

DOES THE MARITIME TRANSPORT ACT 1994 (NZ) EFFECTIVELY INHIBIT MARINE POLLUTION?

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It was almost midnight when the *Fouler* ploughed into New Zealand's Exclusive Economic Zone, destined for the port of Auckland. The Liberian flagged super-tanker had departed Ras Tanura, with its Filipino crew, several weeks earlier. Laden with crude oil, it posed a serious danger to New Zealand's marine environment. However, the threat of an accidental disaster was not the only menace the tanker posed. Intentional discharges and the culture of concealment fostered among the crew presented the greatest hazard. Motivated by gratuities if the costs of discharging at port reception facilities were avoided, the crew readily closed the valve to the waste oil feed and mechanically disconnected the fittings to the oily water separator (OWS). The Chief Engineer then redirected the waste oil feed line into a prefabricated piping system concealed under the engine room floor, bypassing the OWS and tunnelling directly into the sea.¹ Orders were then given by the Master to open the valve until all waste oils were discharged. Once complete, the crew perfunctorily reconnected the standard pipes, replaced the floor plates, and hastily applied spray paint to the paint-chipped bolts to conceal any lingering evidence. The crew worked competently under the cloak of night, discharging the toxic oils within the course of a few minutes. While the oily residues trailed the super tanker for several miles, the *Fouler* was safely in port and clear of any evidential connection before the operational discharge was exposed.

Operational discharges of oil and the complementing culture of concealment fostered among crews pose substantial risks to New Zealand's marine environment. Despite this fact, it is only accidental discharges of oil resulting in catastrophic damage to the marine environment that have warranted serious media attention.² The pervading culture of concealment fostered on-board vessels plying New Zealand waters ensures prosecution and detection rates for intentional discharges remain dismally low. This lack of detection contributes to the misinformed idea that operational discharges occur infrequently within our waters. Furthermore, the lack of media scrutiny legitimises the notion that marine pollution offences do not warrant further attention. Operational discharges of oil continue to be veiled under a cloak of secrecy by the crews that transgress the regulations and the media that fails to report them. These are the issues that the *Maritime Transport Act 1994 (NZ)* (MTA) attempts to regulate, and the legislature needs to grapple with, if vessel-source pollution is to be deterred in New Zealand waters.³

In evaluating the effectiveness of the MTA in inhibiting marine pollution, this article will provide a limited historical background to the problem of vessel-source oil pollution, followed by an introduction to the *International Convention for the Prevention of Pollution from Ships* (MARPOL) and the *United Nations Convention on the Law of the Sea* (UNCLOS).⁴ The development of criminal liability under New Zealand legislation will then be discussed in order to illustrate how the MTA has given effect to the aforementioned conventions and the impact this has on the aims and objectives of the Act. After identifying the purposes of the MTA, a benchmark test will be established in order to evaluate the efficacy of the MTA's penalty provisions in preventing marine pollution. A very brief introduction to the legislative instruments in Australia and Canada will then be provided in order to contextualise the comparative case analysis that follows. After examining the approaches adopted by the courts in New Zealand, Australia and Canada towards marine pollution offences the article will illustrate that the MTA fails to effectively inhibit marine pollution. Finally, in drawing upon the criminological theories of deterrence, reintegrative shaming, and incapacitation, some recommendations will be offered for the future.

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¹ See David G Dickman 'Recent Developments in the Criminal Enforcement of Maritime Environmental Laws' (1999) 24 *Tulane Maritime Law Journal* 1 and David G Dickman 'Recent Developments Involving the Criminal Enforcement of Maritime Environmental Laws: Corporate Accountability Goes to Sea' (2003) 1 *Benedict's Maritime Bulletin* 1, for an overview on how prevalent these criminal practices are within the shipping industry.

² JM Weber and RE Crew 'Deterrence theory and marine oil spills: Do Coast Guard civil penalties deter pollution?' (2000) 58 *Journal of Environmental Management* 161, 161.

³ *Maritime Transport Act 1994 (NZ)*.

⁴ 1978, 1340 UNTS 61; 1982, 1833 UNTS 3.

1 Historical Background

Under Article 1(4) of UNCLOS, marine pollution is defined as:⁵

the introduction by man, directly or indirectly, of substances or energy into the marine environment ..., which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

While marine pollution covers a wide range of substances entering the marine environment, the following discussion solely concentrates on vessel-source oil pollution. Oil pollution from ships generally occurs as a consequence of maritime accidents or through operational discharges.⁶ While pollution resulting from accidental discharges often has devastating effects on the marine environment, they only account for five per cent of all oil that enters the ocean.⁷ Unfortunately, intentional discharges of ship-generated pollution accounts for a much greater proportion.⁸ The cumulative impact of these operational discharges has a devastating impact on our oceans which continues to be discounted.⁹ Like all vehicles powered by fossil-fuel engines, ships generate substantial amounts of oily wastes in their engine rooms and mechanical spaces which continue to be disposed of at sea.¹⁰ While these practices occurred routinely during the first half of the twentieth century without any real criticism, the attitude and response to these activities has since changed.¹¹ More recently, concerted efforts have been made to eliminate this type of environmental offending, primarily through international conventions and national legislation. In spite of these attempts, marine pollution has trailed into the 21st century, posing substantial risks to the marine environment.¹²

