Foster, ‘Manslaughter by Managers: The Personal Liability of

## 1 *The 'Guilty Mind'*

Criminal offending has developed along the maxim *actus non facit reum, nisi mens sit rea*, meaning 'an act done does not make a person guilty of a crime unless that person's mind be also guilty.'<sup>52</sup> This conceptualisation of offending has evolved into each criminal offence having a 'physical element' (equating to the 'actus reus') and a 'fault element' (equating to the 'mens rea'). The exception to this rule is strict liability offences.<sup>53</sup> A physical element is established by the actions done (or omitted) by the accused person, and the fault element concerns their state of mind at the time of committing the offence. Though the definition differs slightly in each state, the physical element of a homicide offence is to 'cause death'.<sup>54</sup> The fault element that is established will determine whether the appropriate offence is murder or manslaughter. The fault elements corresponding to murder and manslaughter vary from state to state. If one of the required fault elements for murder cannot be established, the appropriate charge will be manslaughter.<sup>55</sup>

The most common types of fault element are intention, recklessness and negligence. Each may have a slightly different definition between state jurisdictions, and between the states and the Commonwealth, but they are very similar. The *Criminal Code Act 1995* (Cth) provides definitions of each possible fault element used in the established Commonwealth crimes.<sup>56</sup> State common law may provide their own definitions of different fault elements; however, they will be largely the same as their Commonwealth counterpart.

---

Company Officers for Death Flowing From Company Workplace Safety Breach' (2006) 9 *Flinders Law Reform Journal* 79, 83.

<sup>52</sup> *Haughton v Smith* [1975] AC 476, 491-492.

<sup>53</sup> Strict liability offences, by their very nature, do not include any fault element. They are based solely on an actus reus being established. See *Proudman v Dayman* (1941) 67 CLR 536, 541 (Dixon J).

<sup>54</sup> Lorraine Finlay and Tyrone Kirchengast, *Criminal Law in Australia* (Lexisnexis Butterworths, 2015) 85-92.

<sup>55</sup> *Crimes Act 1900* (NSW) s 18(1)(b); *Criminal Code Act 1983* (NT) s 160; *Criminal Code Act 1899* (Qld) s 303; *Criminal Code Act 1924* (Tas) s 159; *Criminal Code Act 1913* (WA) s 280. In South Australia and Victoria, the principle is held at common law. See Lorraine Finlay and Tyrone Kirchengast, *Criminal Law in Australia* (Lexisnexis Butterworths, 2015) 100-117.

<sup>56</sup> *Criminal Code Act 1995* (Cth) s 5.1.

*(a) Intention*

If a Commonwealth criminal offence does not specify the fault element required for liability, the assumed fault element will be intention.<sup>57</sup> Intention is defined in the *Criminal Code Act 1995* (Cth) as follows:<sup>58</sup>

- (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

Consider the following case, in terms of murder:

*Scenario One. Captain Vanderkley is facing a mutiny of his crew. He decides to steer his vessel into submerged rocks in order to sink the vessel and kill the crew. The hull is breached and the vessel floods, but Captain Vanderkley escapes in a lifeboat. Several crewmembers die.*

The conduct of the master is definitely of a kind that should constitute a crime. In this case, the physical element of ‘causing death’ is clearly established. To establish a charge of murder, the requisite fault element is intention. The applicable test would be to have an ‘intention with respect to a result’, as death is the result that must have been intended in order to attribute culpability. The facts state that the master had the intention for death to result. Therefore, murder will be relatively simple to prove in a court. The situation becomes more complicated when the accused party does not intend the consequences of what did eventuate.

*(b) Recklessness*

The *Criminal Code Act 1995* (Cth) provides that:<sup>59</sup>

- (1) A person is reckless with respect to a circumstance if:
  - (a) he or she is aware of a substantial risk that the circumstance exist or will exist;and

---

<sup>57</sup> *Criminal Code Act 1995* (Cth) s 5.6.

<sup>58</sup> *Criminal Code Act 1995* (Cth) s 5.3.

<sup>59</sup> *Criminal Code Act 1995* (Cth) 5.4.

- (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
  - (a) he or she is aware of a substantial risk that the result will occur; and
  - (b) having regard to the circumstance known to him or her, it is unjustifiable to take the risk.

The general rule is that death caused by recklessness will be found where ‘the accused foresaw that death was a probable consequence of his or her actions, yet took the risk and performed those actions in any event.’<sup>60</sup> In *Rofe*, Brereton J further discussed the concept of ‘recklessness as to conduct’, which applies in cases when the reckless conduct itself is the physical element of the offence, such as reckless driving.<sup>61</sup>

The case of *Rofe* concerned a charge of ‘reckless navigation’ under the *Marine Safety Act 1998* (NSW). The accused was a member of the Royal Australian Navy who was responsible for adventure training activities. In the course of a ‘joy ride’ on a motorised inflatable boat, a passenger fell from the vessel and came into contact with the propeller. The victim suffered serious injuries amounting to the grievous bodily harm. Though the case did not concern a death, it does illustrate conduct which will be considered to be reckless.

Brereton J briefly discussed recklessness as it would apply generally within a commercial shipping context:<sup>62</sup>

A vessel operator assumes the risk of striking a submerged object, with the grave potential consequences of the vessel sinking and its passengers drowning, but would not be said to be navigating recklessly, unless in the circumstances the risk was an obvious and serious possibility; for example, if he or she proceeded to sail through a channel in which there were known to be such objects.

Consider the following case, in terms of reckless manslaughter:

---

<sup>60</sup> Lorraine Finlay and Tyrone Kirchengast, *Criminal Law in Australia* (Lexisnexis Butterworths, 2015) 96.

<sup>61</sup> *Maritime Authority of NSW v Rofe* [2012] NSWSC 5, 15.

<sup>62</sup> *Maritime Authority of NSW v Rofe* [2012] NSWSC 5, 23.

*Scenario Two. There are two routes through which Captain Vanderkley may navigate his vessel. The first is shorter, but is known to be very dangerous; it has been known to cause deaths. The second route is slightly longer, but safer. Captain Vanderkley chooses the shorter route. The vessel hits submerged rocks, the hull is breached and the vessel floods. Captain Vanderkley escapes in a lifeboat. Several crewmembers die.*

The risk-taking behaviour is of a kind that the law has chosen to criminalise, by deeming it to be reckless. The physical element of manslaughter charge seems to be slightly more difficult to establish, but factual and legal causation appear to have been met.<sup>63</sup> As the death is the focus of the charge, the fault requirement for reckless manslaughter is to be ‘reckless with respect to a result’. The scenarios shows that the master was aware of a substantial risk of hitting rocks. A court may find that, with a sound alternative route available, it was unjustifiable to have taken the dangerous route.

### *(c) Negligence*

The *Criminal Code Act 1995* (Cth) provides that:

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 circumstances; and
- (b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.<sup>64</sup>

This definition reflects the position at common law,<sup>65</sup> although the common law has struggled to enunciate such. To explain the type of conduct relevant to criminal negligence, the words ‘gross’ and ‘wicked’ have been used; however, the Lord Chief Justice in *Bateman* said that, regardless of the epithets used, criminal negligence:

---

<sup>63</sup> *Royall v R* (1991) 172 CLR 378; *Krakouer v State of Western Australia* (2006) 161 A Crim R 347.

<sup>64</sup> *Criminal Code Act 1995* (Cth) 5.5.

<sup>65</sup> *Nydam v The Queen* [1977] VR 430, 445.

[Goes] beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.<sup>66</sup>

The common law has previously reflected the position that recklessness was an example of conduct with was criminally negligent.<sup>67</sup> This is no longer the case.<sup>68</sup>

Consider the following case, in terms of negligent manslaughter:

*Scenario Three. Captain Vanderkley is required to check the navigational aids as he navigates. He does not check them at all. As such, he fails to notice that he is navigating his vessel into submerged rocks. The vessel hits the rocks, the hull is breached and the vessel floods. Captain Vanderkley escapes in a lifeboat. Several crewmembers die.*

As the master of the vessel has a duty of care to those on board, it is expected that the law will criminalise a serious breach of that duty of care which causes harm to others. The physical element of ‘causing death’ has been met, in this case. The fault element also appears to be established. There is a high risk that poor navigation of a sea-going vessel could result in damage to the vessel and subsequent loss of life. Further, as there appears to be such a great falling short of the standard of care required of the master, a charge of negligent manslaughter is likely to be established.

Kirby J has said:

‘In the overwhelming majority of cases, a person who causes death by aggravated criminal negligence will be regarded as extremely blameworthy. The criminal law, by fixing liability only on those who act with aggravated negligence confines liability to cases of very serious wrongdoing in the circumstances of moral blame.’<sup>69</sup>

---

<sup>66</sup> *R v Bateman* (1927) 19 Cr App R 8, 11-12.

<sup>67</sup> In *Andrews v Director of Public Prosecutions* [1937] AC 576, Lord Atkin stated that the appropriate degree of negligence required could be described as ‘reckless’.

<sup>68</sup> See *Callaghan v The Queen* (1952) 87 CLR 115 in Australia and *R v Adomako* [1995] AC 171 in the United Kingdom.

<sup>69</sup> *R v Lavender* (2005) 222 CLR 67, 108 (Kirby J).



Negligence is a failure to meet a standard of care. The most common occasion for this analysis is in cases of negligent driving. Lord Diplock said in *Lawrence* that ‘in deciding this [the jury] may apply the standard of the ordinary prudent motorist as represented by themselves’.<sup>70</sup> This is more difficult in maritime cases, due to a jury’s inexperience with the subject matter.<sup>71</sup>

In the case of *Rofe*, Brereton J explains the distinction between degrees of negligence in forensic detail.<sup>72</sup> He explains that, though ‘there is no doubt that criminal negligence and civil negligence are distinct concepts’,<sup>73</sup> negligence in regulatory law (as opposed to in murder or manslaughter) exists when there has been a departure from the standard of care ‘to be expected of a prudent operator in all the circumstances.’<sup>74</sup> That is, that the threshold is lower than with murder and manslaughter.

## 2 *Implications*

The community view is:

‘[T]hat any person who has a work-related duty of care, but does not observe it, should be liable to a criminal sanction for placing another person’s safety at risk.’<sup>75</sup>

Kirby J has said that ‘[s]ubjective intention does not enjoy a monopoly on moral culpability’.<sup>76</sup> The law in Australia seems to reflect this perspective, by criminalising conduct which is reckless or negligent. As such, for the purpose of consistency, the law applicable to maritime disasters causing death should reflect the willingness of the lawmakers to criminalise recklessness and negligence.

---

<sup>70</sup> *R v Lawrence* [1982] AC 510, 527 (Lord Diplock).

<sup>71</sup> *Maritime Authority of NSW v Rofe* [2012] NSWSC 5, 53.

<sup>72</sup> *Maritime Authority of NSW v Rofe* [2012] NSWSC 5, 25-42.

<sup>73</sup> *Maritime Authority of NSW v Rofe* [2012] NSWSC 5, 26.

<sup>74</sup> *Maritime Authority of NSW v Rofe* [2012] NSWSC 5, 42.

<sup>75</sup> Explanatory Memorandum, Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (Cth) 12.

<sup>76</sup> *R v Lavender* (2005) 222 CLR 67, 108 (Kirby J).

