

SENTENCING IN MARINE POLLUTION PROSECUTIONS

OUTLINE

1. Offence provisions – dumping, discharge of harmful substances or contaminants, ships or offshore installations
 - RMA - Coastal Marine Area
 - ss 15A, B, C
 - s 338 – offence – master and owner, installation - owner
 - MTA - EEZ and over continental shelf - dumping discharge from ships or offshore installations
 - s 226 – 237

2. Strict liability offending – no mental culpability
 - Subject to statutory defence regime
 - RMA s 341, 341A, 341B
 - MTA s 243

For detail, Chapter 9, Marine Pollution, Environmental and Resource Management Law, 3rd Edition 2005.

3. Proceedings commenced by laying information – heard in District Court – established criminal procedure applies

4. Penalty provisions
 - s 339 RMA
 - Maximum 2 years imprisonment, fine not exceeding \$300,000, natural person, company fine not exceeding \$600,000
 - Further fine of \$10,000 per day, continuing offence
 - s 244 MTA – penalty not amended \$200,000, \$10,000 per day if continuing offence
 - Protection against imprisonment where foreign ship
 - s 339A RMA
 - s 244(2) MTA

5. Sentencing process
 - Sentencing Act 2002 (“SA”) overarching statutory provisions applicable
 - *Machinery Movers Ltd v Auckland Regional Regional Council* [1994] 1 NZLR 492 (effect on environment, degree of culpability, attitude of accused)

6. SA provisions
 - s 7 Purposes of sentencing
 - s 8 Principles of sentencing

- s 9 Aggravating and mitigating factors
 - s 10 Court must take into account measures to make amends
 - s 40 fines - means of offender
7. Practice Note procedure for sentencing in trial jurisdiction (**attached**) not directly applicable if tried in summary jurisdiction but similar procedure may well be followed
 8. Sentencing process
 - Establish starting point for offending on basis of finding of guilt after trial
 - Apply any mitigating aggravating factors concerning offending
 9. Guilty plea – discount 33% for guilty plea at first available opportunity relevant to fine – reducing reduction for later plea, recent Court of Appeal decision in *R v Hassell* [2009] NZCA 450
 10. Important role of summary of facts as basis for treatment of offending
 - s 24 SA disputed fact hearings
 11. Starting points
 - RMA single offence – small spills in harbour less than 100 litres - \$30,000 – higher for more (see various District Court decisions referred to in *Southland Regional Council v Pantas Corporation*, Invercargill District Court, Newhook DCJ, where starting point was \$50,000 – possible review of starting points)
 - *MNZ v Prosafe Production and Australian Worldwide Exploration*, New Plymouth District Court, Thorburn DCJ - Discharge in EEZ from FPSO – between 25,000 and 42,000 litres, no disputed fact hearing, Judge went “down middle”, treated as at least 30,000 litres. Starting point \$150,000. Fine \$105,000 apportioned equally. Two defendants both “owners” of the installation under MTA.
 - Where two defendants 1 offence in substance, arrive at fine for offending overall and apportion
 12. Presence of specific RMA MTA provisions to order recovery of clean-up costs cannot erode court’s responsibility to take response into account under s10 SA
 13. Practical points
 - Prompt clean-up
 - Investigate as quickly as possible to establish whether not guilty or guilty plea appropriate – expert assistance
 - Seek agreement on facts, if guilty plea
 - Possible disputed facts hearing after plea

Paul David, Barrister
 Eldon Chambers, Auckland
 February 2010