## C Penalties

Past maritime disasters have demonstrated that ‘prevention is better than cure.’<sup>77</sup> However, a legal cure is still necessary when a disaster occurs. Criminal law should have effective penalties if it is to satisfy its purpose. There are two main penalties for criminal liability: imprisonment and monetary ‘penalty units’. Penalty units ‘[straddle] the line between civil and criminal sanctions.’<sup>78</sup> They, in effect, represent a fine imposed on the offending party and may be imposed by an authoritative body without the need for trial.<sup>79</sup> One penalty unit is currently equal to \$180.<sup>80</sup> That amount will increase incrementally subject to sub-section 4, which determines ‘indexation days’ commencing with 1 July 2018.<sup>81</sup> This paper will not analyse theories of justice, but acknowledges that the most effective criminal laws may not always have the highest penalties. At the very least, the deterrence effect of the legal sanctions will hopefully go to preventing future disasters.

## E Conclusion

Criminal law applicable to maritime disasters causing death should be fit for the general purposes required of criminal law. This includes, but is not limited to, application to responsible parties, criminalising appropriate conduct and providing effective sanctions. In order to apply to appropriate parties, the relevant laws must consider the ‘safety chain’ concept and be wary of allowing the master of a vessel to be blamed for an outcome that was otherwise not within his responsibility to control. To ensure they are criminalising appropriate conduct, lawmakers should consider the serious implications being negligent on a vessel may have to the safety of life. In order to provide effective sanctions, consideration should be had of the deterrent effect that strong penalties will have.

---

<sup>77</sup> Edgar Gold, ‘Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie’ (2005) 24 *University of Queensland Law Journal* 251, 258.

<sup>78</sup> Shane Bosma, ‘The Impact of Recent Shipping Reforms on the Offshore Oil and Gas Industry in Australia’ (2013) 27 *Australia and New Zealand Maritime Law Journal* 8, 15.

<sup>79</sup> See, eg, Alexander White, ‘Passengers’ Duties and the Marine Safety (Domestic Commercial Vessel) National Law 2012 in Queensland’s Internal Waters’ (2015) 7(2) *Australian Journal of Maritime and Oceanic Affairs* 152.

<sup>80</sup> *Crimes Act 1914* (Cth) s 4AA(1).

<sup>81</sup> *Crimes Act 1914* (Cth) s 4AA(3).

### III THE RELEVANT LAW

Many factors influence whether a maritime disaster causing death will lead to criminal charges. In Australia, a prosecuting body may have a suit of criminal charges available to utilise in prosecution of reckless or negligent conduct. There are several regulatory crimes that may be relevant, under several statutes, in addition to the crimes provided by state and territory criminal law under the CSA Scheme. The main relevant charges under state and territory law are murder and manslaughter. The main relevant Commonwealth statutes are:

- the *Navigation Act 2012* (Cth) (the ‘*Navigation Act*’); and
- the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) (the ‘*National Law*’).

This chapter will analyse each of these laws in order to determine whether they are fit for their respective intended purposes. Considering the issues as they are outlined above, the analysis will focus on (a) the conduct criminalised by the applicable laws (including defences to that criminalisation), (b) the parties to whom that liability may be imposed, and (c) the criminal penalties that may flow as a result of conviction.

#### A *State Criminal Law*

Pursuant to the CSA, the criminal law of each state will apply to vessels within the waters to which that state is adjacent. State criminal law is highly variable. Depending on the adjacent state, a seafarer may be subjected to common law offence or statutory offences. The content of those offences also varies greatly from state-to-state.

##### 1 *Application*

Criminal law will apply to all individual persons with little restriction. In the context of maritime disasters, this is likely to have encouraged prosecuting bodies to scapegoat the master as an individual person. Gold further explains that ‘scapegoating’ the master often allows other members of the safety chain to avoid criminal liability completely. He says:

In many accidents the first line of defence is to find someone to blame, a scapegoat, usually situated lower on the operational or management ladder. Yet as almost all accidents show, it is not usually single individuals who are to blame for what has occurred, but a combination of omission, commission or error, that lies much deeper within the system, outlook, philosophy, attitude and involvement of the whole organization.<sup>82</sup>

State criminal law does not provide an effective avenue for prosecuting the whole organisation responsible for a maritime disaster. The provisions under the Commonwealth system apply only to Commonwealth offence, which does not include murder or manslaughter. Gobert and Punch explain:

‘[The] criminal law was not developed with companies in mind. Concepts such as *mens rea* and *actus reus*, which make perfectly good sense when applied to individuals, do not translate easily to an inanimate fictional entity such as a corporation. Trying to apply these concepts to companies is a bit like trying to squeeze a square peg into a round hole.’<sup>83</sup>

A prosecuting body intended to charge a company for manslaughter, they may prosecute the responsible individual within that company. This was the situation in the New South Wales District Court case of *Cittadini*.<sup>84</sup> The case concerned the death of four crew members working on a yacht. After investigation, it was found that the keel of the yacht has been cut and re-welded during the construction of the vessel. The manufacturer was convicted of negligent manslaughter for failure to properly supervise those in his employ during the vessel’s construction. The Supreme Court of Criminal Appeal allowed an appeal from the manufacturer on the ground that the verdict of the jury was ‘unreasonable’.<sup>85</sup>

---

<sup>82</sup> Edgar Gold, ‘Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie’ (2005) 24 *University of Queensland Law Journal* 251, 256.

<sup>83</sup> James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Cambridge University Press, 2003) 10.

<sup>84</sup> See Rick Sarre, ‘Sentencing Those Convicted of Industrial Manslaughter’ (Speech Delivered at Sentencing Conference 2010, Canberra, 6 February 2010).

<sup>85</sup> *Cittadini v R* [2009] NSWCCA 302 [35]-[87].

The *Crimes Act 1900* (ACT) is the only state criminal law provision particular to the death of an employee.<sup>86</sup> However, the ACT is the only state without an adjacent area for the purposes of the Cooperative Scheme. The industrial manslaughter offence will only apply in a maritime context to Australian vessels operating outside of the adjacent area.

## 2 *Criminalised Conduct*

The most relevant offences in each state jurisdiction are murder and manslaughter. As previously mentioned, these two offences share ‘causing death’ as the common physical element, and it is the determination of particular fault elements that will establish the particular charge. The fault elements required by each offence vary from state-to-state. In New South Wales, Victoria, South Australia and Tasmania, recklessness will be sufficient to establish murder.<sup>87</sup> In the Northern Territory, recklessness is specifically an element of manslaughter.<sup>88</sup> In Western Australia and Queensland, conduct which is reckless should be argued as being negligent (or by way of an intentional act) in order to incur a charge of manslaughter.<sup>89</sup> To have the same conduct criminalised to different extents across jurisdictions presents a very confusing situation to seafarers who are travelling around the coasts of Australia, or even only through two different adjacent areas.

There are several criminal offences other than murder and manslaughter that may be relevant to a maritime disaster causing death. These offences vary from state-to-state. There is confusion, however, as to which of these offences can and should be used when charging with a maritime disaster causing death. Any state law that relates to marine safety will be excluded by the National Law, unless the law is prescribed by the regulations.<sup>90</sup>

---

<sup>86</sup> *Crimes Act 1900* (ACT) s 49D.

<sup>87</sup> *Crimes Act 1900* (NSW) s 18(1)(a); *Criminal Code Act 1924* (Tas) s 157(1)(c). In South Australia and Victoria, the elements of murder are given in common law.

<sup>88</sup> *Criminal Code Act 1983* (NT) s 160.

<sup>89</sup> *Criminal Code Act 1913* (WA) s 280; *Criminal Code Act 1899* (Qld) s 303.

<sup>90</sup> *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) (the ‘National Law’) s 6.

Figure 3. Other relevant offences by state.

State (or territory)	Relevant offence(s)
Queensland	Dangerous operation of a vehicle* ( <i>Criminal Code Act 1899</i> (Qld) s 328A)
New South Wales	Dangerous navigation* ( <i>Crimes Act 1900</i> (NSW) s 52B)
	Reckless, dangerous or negligent navigation and other acts ( <i>Marine Safety Act 1998</i> (NSW) s 13)
South Australia	Causing death or harm by use of vehicle or vessel* ( <i>Criminal Law Consolidation Act 1935</i> (SA) s 19A)
Tasmania	Endangering life on a ship ( <i>Criminal Code Act 1924</i> (Tas) s 180(2))
	Breach of duty as a seaman ( <i>Criminal Code Act 1924</i> (Tas) s 180(3))
Victoria	Culpable driving causing death* ( <i>Crimes Act 1958</i> (Vic) s 318)
	Dangerous driving causing death or serious injury* ( <i>Crimes Act 1958</i> (Vic) s 319)
	Dangerous operation of a recreational vessel, government vessel or hire and drive vessel ( <i>Marine Safety Act 2010</i> (Vic) s 87)
	Acts tending to endanger vessel or crew ( <i>Marine Safety Act 2010</i> (Vic) s 88)
Western Australia	Culpable driving (not of motor vehicle) causing death or grievous bodily harm* ( <i>Criminal Code Act 1913</i> (WA) s 284)

\* Specifically not excluded by the National Law.<sup>91</sup>

<sup>91</sup> *Marine Safety (Domestic Commercial Vessel) National Law Regulation 2013* (Cth) reg 5.

### 3 *Penalties*

The maximum penalty for both murder and manslaughter is the same in most states; life imprisonment. The distinction between the two offences is merely for the purposes of classification. Regarding the other relevant offences in each state, the penalties vary widely. In cases of maritime disasters, a number of factors would be taken into account for sentencing, including number of deaths, level of responsibility and level of negligence or recklessness.

### 4 *Conclusion*

The Cooperative Scheme was introduced ‘in order to achieve a consistent jurisdictional approach to the application of offences at sea.’<sup>92</sup> Though it may be more consistent than the previous system, the Cooperative Scheme does not apply one consistent law to all maritime disasters causing death. This would not be problematic if the laws applicable to maritime disasters were similar across the states; however, the state criminal law (and additional regulatory crimes) are highly variable. A vessel that is passing the coast of several Australian states when it suffers a disaster may face distinctly different offences every time that it crosses an invisible maritime border.

## B *Navigation Act*

The *Navigation Act 2012* (Cth) (the ‘*Navigation Act*’) has been described as the ‘foundation for the regulation of Australian ships and shipping’.<sup>93</sup> The *Navigation Act* came into effect on 1 July 2013, superseding the *Navigation Act 1912* (Cth) (the ‘*Navigation Act 1912*’). The 2012 version was introduced into Australian parliament alongside several other pieces of legislation which, together, represented some of the largest maritime reforms in Australia’s history.

### 1 *Application*

The *Navigation Act* applies to vessels which often leave Australian waters. These vessels may be either a Foreign Vessel (‘FV’) or a Regulated Australian Vessel

---

<sup>92</sup> Mary Wood, Derran Moss and Barton Hoyle, ‘Australian Legislation Concerning Matters of International Law 2000’ (2000) *Australian Year Book of International Law* 20, 20.

<sup>93</sup> Michael White, *Australian Maritime Law* (Federation Press, 3<sup>rd</sup> ed, 2014) 342.

(‘RAV’). It also applies to Domestic Commercial Vessels (‘DCVs’) and Recreational Vessel (‘RVs’). Each criminal offence in the *Navigation Act* specifies the types of vessels to which that offence applies. The *Navigation Act* does not apply to naval vessels<sup>94</sup> and certain Australian Border Force vessels.<sup>95</sup>

The *Navigation Act* will apply to FVs in two instances:

- (a) When the FV has Australian Nationality, despite being registered in another country; or
- (b) When the FV is operating in Australian waters.<sup>96</sup>

‘Australian nationality’ is defined as having the meaning given in the *Ship Registration Act 1981* (Cth). The definition includes an Australian-registered ship, an unregistered Australian-owned ship, an unregistered ship wholly owned by residents of Australia, or a ship solely-operated by residents of Australia.<sup>97</sup>

An FV will be operating in Australian waters if the vessel is:<sup>98</sup>

- a) In an Australian port; or
- b) Entering or leaving an Australian port; or
- c) In the internal waters of Australia; or
- d) In the territorial sea of Australia, other than in the course of innocent passage.

An RAV is defined as a non-recreational vessel that is registered under the *Ship Registration Act 1981* (Cth) and, one or more of the following:

- (i) the vessel is proceeding on an overseas voyage or is for use on an overseas voyage;
- (ii) a certificate issued under [the *Navigation Act*]...is in force for the vessel;
- (iii) an opt-in declaration is in force for the vessel.

The opt-in declaration is done by way of application to AMSA.<sup>99</sup> Upon an application being successful, the vessel will become subject to a wider range of

---

<sup>94</sup> *Navigation Act* s 10.

<sup>95</sup> *Navigation Act* s 11.

<sup>96</sup> *Navigation Act* s 9.

<sup>97</sup> *Ship Registration Act 1981* (Cth) s 29.

<sup>98</sup> *Navigation Act* s 9.



criminal liability under the Navigation Act. AMSA also has the power to declare that a vessel is not an RAV.<sup>100</sup> According to the Q&A, AMSA may declare that the vessel is to be subject to the National Law instead,<sup>101</sup> but this would only be in the case that the vessel in question is a domestic commercial vessel as per the definition in the National Law.<sup>102</sup>

A DCV under the Navigation Act has the same definition as under the National Law.<sup>103</sup> It is ‘a vessel that is for use in connection with a commercial, governmental or research activity.’<sup>104</sup> The commercial vessels within this definition are considered to be ‘domestic’ if they operate solely within the EEZ.<sup>105</sup>

## 2 *Criminalised Conduct*

There are three major charges under the *Navigation Act* relevant to causing death through maritime disaster: collision, unseaworthiness, and unsafe loading.

### (a) *Collision*

The Navigation Act gives effect to the *Convention on the International Regulations for Preventing Collisions at Sea*.<sup>106</sup> The charge of ‘operating a vessel in contravention of the regulations’ is applicable to all vessels regulated under the Navigation Act.<sup>107</sup> The two offences criminalise conduct of the ‘owner’ and master of the vessel respectively.

---

<sup>99</sup> *Navigation Act 2012* (Cth) s 25.

<sup>100</sup> *Navigation Act 2012* (Cth) s 19.

<sup>101</sup> Australian Maritime Safety Authority, *Navigation Act 2012: Questions and Answers* (2012) 3.

<sup>102</sup> *National Law* s 7.

<sup>103</sup> *Navigation Act 2012* (Cth) s 14.

<sup>104</sup> *National Law* s 7.

<sup>105</sup> See Australian Maritime Safety Authority, *Navigation Act 2012: Questions and Answers* (2012).

<sup>106</sup> *Convention on the International Regulations for Preventing Collisions at Sea*, opened for signature 20 October 1972, 1050 UNTS 16 (entered into force 29 February 1980).

<sup>107</sup> *Navigation Act* s 174.

For the purposes of the Navigation Act, an owner is defined as one or more of the following:<sup>108</sup>

- (a) A person who has a legal or beneficial interest in the vessel other than as a mortgagee;
- (b) A person with overall general control and management of the vessel;
- (c) A person who has assumed responsibility for the vessel from a person referred to in paragraph (a) or (b).

This definition is very broad. White has said:

The wide definition of owner may mean that some, or even all, of the beneficial owner, the legal owner, registered owner, charterer by demise or otherwise, sub-charterer, master, pilot and operator may be exposed to this duty.<sup>109</sup>

Further, it is unclear as to whether ‘ownership’ shifts from each party as control shifts, or whether all parties that may be considered the ‘owner’ of the vessel hold responsibility for collision concurrently. As the offence provisions use the definite article ‘the’ to describe the owner, it could be argued that be assumed that ownership shifts depending on who has general control and management of the vessel at the time of the offence being committed. The definition also says that the master or pilot of the vessel is not taken to have general control and management of the vessel merely by virtue of being the master or pilot.<sup>110</sup>

#### *(b) Seaworthiness*

Seaworthiness is a common concept in shipping law. It exists as an implied term in contracts of carriage<sup>111</sup> and as an express obligation under the Hague-Visby Rules.<sup>112</sup> A shipowner owes a duty to ensure that their vessel is seaworthy at the commencement of any voyage. A breach of a civil seaworthiness obligation may bring civil actions against the shipowner or the charterer of the vessel.

The *Navigation Act* criminalises unseaworthiness. The obligation is held by the owner and the master, separately. Under the *Navigation Act*:

---

<sup>108</sup> *Navigation Act* s 14.

<sup>109</sup> Michael White, *Australian Maritime Law* (Federation Press, 3<sup>rd</sup> ed, 2014) 370.

<sup>110</sup> *Navigation Act* s 14.

<sup>111</sup> *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] EWCA Civ 7.

<sup>112</sup> *Carriage of Goods by Sea Act 1991* (Cth) sch 1 (the ‘*Hague-Visby Rules*’).

A vessel is *seaworthy* if, and only if:

- (a) It is in a fit state as to the condition of hull and equipment, boilers (if any) and machinery, the stowage of ballast or cargo, the number and qualifications of seafarers, and in every other respect to:
  - (i) Encounter the ordinary perils of the voyage undertaken; and
  - (ii) Not pose a threat to the environment; and
- (b) It is not overloaded; and
- (c) The living and working conditions on board the vessel do not pose a threat to the health, safety or welfare of the vessel's seafarers.<sup>113</sup>

The offence of 'taking [an] unseaworthy vessel to sea' provides for a 'fault-based' penalty, but does not specify the specific fault required.<sup>114</sup> According to the *Criminal Code Act 1995* (Cth):

If the law creating the offence does not specify a fault element for a physical element that consists only of a circumstance or a result, recklessness is the fault element for that physical element.<sup>115</sup>

It can be argued that unseaworthiness is a 'circumstance' to which an owner or a master may be reckless. This is the same fault element which was provided in the 1912 Navigation Act.<sup>116</sup>

In a civil context, a carrier need only exercise 'due diligence to...make the ship seaworthy'.<sup>117</sup> Under the *Navigation Act*, the obligation appears to be absolute. Under the *1912 Navigation Act*, the obligation was also absolute; however, it was a defence to a charge of unseaworthiness to have 'used all reasonable means to ensure the seaworthiness of the ship'.<sup>118</sup> There was also allowance made for unseaworthy vessels put to sea in 'special circumstances' which made the putting of the vessel to sea 'reasonable and justifiable'.<sup>119</sup> Neither the defence, nor the special circumstances, exist in the *Navigation Act*. This seaworthiness obligation

---

<sup>113</sup> *Navigation Act* ss 23(b), 23(c).

<sup>114</sup> *Navigation Act* ss 109, 110.

<sup>115</sup> *Criminal Code Act 1995* (Cth) s 5.6.

<sup>116</sup> *Navigation Act 1912* (Cth) s 208(2).

<sup>117</sup> *Hague-Visby Rules* art 3 r 1.

<sup>118</sup> *Navigation Act 1912* (Cth) s 208(1A).

<sup>119</sup> *Navigation Act 1912* (Cth) s 208(4).

places an unfair standard on the owner and master of a vessel, which far exceeds the obligations placed on parties under the civil law.

According to the Australian Maritime Safety Authority ('AMSA'), there are several issues that will be taken into account before AMSA will prosecute an offence under the Navigation Act.<sup>120</sup> They include:

- Does the breach exhibit a significant degree of criminality or disregard?
- Is the breach sufficiently serious that the Commonwealth and the community would expect it to be dealt with by prosecution?
- Is it important to deter similar behaviour?

It appears that the considerations required of AMSA before a prosecution is made are actually issues that should have been considered by the lawmakers when formulating appropriate offences, or by the judiciary in a case concerning an offence under the *Navigation Act*. Such a large amount of discretion on the part of a statutory authority may mean that there is a large degree of variance in the prosecuted parties.

Strangely, the seaworthiness obligation under the *Navigation Act* is only applicable to RAVs and FVs.<sup>121</sup> In other words, criminal sanctions for unseaworthiness will only apply to vessels which regularly leave Australian waters. There is no criminal liability for DCVs or RVs, nor is seaworthiness covered in the National Law, which is applicable to domestic vessels specifically.

Further, the obligation of seaworthiness for RAVs and FVs only falls on the 'owner' and the master. When reviewing the 1912 Navigation Act, the report said that:

---

<sup>120</sup> Australia Maritime Safety Authority, *Compliance and Enforcement Protocol: Navigation Act 2012* < <https://www.amsa.gov.au/forms-and-publications/Publications/AMSA354-CEP-NavAct.pdf>>, 12.

<sup>121</sup> *Navigation Act* ss 108, 111.

‘Ship and company management should be liable for fines or imprisonment where a ship is unseaworthy or loss of life or serious personal injury are a direct consequence of management failing to take responsibility for safety.’<sup>122</sup>

These provisions, though new, show various inconsistencies and other problems. The provisions in the *Navigation Act* demonstrate this when the only ‘management’ which may be liable for the unseaworthiness is the ‘owner’. Though that definition may be broad, it is unlikely to be broad enough to encompass the manufacturer of the vessel.

### 3 Overall Issues

#### (a) *The chain of responsibility*

Offences under the *Navigation Act* do not appreciate the ‘safety chain’ concept. Though it has been noted that the word ‘owner’ may be incredibly vague when used in the offence provisions, it is unlikely to be vague enough to include the manufacturer of the vessel, or maintenance personnel. Both of these parties may be responsible for causing a vessel to be unseaworthy or, at the very least, causing an increased number of deaths.<sup>123</sup> It is arguable, then, that the *Navigation Act* is not broad enough to be considered fit for its purpose to criminalise liability on a regulated Australian Vessel.

#### (b) *The criminalised conduct*

Under the *Navigation Act*, there are no offences relating to generally negligent or reckless conduct. Though the *Navigation Act* covers criminal liability of masters and shipowners for unseaworthiness and collision, it does not cover any other situations in which death is likely to occur. If a vessel is merely grounded due to negligent or reckless navigation, the *Navigation Act* does not assist in attributing criminal liability. Prosecuting bodies may then choose to utilise state law in order to fill the gaps. This means that state criminal law will be the only applicable law

---

<sup>122</sup> Department of Infrastructure and Regional Development (Australia), *Review of the Navigation Act 1912: Final Report* (2000) recommendation 109.

<sup>123</sup> In both the *Costa Concordia* disaster and the *Lamma IV* collision, the manufacture and maintenance of the vessel was called into question, as a factor that may have contributed to the deaths suffered, but criminal prosecutions were not pursued.

to FVs and RAVs, which fall victim to a maritime disaster due to negligent or reckless navigation.

*(c) Penalties*

The penalties under the Navigation Act are relatively low, when compared with the penalties under state criminal law for murder or manslaughter. All of the relevant offences provide for a maximum penalty of 10 years imprisonment or 600 penalty units, or both.<sup>124</sup> It is likely, then, that charges of unseaworthiness or collision are intended to supplement the state criminal law offences, rather than to substitute for them.

4 *Conclusion*

In summary, the Navigation Act is fit for its intended purpose in some respects. If the seaworthiness obligation were to be extended to DCVs and RVs, under the *Navigation Act* or the National Law, it would strengthen the consistency of the criminal law. Further, if the seaworthiness obligation were to be extended to other parties within the safety chain (particularly the manufacturer), it would allow a prosecuting body more options for punishment of an offence.

C *National Law (current)*

During the Second Reading speech for the Marine Safety (Domestic Commercial Vessel) National Law Bill 2012, the Hon. Anthony Albanese explained that the benefit of the National Law would produce one unified system to deal with the marine safety of all domestic commercial vessels.<sup>125</sup> In line with that, one of the stated objects of the National Law is to '[provide] a single national framework for ensuring the safe operation, design, construction and equipping of domestic

---

<sup>124</sup> *Navigation Act* ss 109(2), 110(2), 177(2), 178(2). At present, 600 penalty units equates to a fine of \$108,000. See *Crimes Act 1914* (Cth) s 4AA.

<sup>125</sup> Second Reading Speech, Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (Cth).

commercial vessels'.<sup>126</sup> The National Law is now part of the criminal law of almost all states and it applies with force of the CSA.<sup>127</sup>

### 1 *Application*

As previously mentioned, a DCV is defined as being 'a vessel that is for use in connection with a commercial, governmental or research activity.'<sup>128</sup> White describes the scope of the National Law as being 'an uncomfortable combination of vessels involved in three quite different functions.'<sup>129</sup> The National Law specifically does not apply to RAVs, FVs, defence vessels and vessels owned by a school.<sup>130</sup> RAVs and foreign vessels, in particular, are subject to liability under the Navigation Act as their operations are not domestic in nature.

Criminal liability under the National Law is split into six sections. The sections are split by parties, in order to specify their individual liability. The parties dealt with are:

- a) Owners<sup>131</sup>
- b) 'Designers, builders, manufacturers etc.'<sup>132</sup>
- c) Masters<sup>133</sup>
- d) Crew<sup>134</sup>
- e) Passengers<sup>135</sup>
- f) Others<sup>136</sup>

---

<sup>126</sup> *National Law* s 3.

<sup>127</sup> Except for Western Australia (and the Australian Capital Territory). It appears from the website of the Western Australian Department of Transport that the state government believes that the regulation of domestic commercial is the responsibility of the Commonwealth government. See Department of Transport (WA), *National Reform of Shipping Regulations* (14 October 2015) <[www.transport.wa.gov.au/imate/national-reform-of-shipping-regulations.asp](http://www.transport.wa.gov.au/imate/national-reform-of-shipping-regulations.asp)>.

<sup>128</sup> *National Law* s 7(1).

<sup>129</sup> Michael White, *Australian Maritime Law* (Federation Press, 3<sup>rd</sup> ed, 2014) 368.

<sup>130</sup> *National Law* s 7(3).

<sup>131</sup> *National Law* ss 12-13.

<sup>132</sup> *National Law* ss 14-15.

<sup>133</sup> *National Law* ss 16-18.

<sup>134</sup> *National Law* ss 19-20.

<sup>135</sup> *National Law* ss 21-22.

The definition of ‘owner’ under the National Law is almost identical to that under Navigation Act and brings with it the same uncertainties. The parties captured by the section applying to ‘designers, builders, manufacturers etc’ are also very broad. It includes:<sup>137</sup>

‘A person who designs, commissions, constructs, manufactures, supplies, maintains, repairs or modifies a domestic commercial vessel, or marine equipment that relates to such a vessel’.

By providing offences that apply to the above listed parties, the National Law is much broader than the Navigation Act, which makes the National Law more effective in achieving the purpose of criminal law to apply to any parties responsible for damage. There is no limitation in the National Law as to whether one of the listed parties needs to be Australian in order to incur the applicable penalty. The National Law purports to apply extra-territorially,<sup>138</sup> which means that an Australian prosecuting body may attempt to enforce the obligations of ‘designers, builders, manufacturers etc’ to foreign parties residing in other jurisdictions.

The definition of the term ‘master’ is also broad. The National Law defines the master of a vessel as ‘the person who has command or charge of the vessel, but does not include a pilot.’<sup>139</sup> This definition could potentially include any member of the crew who is exercising the role of the master at some point during the voyage. In New Zealand, under similar legislation, a first mate was considered liable for criminal provisions intended to apply to a master because he ‘had command or charge of the vessel’ at the time of an incident occurring.<sup>140</sup> As a result of being considered to be the master at that time, the accused was required to comply with the reporting requirements that would ordinarily apply to masters.

---

<sup>136</sup> *National Law* ss 23-26.

<sup>137</sup> *National Law* s 14.

<sup>138</sup> *National Law* s 8.

<sup>139</sup> *National Law* s 6.

<sup>140</sup> *Maritime New Zealand v Birchall* [2009] NZCA 119.



## 2 *Criminalised Conduct*

In the context of a maritime incident causing death, there are several provisions under the National Law which may be used to impose criminal liability. The focus of the National Law was always intended to be on its deterrent effect rather than punishments it imposed on those liable for breaches. The Explanatory Memorandum of the Act states that ‘the overall objective of the penalties in the Bill is to increase compliance with the National Law and decrease the resort to prosecution to achieve that aim.’<sup>141</sup>

The provisions in the National Law do not actually punish individuals for causing death. Instead, they punish an individual for failing to ensure safety on board the vessel. As example of the obligations under the National Law is as follows:<sup>142</sup>

- (1) An owner of a domestic commercial vessel must, so far as reasonably practical, ensure the safety of:
  - (a) The vessel; and
  - (b) Marine safety equipment that relates to the vessel; and
  - (c) The operation of the vessel.

Though ‘ensure’ is not defined within the National Law, the word was discussed in the case of *Cittadini*. McClellan CJ at CL said that it was important not to import absolute liability onto a person with the obligation to ‘ensure’.<sup>143</sup> An absolute liability offence is defined as an offence without the need to prove a fault element or the ability to argue a defence.<sup>144</sup> In each of the sections attributing criminal liability, the conduct required of the respective parties is to ensure safety ‘so far as reasonably practical’. There are several issues to be taken into account when assessing what was reasonably practical. The most simple defence to argue in regard to unsafe conduct, is to argue that the accused person did all that was ‘reasonably able to be done’ when ‘taking into account and weighing up all

---

<sup>141</sup> Explanatory Memorandum, Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (Cth) 12.

<sup>142</sup> *National Law* s 12. An identical obligation exists for the master of a vessel. See *National Law* s 16.

<sup>143</sup> *Cittadini v R* [2009] NSWCCA 302 [96].

<sup>144</sup> *Wampfler v R* (1987) 67 CLR 531.

relevant matters'.<sup>145</sup> The relevant matters listed include likelihood of the risk, degree of harm, and the availability and suitability of ways to eliminate or minimise the risk. According to the government, courts should consider the degree of control one party has to ensure safety, as opposed to other parties, when deciding what is reasonably practical under the National Law.<sup>146</sup>

Each offence provides for three corresponding fault elements.<sup>147</sup> The fault element that is established will determine the applicable penalty. They are:

- a) The person *intends* the act or omission to be a risk to the safety of a person or the domestic commercial vessel concerned; or
- b) The person is *reckless* as to whether the act or omission is a risk to the safety of a person or the domestic commercial vessel concerned; or
- c) The person is *negligent* as to whether the act or omission is a risk to the safety of a person or the domestic commercial vessel concerned.

In the case of a maritime disaster, it is unlikely that a person is going to cause the disaster intentionally (and therefore they did not intend a risk), so the two most relevant fault elements are recklessness and negligence. Each offence provides for a strict liability offence, if the conduct of the accused person did not ensure the safety of the vessel and its operation, but there is no fault element established.

### 3 Overall Issues

#### (a) Excluding Other Offences

The National Law applies to the exclusion of any state and territory laws that relate to marine safety 'so far as [they] would otherwise apply in relation to domestic commercial vessels'.<sup>148</sup> This provision appears to be a direct attempt to oust the applicability of the criminal offences provided in the *Marine Safety Act 2012* (Vic) and the *Marine Safety Act 1998* (NSW). There are exceptions to the ousting provision provided in the *Marine Safety (Domestic Commercial Vessel)*

---

<sup>145</sup> *National Law* s 27.

<sup>146</sup> Australian Maritime Safety Authority, *Marine Safety (Domestic Commercial Vessel) National Law Bill Consultation Feedback Report* (2012), 12.

<sup>147</sup> *National Law* ss 13, 15, 18, 20, 22 24, 26.

<sup>148</sup> *National Law* s 6(1).

*National Law Regulation 2013*, but the New South Wales and Victorian acts are not listed there.<sup>149</sup>

(b) *Penalties*

The fines imposed for each relevant offence under the National Law range from 200 to 120 penalty units. Though the offences under the National Law are not specifically applicable to causing death, the offence of ‘failure to ensure safety’ may be the only criminal liability that is enforceable against a manufacturer. Therefore, it would be beneficial for the penalties under the National Law to be increased to allow for effective prosecution of a manufacturer if the prosecuting body deem it appropriate.

4 *Conclusion*

The National Law is very broad in the conduct that it criminalises, and it is very broad in the parties to which it potentially applies. These features give a prosecuting body a large degree of flexibility when considering a prosecution. That flexibility may equate to uncertainty on the part of any member of the safety chain who is seeking to avoid criminal charges. This flexibility, however, would be mitigated by the broad defence. It may satisfy the purposes of broad applicability, but there is a serious question as to whether the penalties under the National Law would deter offending in any way.

D *National Law (Future)*

Whilst the Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (Cth) was passing through parliament, the government consulted with maritime stakeholders across the country for opinions on the criminal liability provisions.<sup>150</sup> The consulted groups expressed their support for the offence provisions to be brought into lines with the *Work Health and Safety Act 2011* (Cth) (the ‘WHS Act’), which does not apply to vessels. The parliament then passed the *Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments)*

---

<sup>149</sup> *Marine Safety (Domestic Commercial Vessel) National Law Regulation 2013* (Cth) reg 5.

<sup>150</sup> Australian Marine Safety Authority, *Marine Safety (Domestic Commercial Vessel) National Law Bill Consultation Feedback Report* (2012).

*Act 2012* (Cth) in order to alter the offence provisions in the National Law. The amendments are due to come into effect once all states have brought their own versions of the WHS Act into force.<sup>151</sup> The two major changes to the offence provisions of the National Law are in the conduct which is criminalised and the maximum penalties.

### 1 *Criminalised conduct*

Under the amended legislation, liability will only fall on those who have been reckless (and in situations where strict liability is appropriate). The amendment also introduces a type of offending that is still failure to ensure safety, but does not require any risk of death or serious injury or illness. Pursuant to the *Criminal Code Act 1995* (Cth), the fault element of recklessness will also be established by intention.<sup>152</sup> This means that, effectively, the only fault element which has been removed from the applicable sections is negligence. Any conduct that would fall under negligence in the current version of the Act will likely need to be charged under the strict liability section in the new one.

### 2 *Penalties*

The amended penalties correspond with the penalties under the WHS Act and dramatically increases the penalties for each type of offending under the National Law. The amendment effects the sections pertaining to owners, masters, manufacturers etc., and crew. The amended penalties for recklessness are:

- (a) If the offence is committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking) - \$300,000 or 5 years imprisonment or both; or
- (b) If the offence is committed by an individual as a person conducting business or undertaking or as an officer of a person conducting a business or undertaking - \$600,000 or 5 years imprisonment, or both; or
- (c) If the offence is committed by a body corporate - \$3,000,000.<sup>153</sup>

---

<sup>151</sup> See Explanatory Memorandum, *Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments) Bill 2012* (Cth).

<sup>152</sup> *Criminal Code Act 1995* (Cth) s 5.4(4).

<sup>153</sup> *Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments Act 2012* (Cth) ss 8-12.

The strict liability version of the offence provides:

- (a) If the offence is committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking) - \$150,000; or
- (b) If the offence is committed by an individual as a person conducting business or undertaking or as an officer of a person conducting a business or undertaking - \$300,000; or
- (c) If the offence is committed by a body corporate – \$1,500,000.<sup>154</sup>

Though it is intended to be a strict liability provision, it is assumed that conduct that does not meet the fault element requirement of recklessness will be included. This means that, though there is no specific section for negligence as fault element, it appears that negligent conduct will be sufficient to establish the strict liability offence.

*Figure 4. Financial penalties by conduct, before and after amendments.*

<b>Conduct</b>	<b>National Law (current)</b>	<b>National Law (future)</b>
Recklessness	200 penalty units	\$300,000 - \$3,000,000
Negligence	120 penalty units	N/A
Strict liability	60 penalty units	\$150,000 – \$1,500,000

### 3 Conclusion

These changes restrict the type of conduct which is criminalised, but does increase the sanctions for the remaining types. The purpose of the law, then, is both weakened and strengthened simultaneously. However, if consistency in the law is one of the overarching principles of maritime law as it applies to seafarers, then bringing the scheme into line with the WHS scheme can only be a good thing.

#### E Other Commonwealth Statute Law

The statutes discussed above do not represent an exhaustive list of the law applicable to individuals in the maritime industry who have caused the death. There are, at least, two other potentially relevant Commonwealth statutes.

---

<sup>154</sup> Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments Act 2012 (Cth) ss 8-12.

## 1 *Causing the Death of an Australian*

The *Criminal Code Act 1995* (Cth) sets out Commonwealth criminal offences, with no apparent restriction on the parties to which it applies.<sup>155</sup> Section 115.2 of the *Criminal Code Act 1995* (Cth) makes it an offence to cause the death of an Australian. The offence was intended to apply to those working within terrorist organisations who caused the death of Australians by orchestrating terrorist acts.<sup>156</sup> It seems unlikely that a crime against the Criminal Code could be charged, though. It is unlikely that this section of the Criminal Code was intended to apply on board a ship.<sup>157</sup>

## 2 *Causing Death at Sea*

Under the *Crimes (Ships and Fixed Platforms) Act 1992* it is an offence to cause death on a ship ‘in connection with the commission or attempted commission of an offence against [specified sections of the act]’.<sup>158</sup> Those specified sections relate to the following conduct:

- Seizing a ship;
- Acts of violence;
- Destroying or damaging a ship;
- Placing destructive devices on a ship;
- Destroying or damaging navigational facilities; or
- Giving false information.

In the case of a maritime disaster, it is possible that an individual may be charged with causing death in connection with destroying or damaging a ship. The maximum penalty for such an offence is life imprisonment, which is the most serious of all penalties under the relevant Commonwealth regulatory crimes. However, it appears that negligence or recklessness will not be sufficient to establish an offence under the *Crimes (Ships and Fixed Platforms) Act 1992*

---

<sup>155</sup> *Criminal Code Act 1995* (Cth) s 115.2.

<sup>156</sup> Legal and Constitutional Affairs Legislation Committee (Cth), *Criminal Code Amendment (Harming Australian) Bill 2013* (2015).

<sup>157</sup> Kate Lewins and Nick Gaskell, ‘Jurisdiction Over Criminal Acts on Cruise Ships: Perhaps, Perhaps, Perhaps?’ (2013) 37 *Criminal Law Journal* 221, 236.

<sup>158</sup> *Crimes (Ships and Fixed Platforms) Act 1992* (Cth) s 14.

(Cth). As there is no fault element specified in the offence, the *Criminal Code Act 1995* (Cth) will import ‘intention’ as the fault element. This is unlikely to be established by the circumstances of a maritime disaster.

### G Conclusion

There appear to be several complexities and unanswered questions regarding the laws applicable to death caused by maritime disaster. Overall, it appears that several of the individual offences are not fit for their intended purpose. Of particular concern is the *Navigation Act*, due to its seaworthiness obligation and its lack of offences for negligent or reckless navigation. Not only is the seaworthiness obligation limited to RAVs and FVs, and only the owners and the masters of those vessels, but it appears to render an accused person indefensible once charged. Further, as there are no general provisions under the *Navigation Act* for failure to ensure safety (as there are under the National Law), a prosecuting body will need to choose between a charge of unseaworthiness and a charge under the applicable state criminal law.

*Figure 5. Liability by type of vessel.*

<b>DCV</b>	<b>Foreign vessel</b>	<b>RAV</b>
Collision	Unseaworthiness	Unseaworthiness
National Law (current)	Collision	Collision
National Law (future)	Murder	Murder
Murder	Manslaughter	Manslaughter
Manslaughter		

*Figure 6. Liability by party.*

<b>Shipowner</b>	<b>Master</b>	<b>Manufacturer</b>
Unseaworthiness	Unseaworthiness	National Law (current)
Collision	Collision	National Law (future)
National Law (current)	National Law (current)	Murder
National Law (future)	National Law (future)	Manslaughter
Murder	Murder	
Manslaughter	Manslaughter	

## V CASE STUDIES

Though Australia has been very fortunate not to have suffered from any large-scale maritime disasters requiring criminal prosecution, it may not be so fortunate in future. As ‘it usually takes a disaster to focus the attention of maritime policy-makers’, this chapter attempts to apply Australian laws to several fictional scenarios in order to appreciate the complexities of the application and use of each law.<sup>159</sup> It may be useful to lawmakers to attempt to apply the applicable Australian law to hypothetical situation such as those which the world has already seen. This chapter will analyse notable recent maritime disasters which involved death. The analysis will take the factual scenarios of these notable cases and ask what would have happened by way of criminal prosecution if the events had instead occurred within Australian waters. The focus of this chapter is less on whether an Australian prosecuting body *would* prosecute, but more on whether they *could*. The Australian law will be fit for purpose if it has the ability to impose liability on the party (or parties) responsible for the damage to the victim (or victims). Issues of enforcement against a foreign party and other decisions affecting the choice to prosecute will not be discussed at length. The factual situations that will be analysed are based on the Costa Concordia, the Lamma IV, the Sewol, and the Princess Ashika.

It is often difficult to secure the official reports for a maritime disaster occurring in another jurisdiction as they may only be prepared for and presented to a court. Much of the information in this chapter has come from news reports. However, as the purpose of this chapter is to pose hypothetical situations, the accuracy of the accusations made in the news article is not of paramount importance.

### A *Determining Liability in General*

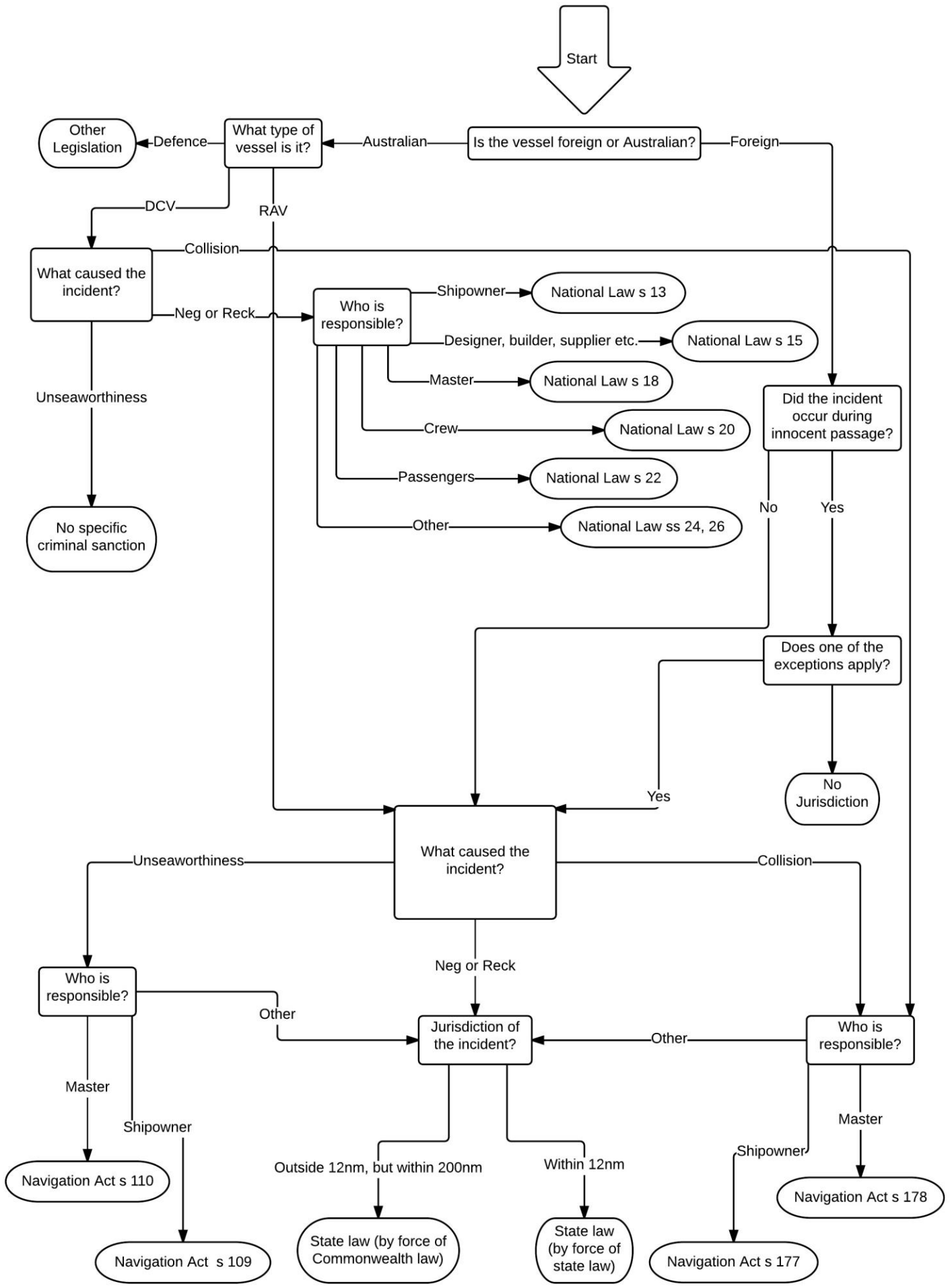
When authorities are considering the prosecution of those responsible for a maritime disaster, it may be useful to consider liability for particular offences as it applies to different vessels, different parties, and different conduct. Below are several ways to consider these factors when mounting a prosecution:

---

<sup>159</sup> Edgar Gold, ‘Learning from Disaster: Lessons in Regulatory Enforcement in the Maritime Sector’ (1999) 8(1) *Reciel* 16, 16.



Figure 7. Determination of Liability.



## B *The Costa Concordia Disaster*

*Scenario Four. An Australian cruise ship leaving an Australian port navigates very close to an island. The vessel makes contact with some rocks surrounding the island, which causes a large breach of the hull. The vessel floods. The master does not call for an evacuation as he is waiting for the emergency generator system to start. The system does not start. Several people die.*

This situation is based on the facts of the Costa Concordia disaster in Italian waters in January 2012. The master of the vessel, Captain Francesco Schettino, has since been convicted under Italian law for ‘multiple manslaughter’, causing a shipwreck and abandoning a ship.<sup>160</sup> The consumer group Codacons, who is pursuing a class action suit against the owners of the Cost Concordia say that ‘Schettino should be punished but he has been made a scapegoat.’<sup>161</sup> The group has said that it was ‘unacceptable and unbelievable’ that the prosecutors were not pursuing other parties for ‘serious malfunctions of the ship’.<sup>162</sup> There even seems to be questions about whether the master of the vessel actually made the decision to veer close to the rocks.<sup>163</sup> The purpose of this chapter is not to determine the responsible parties. It is instead the purpose of this chapter to consider whether Australian law provides for other parties that arguably contributed to the Costa Concordia disaster to be appropriately charged.

The itinerary of the Costa Concordia shows that it planned to visit several ports in the Mediterranean, after leaving Italy.<sup>164</sup> If a similar vessel was planning to leave

---

<sup>160</sup> ‘Costa Concordia Captain Schettino Guilty of Manslaughter’ *BBC* (online), 11 February 2015 <<http://www.bbc.com/news/world-europe-31430998>>.

<sup>161</sup> Michael Day and Henry Austin, ‘Costa Concordia Trial: Captain Francesco Schettino Given 16-year Sentence for Manslaughter, but Could Remain a Free Man’, *The Independent* (online), 12 February 2015 <<http://www.independent.co.uk/news/world/europe/costa-concordia-trial-verdict-looms-for-captain-francesco-schettino-10039609.html>>.

<sup>162</sup> *Ibid.*

<sup>163</sup> Michael Day, ‘Costa Concordia Trial: Was Captain Francesco Schettino really the Only One at Fault for the Disaster?’, *Independent* (online), 15 February 2015 <<http://www.independent.co.uk/news/world/europe/costa-concordia-trial-was-captain-francesco-schettino-really-the-only-one-at-fault-for-the-disaster-10046725.html>>.

<sup>164</sup> Marine Casualties Investigative Body, Ministry of Infrastructures and Transports (Italy), *Costa Concordia: Report on the Safety Technical Investigation* (2013) 13.

an Australian port to operate a cruise between other countries in Australasia, it is likely that that vessel would be classified by AMSA as a regulated Australian vessel. As discussed previously, this is because the vessel would be regularly leaving the Australian EEZ. With this classification for the purposes of Australian law, the Australian version of the Costa Concordia would be regulated by the Navigation Act. Further, as the Italian Costa Concordia grounded within Italian territorial waters on the western coast of the country, it is assumed that the hypothetical Australian vessel grounded within Western Australian territorial waters.

Figure 8. Costa Concordia Route.<sup>165</sup>



As there is no evidence to suggest instances of either unsafe loading or collision, the only possible criminal cause of action under the *Navigation Act* is for unseaworthiness. As mentioned above, a charge of unseaworthiness may be laid on the owner or master of a vessel if the vessel is not ‘in a fit state as to the

<sup>165</sup> Marine Casualties Investigative Body, Ministry of Infrastructures and Transports (Italy), *Costa Concordia: Report on the Safety Technical Investigation* (2013) 13.

condition of...equipment [or] qualifications of seafarers'.<sup>166</sup> According to the government investigation report, the equipment on board the vessel was compliant with all required standards at the time of its departure from port.<sup>167</sup> Further, though it was the actions of the master that were found to be the cause of the disaster,<sup>168</sup> there has been no question raised as to his formal qualifications. Given these findings, it is unlikely that an Australian prosecuting body would consider unseaworthiness to be an appropriate charge against the owner or master of the *Costa Concordia*.

It was reported that the vessel suffered from 'faulty water-tight compartment doors, blocked lifts and the failure of emergency power supplies'<sup>169</sup> and that these are issues that may have caused lives to be lost. Unless this goes further to establishing a charge of unseaworthiness against the owner or master, this evidence could only go towards a charge against the manufacturer of the vessel. Under Australian law, however, the only charge that can be laid specifically against the manufacturer is under the National Law. This act will not apply to regulated Australian vessels such as a cruise ship which leaves the EEZ regularly.

If the offences provided under the *Navigation Act* are not relevant to a situation involving a regulated Australian vessel, the following step is to consider the applicable law of the relevant state or territory, pursuant to the CSA. In this case, the relevant criminal law would come from the *Criminal Code Act 1913* (WA) (the 'WA Code').

---

<sup>166</sup> *Navigation Act* s 23.

<sup>167</sup> Marine Casualties Investigative Body, Ministry of Infrastructures and Transports (Italy), *Costa Concordia: Report on the Safety Technical Investigation* (2013) 132-151.

<sup>168</sup> *Ibid* 152-162.

<sup>169</sup> Michael Day and Henry Austin, 'Costa Concordia Trial: Captain Francesco Schettino Given 16-year Sentence for Manslaughter, but Could Remain a Free Man', *The Independent* (online), 12 February 2015 <<http://www.independent.co.uk/news/world/europe/costaconcordia-trial-verdict-looms-for-captain-francesco-schettino-10039609.html>>.

The relevant offences under the WA Code are murder<sup>170</sup> and manslaughter.<sup>171</sup> The fault elements for a charge of murder are only a) intent to kill and b) intent to do a bodily injury. In the case of the Costa Concordia, it appears that the fault element was recklessness, which will not be sufficient to constitute murder under the WA Code. It would, however, be sufficient to constitute murder in New South Wales, Victoria, South Australia and Tasmania. Subject to the law of Western Australia, it appears that the master of the Costa Concordia would be charged with multiple counts of manslaughter.

### C *Lamma IV Collision*

*Scenario Five. Two ferries collide off the coast of the Northern Territory. Both vessels are domestic commercial vessels. Both vessels sink and several crew members die. The masters of each vessel survive.*

The facts for this scenario are similar to the Sea Smooth/Lamma IV collision in Hong Kong's territorial waters in 2012. In that disaster, 39 people died as a result of a collision, which has been described as 'Hong Kong's deadliest marine tragedy of recent times'.<sup>172</sup> Captain Lai Sai-Ming of the Sea Smooth was found guilty of causing the collision.

As the collision is the most obvious cause of death, a prosecuting body is most likely to consider the relevant criminal charge under the *Navigation Act*. The relevant charges apply to all vessels operating under its jurisdiction, which means that a DCV such as the Sea Smooth could be prosecuted. As this charge may apply to both the owner and the master of the vessel, an investigation report would be required to determine which party, if either, was responsible for the collision. The reports of the Lamma IV collision suggest that the Sea Smooth vessel was responsible for the initial collision, due to the poor navigation of the

---

<sup>170</sup> *Criminal Code Act 1913 (WA)* s 279.

<sup>171</sup> *Criminal Code Act 1913 (WA)* s 280.

<sup>172</sup> Thomas Chan, 'Hong Kong Ferry Skipper Convicted of 39 Counts of Manslaughter for Deadly Lamma Crash', *South China Morning Post* (online), 15 February 2015 <<http://www.scmp.com/news/hong-kong/article/1710671/lamma-ferry-verdicts-skipper-acquitted-first-count-manslaughter>>.

master. Therefore, in the Australian version of the Lamma IV disaster, the responsible party would be effectively charged. The Australian law appears to be fit for its intended purpose in this scenario. The parties responsible would be ‘caught’ by the applicable criminal law.

One report of the Lamma IV disaster described the collision as ‘relatively minor’, but did explain that there were several manufacturing issues that may have caused the vessel to sink particularly quickly and, therefore, claim more lives than the initial collision.<sup>173</sup> In this case, an Australian prosecuting body may wish to consider appropriate criminal charges against the manufacturer of the vessel (or another party responsible for the vessel, which is not the master or owner). Though the prosecutors would be unable to do so under the Navigation Act, the National Law does provide for appropriate charges against the manufacturer. At present, the penalties for applicable conduct are very low; however, if the incident occurred after the new changes are made to the National Law, then the manufacturer of the vessel may face up to five years imprisonment.

If the prosecuting body chooses not to charge in the ways discussed, they may resort to charging the master under Northern Territory criminal law for manslaughter. A charge of manslaughter against the master may be relatively simple to establish. If, however, the vessel were in the adjacent area of New South Wales, the master’s recklessness in causing the collision with the Lamma IV may be used to establish a charge of murder. This demonstrates the variability of the laws from state-to-state.

A charge of manslaughter against the manufacturer may be difficult to prove due to the element of causation. There is no Northern Territory regulatory crimes that apply to maritime disasters causing death. Therefore, the prosecuting body is more likely to gain a successful prosecution of the manufacturer under the National Law.

---

<sup>173</sup> Philip Browning, ‘Culpability for Lamma Ferry Crash must be Properly Shared’, *South China Morning Herald* (online) 5 May 2013 <<http://www.scmp.com/comment/insight-opinion/article/1230162/culpability-lamma-ferry-crash-must-be-properly-shared>>.

## D *The Sewol Disaster*

*Scenario Six. An Australian ferry departs a port in Queensland and is destined for a port in New South Wales. After entering the waters adjacent to New South Wales, the vessel capsizes and sinks. Several people die. The master survives.*

The Sewol ferry departed Incheon port on 15 April 2014. The next day, the vessel capsized and sank. Over 300 lives were lost, many of whom were school children. The master of the vessel, Lee Joon-Seok, and the chief engineer survived the disaster. They were arrested by South Korean authorities shortly after being rescued. The prima facie cause of the capsizing was the failure of the vessel's third mate to navigate safely through particularly treacherous waters. However, it seems that the seaworthiness of the vessel had been called into question prior to the incident.<sup>174</sup> The lawyer for the chief engineer said that '[t]he defendants must be punished properly ... but I hope there will also be stern punishment for the company which turned the Sewol into a timebomb.'<sup>175</sup> Nautilus International were particularly concerned about the lack of support that was shown by the international maritime community for the Sewol seafarers.<sup>176</sup> Investigations into the vessel suggests that the ferry was overloaded and that the crew not trained for emergency evacuations. Evidence has also emerged that suggests that there were faulty modifications made to the vessel made prior to its departure.<sup>177</sup>

If the Sewol ferry was an Australian vessel it is likely to have been a domestic commercial vessel, as it operated for commercial purposes and was not intending to leave the EEZ of its country of origin. With this classification, the Australian version of the Sewol ferry would have been governed by the National Law and its provisions on negligence and recklessness.

---

<sup>174</sup> Charlie Campbell, 'South Korea Ferry Owners 'Ignored Stability Problems'', *Time* (online), 30 April 2014 <<http://time.com/82316/south-korea-ferry-stability-sewol/>>.

<sup>175</sup> 'South Korea Ferry Trial: Defence Warns against Scapegoating Crew', *ABC* (online) 17 June 2014 <<http://www.abc.net.au/news/2014-06-17/an-south-korea-ferry-trial3a-defence-warns-against-scapegoatin/5530822>>.

<sup>176</sup> Nautilus International, 'Criminalisation Concern Raised' *Nautilus Telegraph* (online), February 2015 <[http://issuu.com/redactive/docs/tel\\_feb\\_2015](http://issuu.com/redactive/docs/tel_feb_2015)>.

<sup>177</sup> Madison Park, 'What Went Wrong on Sewol?', *CNN* (online) 15 May 2014 <<http://edition.cnn.com/2014/05/15/world/asia/sewol-problems/>>.

Despite the fact that the seaworthiness of the Sewol vessel was called into question, there would be no provision in the National Law to prosecute for that unseaworthiness. If the vessel were regulated under the Navigation Act, the prosecuting body would have had that option. Instead, the prosecutors may charge under the National Law (and, therefore, attempt to fine the responsible parties) or to charge under the relevant state or territory criminal law. It is possible for the captain of the Australian Sewol to be charged with reckless navigation under the *Marine Safety Act 1998* (NSW), which may attribute a penalty of up to two years imprisonment;<sup>178</sup> however, this offence is likely to have been excluded by the National Law, which would attribute a penalty of up to \$36,000 for this conduct.

Figure 9. Sewol Route.<sup>179</sup>



<sup>178</sup> *Marine Safety Act 1998* (NSW) s 13.

<sup>179</sup> ‘South Korea Sewol Ferry: What We Know’ *BBC* (online), 16 May 2014 <<http://www.bbc.com/news/world-asia-27342967>>.



## E      *The Princess Ashika Disaster*

*Scenario Seven. An Australian ferry is travelling from Victoria to Tasmania. The vessel has previously been classified 'unseaworthy', but has since been given written permission from the government to resume service. During the voyage, the vessel begins taking on water. The vessel eventually capsizes and sinks. Several people die.*

In August 2009, a Tongan inter-island ferry capsized and sank, causing the deaths of 74 people. After investigation, it was concluded that the vessel began taking water into the cargo hold below deck and that this set the deadly events into motion.<sup>180</sup> Though there was no specific reason found for the water to have penetrated the hull, the seaworthiness of the vessel was seriously questioned.<sup>181</sup> According to news reports, it was Tongan transport minister decided that the Princess Ashika was seaworthy, and signed a contract stating his approval of the vessel being put to sea.<sup>182</sup> The investigation also found that there were not sufficient appropriate safety measures in place for emergency situations.<sup>183</sup> According to the investigation report, the Princess Ashika was operating 'in the most challenging sea environment in which it had ever been, while it was in its worst condition ever'.<sup>184</sup> The Royal Commission of Inquiry into the Sinking of the Ferry Princess Ashika is reported to have said:

"[T]here were many causes of the disaster. The tragedy is that they were all easily preventable and the deaths were completely senseless. It was scandalous that such a maritime disaster could ever have been allowed to occur. It was a result of systemic and individual failures".<sup>185</sup>

---

<sup>180</sup> Transport Accident Investigation Commission (Tonga), 'Final Preliminary Report' (15 February 2010), 83.

<sup>181</sup> 'Staying Aloof in Tonga', *The Economist* (online), 3 August 2010 <[http://www.economist.com/blogs/banyan/2010/08/investigating\\_ferry\\_disaster\\_tonga](http://www.economist.com/blogs/banyan/2010/08/investigating_ferry_disaster_tonga)>.

<sup>182</sup> *Ibid.*

<sup>183</sup> Transport Accident Investigation Commission (Tonga), 'Final Preliminary Report' (15 February 2010), 83-85.

<sup>184</sup> *Ibid.*

<sup>185</sup> 'Editorial: Ferry Tragedy Reveals a Kingdom Full of Holes', *The Dominion Post* (online), 10 April 2010 <<http://www.stuff.co.nz/dominion-post/comment/editorials/3568006/Editorial-Ferry-tragedy-reveals-a-kingdom-full-of-holes>>.

The Princess Ashika was operating between Tongan islands as a domestic vessel. Therefore, if the Princess Ashika were an Australian vessel, it is likely to have been classified as a DCV and, therefore, be regulated under the National Law. As with the case of the Australian Sewol, the seaworthiness obligation under the *Navigation Act* would not apply to the Australian Princess Ashika. Instead, a prosecuting body may only utilise the broad offence provisions under the National Law, and other state criminal laws.

The crux of the Australian Princess Ashika appears to be the recklessness of the government official for allowing the vessel to be used for service. There is no particular evidence to demonstrate that the owner or the master of the vessel displayed any negligence or recklessness on their own accord. Under the National Law, the government official may be prosecuted for a general causing of damage to a vessel.<sup>186</sup> The penalties for this offence, however, are relatively low: \$28,800. It was suggested that the disaster had a particularly bad effect on Tonga due to the size of its population. One commentator said that the 74 Tongans drowning is the equivalent to 3,200 New Zealanders.<sup>187</sup> This implies that there would have been a large degree of pressure on the prosecuting authorities to effectively prosecute those responsible for the disaster.

To this end, a prosecuting body may consider laying a charge of murder or manslaughter on the government official; however, this may be difficult to establish. To say that the official ‘legally caused’ the disaster, and therefore the deaths, would be difficult to argue. The government official could potentially be charged with ‘acts tending to endanger vessel or crew’ under the *Marine Safety Act 2010* (Vic), which currently has a penalty of \$36,400.<sup>188</sup> Not only is this penalty relatively low, but, as mentioned above, the *Marine Safety Act 2010* (Vic) may be excluded by the National Law.

---

<sup>186</sup> National Law ss 25-26.

<sup>187</sup> ‘Editorial: Ferry Tragedy Reveals a Kingdom Full of Holes’, *The Dominion Post* (online), 10 April 2010 <<http://www.stuff.co.nz/dominion-post/comment/editorials/3568006/Editorial-Ferry-tragedy-reveals-a-kingdom-full-of-holes>>.

<sup>188</sup> *Marine Safety Act 2010* (Vic) s 88. One penalty unit is currently worth \$151.67.

## F Conclusion

‘It is a well-known fact that the maritime sector is more reactive than pro-active in terms of safety, environmental protection and related legislative rule-making.’<sup>189</sup> Only when a maritime disaster occurs in Australian territorial waters will the operation of the applicable criminal laws be clearer. Even so, most of the decisions relating to prosecuting will be made by the prosecuting body behind closed doors. As such, it is unlikely that the suitability of the Australian law to fulfil its purposes will become clear any time soon.

Those responsible for maritime disasters causing death may be prosecuted under Australia law, by one way or another. Not only is the Australian law highly variable; it is also highly flexible. The classification of the vessel as either an RAV, FV or DCV will affect the Commonwealth regulatory offences which apply, but will not alter the application of the state criminal law. An authority wishing to prosecute a particular party for causing a maritime disaster has a wide range of offences to choose from.

It is recommended that lawmakers seeking to amend the law in Australia applicable to maritime disaster causing death, look to the recent examples of such events and the problems regarding effective prosecutions that they each faced. This allows Australia a way of being ‘reactive’ without needing to experience a maritime disaster within our own waters. Australian can then be more confident in its law, if we ever do have that experience.

---

<sup>189</sup> Edgar Gold, ‘Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie’ (2005) 24 *University of Queensland Law Journal* 251, 251.

## VI CONCLUSION

This paper has analysed the Australia law relevant to maritime disasters causing death. In doing this, it has explained to applicability and content of the most relevant Commonwealth regulatory laws. It has also considered the relevant state law (and the law of the Northern Territory) as it applies. The focus was whether the relevant Australian law fit for its purpose, both as legislation in itself and in the context of criminal law in general. There are several factors to consider when assessing whether law will be fit for purpose

Regrettably, the answer is complicated. The labyrinth of laws discussed in this paper does not lend themselves to a simple explanation of application. It will pose significant challenges to the relevant prosecuting bodies, and those within the maritime industry. The vagueness surrounding the jurisdiction of the Cooperative Scheme under the CSA, and how that operates within the limits of UNCLOS, means that the law will only be tested through an Australian maritime disaster and a finding by a competent court or tribunal. Although it has been said that maritime accidents are ‘beneficial’ to the development of maritime regulation,<sup>190</sup> it is preferable to ensure laws are fit for their intended purpose before being required for that purpose.

One suggestion is for the CSA to apply the law of the Jervis Bay Territory to all vessels operating in Australia’s territorial waters. Though a uniform system of criminal law in Australia’s territorial waters would be beneficial to seafarers, there are several other implications:

- The prosecuting authorities of each state would be required to understand and enforce the law of the ACT;
- There may be serious questions of constitutionality surrounding a uniform system of criminal law applying at sea;
- The purpose of several of the changes to maritime laws that were made in 2012 would be defeated; and

---

<sup>190</sup> Edgar Gold, ‘Learning from Disaster: Lessons in Regulatory Enforcement in the Maritime Sector’ (1999) 8(1) *Reciel* 16, 16.

- The state governments that enforce the laws of the ACT would have no ability to alter those laws in their own state, which would affect the implementation of state-specific public policy.

Assuming that the issue of jurisdiction is determined, there are then serious questions to be raised about the regulatory offences provided by Commonwealth statutes. For example, the offences relating to unseaworthiness under the *Navigation Act* appears to be problematic for several reasons. If then, a prosecuting body decides to enforce the criminal law of the state (or Northern Territory), the applicable laws will be highly variable from state-to-state. Crossing a maritime border may mean that a master is liable for murder, rather than manslaughter.

The criticism is not necessarily that the Australian law is too lenient or too strict. Instead, the law is vague and variable between the states (and between the two regulatory schemes). There are some parties that are likely to escape liability for maritime disasters due to the inability of the law to prosecute. In the context of state criminal law, a maritime disaster in one state may attract a limited amount of liability, whilst the same disaster in another jurisdiction may attract several serious criminal charges.

#### A *Issue for the Future*

Technological developments have made maritime navigation more accurate and safer over a number of years.<sup>191</sup> With these advances, there is less responsibility left to individuals. Due to the highly technical nature of modern shipping, there is far less room for human error. This means that the standards for masters and seafarers have been raised and authorities are likely to be under more pressure to prosecute for offending conduct.

With the shipping industry continuing to advance technologically, autonomous seafaring vessels may become by prevalent. The obvious question that arises in

---

<sup>191</sup> Edgar Gold, 'Learning from Disaster: Lessons in Regulatory Enforcement in the Maritime Sector' (1999) 8(1) *Reciel* 16, 18.

relation to these vessels is: if there is no master on board, who do the master's duties fall to? In the context of the issues raised by this paper, the lack of master to scapegoat following a maritime disaster may mean that prosecuting bodies are required to investigate more broadly into the chain of responsibility. If prosecuting bodies encounter difficulties with a prosecution of that kind (particularly under the *Navigation Act*), it may prompt further changes in the law to be more applicable to those other than owners and masters.

### C *Final Comments*

The title of this paper is borrowed from a television programme. In it, the main character sings:

*You're a crook, Captain Hook.*

*Judge, won't you throw the book?*<sup>192</sup>

As this paper demonstrates, the lyrics are quite appropriate to describe the situation seafarers currently face around the world. Prosecuting authorities are 'throwing the book' at seafarers due to the external pressure that they face. The result is that masters are being charged with causing death caused even if they are not the only party responsible for that death. Though reducing worldwide criminalisation is a monumental task, Australian lawmakers should focus on ensuring that the laws in Australia are fit for purpose such that they are clear, consistent and readily enforced.

---

<sup>192</sup> *Arrested Development* (Created by Mitchell Hurwitz, Fox, 2003-2006).

## BIBLIOGRAPHY

### A *Articles/Books/Reports*

Anderson, Phil. International Maritime Organisation, 'International Safety Management Code (ISM Code) and Guidelines on the Implementation of the ISM Code (International Maritime Organisation, 1997)

Anthony, Olagunju F. 'Criminalization of Seafarers for Accidental Discharge of Oil: Is There Justification in International Law for Criminal Sanction for Negligent or Accidental Pollution of the Sea?' (2006) 37(2) *Journal of Maritime Law and Commerce* 219

Bosma, Shane. 'The Impact of Recent Shipping Reforms on the Offshore Oil and Gas Industry in Australia' (2013) 27 *Australia and New Zealand Maritime Law Journal* 8

Crainger, Stuart. *Zeebrugge – Learning from Disaster: Lessons in Corporate Responsibility* (Herald Charitable Trust, 1993)

Daniels, Simon. *The Criminalisation of the Ship's Master: A New Approach for the New Millennium* (PhD Thesis, Southampton Solent University, 2012)

Finlay, Lorraine, and Tyrone Kirchengast, *Criminal Law in Australia* (Lexisnexis Butterworths, 2015)

Foley, Vincent J, and Christopher R Nolan, 'The Erika Judgment – Environmental Liability and Places of Refuge: A Sea Change in Civil and Criminal Responsibility that the Maritime Community Must Heed' 33 *Tulane Maritime Law Journal* 41

Foster, N. 'Manslaughter by Managers: The Personal Liability of Company Officers for Death Flowing From Company Workplace Safety Breach' (2006) 9 *Flinders Law Reform Journal* 79

Gobert, James, and Maurice Punch, *Rethinking Corporate Crime* (Cambridge University Press, 2003)

Gold, Edgar. 'Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie' (2005) 24 *University of Queensland Law Journal* 251

Gold, Edgar. 'Learning from Disaster: Lessons in Regulatory Enforcement in the Maritime Sector' (1999) 8(1) *Reciel* 16

Hart, H L A. *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2<sup>nd</sup> ed, 2008)

Hart, Henry M. 'The Aims of Criminal Law (1958) 23 *Law and Contemporary Problems* 401

Kaye, S. 'Threats from the Global Commons: Problems of Jurisdiction and Enforcement' (2007) *Melbourne Journal of International Law* 185

Lewins, Kate, and Nick Gaskell, 'Jurisdiction Over Criminal Acts on Cruise Ships: Perhaps, Perhaps, Perhaps?' (2013) 37 *Criminal Law Journal* 221

Marine Casualties Investigative Body, Ministry of Infrastructures and Transports (Italy), *Costa Concordia: Report on the Safety Technical Investigation* (2013)

McFadden, Kathleen L, Stephanie C Henegan, and Charles R Gowen, 'The Patient Safety Chain: Transformational Leadership's Effect on Patient Safety Culture, Initiatives, and Outcomes' (2009) 27(5) *Journal of Operations Management* 1

Pozdnakova, A. *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation* (Martinus Nijhoff Publishers, 2012)

Transport Accident Investigation Commission (Tonga), 'Final Preliminary Report' (15 February 2010)

White, Alexander. 'Passengers' Duties and the Marine Safety (Domestic Commercial Vessel) National Law 2012 in Queensland's Internal Waters' (2015) 7(2) *Australian Journal of Maritime and Oceanic Affairs* 152

White, Michael. *Australian Maritime Law* (Federation Press, 3<sup>rd</sup> ed, 2014)

Wood, Mary, Derran Moss and Barton Hoyle, 'Australian Legislation Concerning Matters of International Law 2000' (2000) *Australian Year Book of International Law* 20

## B Cases

*Andrews v Director of Public Prosecutions* [1937] AC 576

*Callaghan v The Queen* (1952) 87 CLR 115

*Cittadini v R* [2009] NSWCCA 302

*Haughton v Smith* [1975] AC 476

*Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] EWCA Civ 7

*Krakouer v State of Western Australia* (2006) 161 A Crim R 347

*Maritime Authority of NSW v Rofe* [2012] NSWSC 5

*Maritime New Zealand v Birchall* [2009] NZCA 119



*Nydam v The Queen* [1977] VR 430  
*Proudman v Dayman* (1941) 67 CLR 536  
*R v Adomako* [1995] 1 AC 171  
*R v Bateman* (1927) 19 Cr App R 8  
*R v Lavender* (2005) 222 CLR 67  
*R v Lavender* (2005) 222 CLR 67  
*R v Lawrence* [1982] AC 510  
*Royall v R* (1991) 172 CLR 378  
*Wampfler v R* (1987) 67 CLR 531

C      *Legislation and Legislative Materials*

*Carriage of Goods by Sea Act 1991* (Cth)  
*Crimes (Ships and Fixed Platforms) Act 1992* (Cth)  
*Crimes Act 1900* (ACT)  
*Crimes Act 1900* (NSW)  
*Crimes Act 1914* (Cth)  
*Crimes at Sea Act* (NT)  
*Crimes at Sea Act 1998* (NSW)  
*Crimes at Sea Act 1998* (SA)  
*Crimes at Sea Act 1999* (Tas)  
*Crimes at Sea Act 1999* (Vic)  
*Crimes at Sea Act 2000* (WA)  
*Crimes at Sea Act 2001* (Qld)  
*Criminal Code Act 1899* (Qld)  
*Criminal Code Act 1913* (WA)  
*Criminal Code Act 1924* (Tas)

*Criminal Code Act 1983 (NT)*

*Criminal Code Act 1995 (Cth)*

*Jervis Bay Territory Acceptance Act 1915 (Cth)*

*Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth)*

*Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments Act 2012 (Cth)*

*Marine Safety (Domestic Commercial Vessel) National Law Regulation 2013 (Cth)*

*Migration Act 1958 (Cth)*

*Navigation Act 1912 (Cth)*

*Navigation Act 2012 (Cth)*

*Ship Registration Act 1981 (Cth)*

## D *Treaties*

*Convention on the International Regulations for Preventing Collisions at Sea*, opened for signature 20 October 1972, 1050 UNTS 16 (entered into force 29 February 1980)

*United Nations Convention of the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994)

## E *Other*

‘Costa Concordia Captain Schettino Guilty of Manslaughter’ *BBC* (online), 11 February 2015 <<http://www.bbc.com/news/world-europe-31430998>>

‘Editorial: Ferry Tragedy Reveals a Kingdom Full of Holes’, *The Dominion Post* (online), 10 April 2010 <<http://www.stuff.co.nz/dominion-post/comment/editorials/3568006/Editorial-Ferry-tragedy-reveals-a-kingdom-full-of-holes>>

‘South Korea Ferry Trial: Defence Warns against Scapegoating Crew’, *ABC* (online) 17 June 2014 <<http://www.abc.net.au/news/2014-06-17/an-south-korea-ferry-trial3a-defence-warns-against-scapegoatin/5530822>>

‘Staying Aloof in Tonga’, *The Economist* (online), 3 August 2010 <[http://www.economist.com/blogs/banyan/2010/08/investigating\\_ferry\\_disaster\\_tonga](http://www.economist.com/blogs/banyan/2010/08/investigating_ferry_disaster_tonga)>

*Arrested Development* (Created by Mitchell Hurwitz, Fox, 2003-2006)

Australia Maritime Safety Authority, *Compliance and Enforcement Protocol: Navigation Act 2012* <<https://www.amsa.gov.au/forms-and-publications/Publications/AMSA354-CEP-NavAct.pdf>>

Australian Federal Police, *Aide Memoire on Crimes at Sea* (Endorsed on 16 September 2013)

Australian Marine Safety Authority, *Marine Safety (Domestic Commercial Vessel) National Law Bill Consultation Feedback Report* (2012)

Australian Maritime Safety Authority, *Navigation Act 2012: Questions and Answers* (2012)

Browning, Philip. 'Culpability for Lamma Ferry Crash must be Properly Shared', *South China Morning Herald* (online) 5 May 2013 <<http://www.scmp.com/comment/insight-opinion/article/1230162/culpability-lamma-ferry-crash-must-be-properly-shared>>

Campbell, Charlie. 'South Korea Ferry Owners 'Ignored Stability Problems'', *Time* (online), 30 April 2014 <<http://time.com/82316/south-korea-ferry-stability-sewol/>>

Chan, Thomas. 'Hong Kong Ferry Skipper Convicted of 39 Counts of Manslaughter for Deadly Lamma Crash', *South China Morning Post* (online), 15 February 2015 <<http://www.scmp.com/news/hong-kong/article/1710671/lamma-ferry-verdicts-skipper-acquitted-first-count-manslaughter>>

Commonwealth of Australia Gazette, *Intergovernmental Agreement – Crimes at Sea* 2000, No GN 49, 12 December 2001

Day, Michael, and Henry Austin, 'Costa Concordia Trial: Captain Francesco Schettino Given 16-year Sentence for Manslaughter, but Could Remain a Free Man', *The Independent* (online), 12 February 2015 <<http://www.independent.co.uk/news/world/europe/costa-concordia-trial-verdict-looms-for-captain-francesco-schettino-10039609.html>>

Day, Michael. 'Costa Concordia Trial: Was Captain Francesco Schettino really the Only One at Fault for the Disaster?', *The Independent* (online), 15 February 2015 <<http://www.independent.co.uk/news/world/europe/costa-concordia-trial-was-captain-francesco-schettino-really-the-only-one-at-fault-for-the-disaster-10046725.html>>

Department of Infrastructure and Regional Development (Australia), *Review of the Navigation Act 1912: Final Report* (2000)

Department of Transport (WA), *National Reform of Shipping Regulations* (14 October 2015) <[www.transport.wa.gov.au/marine/national-reform-of-shipping-regulations.asp](http://www.transport.wa.gov.au/marine/national-reform-of-shipping-regulations.asp)>

Explanatory Memorandum, Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (Cth)

Explanatory Memorandum, Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments) Bill 2012 (Cth)

Fields, Liz. 'Sewol Ferry Captain Escapes Death Penalty in South Korea – Again', *Vice News* (online), 28 April 2015 <<https://news.vice.com/article/sewol-ferry-captain-escapes-death-penalty-in-south-korea-again>>

Legal and Constitutional Affairs Legislation Committee (Cth), *Criminal Code Amendment (Harming Australian) Bill 2013* (2015)

Meng, Angela. 'Eastern Star Captain Says Ship Hit by Strong Gust and Capsized as it Turned to Face Wind', *South China Morning Post* (online), 5 June 2015 <<http://www.scmp.com/news/china/society/article/1816951/eastern-star-captain-says-ship-hit-strong-gust-and-capsized-it>>

Nautilus International, 'Criminalisation Concern Raised' *Nautilus Telegraph* (online), February 2015 <[http://issuu.com/redactive/docs/tel\\_feb\\_2015](http://issuu.com/redactive/docs/tel_feb_2015)>

Park, Madison. 'What Went Wrong on Sewol?', *CNN* (online) 15 May 2014 <<http://edition.cnn.com/2014/05/15/world/asia/sewol-problems/>>

Sarre, Rick. 'Sentencing Those Convicted of Industrial Manslaughter' (Speech Delivered at Sentencing Conference 2010, Canberra, 6 February 2010)

Schofield, Clive. 'Maritime Zones and Jurisdictions' (Lecture delivered for School of Surveying and Spatial Information, University of New South Wales) <[http://www.iho.int/mtg\\_docs/com\\_wg/ABLOS/ABLOS\\_Conf3/SESSION3.PDF](http://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf3/SESSION3.PDF)>

Seafarer's Rights International, *Criminalization of Seafarer's* (5 September 2015) YouTube <[https://www.youtube.com/watch?v=ZhgHD\\_MEB00](https://www.youtube.com/watch?v=ZhgHD_MEB00)>

Seafarer's Rights International, *SRI Survey: Seafarers and the Criminal Law* (2<sup>nd</sup> ed, 2013).

Second Reading Speech, Crimes at Sea Bill 1999 (Cth)

Second Reading Speech, Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (Cth)

Sekimizu, Koji. 'Address of the Secretary-General' (Speech delivered at the Ninety-Fifth Session of the Maritime Safety Committee, International Maritime Organisation headquarters, 3 June 2015) <<http://www.imo.org/en/MediaCentre/SecretaryGeneral/SecretaryGeneralsSpeechesToMeetings/Pages/MSC-95-opening.aspx>>

'South Korea Sewol Ferry: What We Know' *BBC* (online), 16 May 2014 <<http://www.bbc.com/news/world-asia-27342967>>