Accidental and operational discharges of oil were recognised as a growing problem by the international community as early as the 1920s.¹³ However, it was only in 1954 that the *International Convention for the Prevention of Pollution of the Sea by Oil* (OILPOL) opened for signature.¹⁴ Prompted by the United Kingdom, 32 nations assembled together with the shared goal of preventing environmental and aesthetic harm caused by intentional discharges of oil, creating the first ever treaty addressing marine pollution.¹⁵ OILPOL was primarily concerned with the *reduction of oil pollution* in coastal areas, prescribing acceptable oil discharge standards based on a zoned formula.¹⁶ Unfortunately, OILPOL was largely unsuccessful and following almost two decades of inactivity and indifference by numerous governments, OILPOL was superseded by the MARPOL convention.¹⁷ While this development has been perceived by some as a response to OILPOL's failures, it was ultimately widespread media attention and public outrage following several pollution disasters, notably that of the *Torrey Canyon*, that prompted 'calls in Europe and the United States for international regulation of intentional as well as accidental discharges' of oil.¹⁸

Currently New Zealand is party to numerous environmental treaties and conventions addressing marine pollution.¹⁹ However, two particular conventions underpin New Zealand's marine pollution laws. The first of these is the MARPOL convention which aims to prevent marine pollution through the establishment of ship design and operation standards.²⁰ The MARPOL convention is largely directed by the International Maritime Organisation (IMO) which prescribes standards and rules to be adopted internationally in order to protect the

⁵ 1982, 1833 UNTS 3 art 1(4).

⁶ Colin De La Rue and Charles B Anderson, *Shipping and the Environment: Law and Practice* (Informa, 2nd ed, 2009) 807.

⁷ Bernard Vanheule 'Criminal Sanctions in Relation to Ship-Source Pollution' in Norman A Martinez Gutierrez (ed) *Serving the Rule of International Maritime Law: Essays in Honour of Professor David Joseph Attard* (Routledge, 2010) 54, 56.

⁸ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation* (Martinus Nijhoff, 2013) 1.

⁹ Weber and Crew, above n 2, 161.

¹⁰ Fiona Jayne Leddy 'A critical legal analysis of International Shipping in Australian Waters and the risk of ship-based oil pollution' (2011) 17 *Queensland Environmental Practice Reporter* 120, 127.

¹¹ De La Rue and Anderson, above n 6, 821.

¹² *Ibid.*

¹³ Oran R Young (ed), *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioural Mechanisms* (MIT Press, 1999) 7-8.

¹⁴ 1954, 327 UNTS 3.

¹⁵ Young, above n 13, 33.

¹⁶ *Ibid* 7-8.

¹⁷ *Ibid* 33.

¹⁸ *Ibid* 37.

¹⁹ *Ibid* 1.

²⁰ Ministry for the Environment *Summary of Submissions on Marine Pollution Regulations under the Resource Management Act 1991: Issues and Options Paper* (1995) 3.

marine environment.²¹ The MARPOL convention is closely linked with the UNCLOS which has also been fundamental in shaping New Zealand's approach to marine pollution offences. The UNCLOS provides the jurisdictional regime for marine pollution control, declaring when a State has jurisdictional competency to prescribe and enforce marine pollution standards. Together these conventions provide the framework for New Zealand's marine pollution control measures. Therefore, in assessing whether the MTA effectively inhibits marine pollution one cannot adequately evaluate its effectiveness without recourse to these conventions.

1.1 UNCLOS

The United Nations Convention on the Law of the Sea has been championed as the most comprehensive and significant international convention governing the law of the sea.²² The Convention is the principal international instrument governing the jurisdiction of States over vessel-source pollution.²³ It defines the extent of a country's jurisdiction over the sea, access and navigation rights, and the right to protect and preserve the marine environment.²⁴ In doing so, the UNCLOS has developed a regulatory framework that establishes when a State has jurisdictional competence over foreign ships in violation of national marine pollution laws.²⁵ Furthermore, the Convention prescribes the ambit, scope and limits of this jurisdictional authority.²⁶

While the UNCLOS attempts to remedy some of the jurisdictional obstacles to the prosecution of polluters, it remains heavily dependent on the enforcement measures of flag States. This has resulted in an environment where polluters can rely on one international convention to avoid another.²⁷ The continued recognition of flag State primacy under the UNCLOS impedes the successful regulation of marine pollution offences by the MARPOL convention.²⁸ The main problem with the existing regime is that flag States often have no interest in enforcing marine pollution standards.²⁹ Once a flag of convenience State takes their registration fees, seldom do they see their flagged vessels again.³⁰ Consequently, these vessels pose no environmental threat to the flag State and the enforcement of pollution standards becomes redundant. Moreover, the costs attached to investigating and prosecuting offenders ensures that these regulations remain neglected. While the UNCLOS tried to remedy some of these problems by extending the coastal and port States' authority geographically, the limits to its prescriptive and enforcement jurisdiction means that it continues to lack the jurisdictional competency to adequately protect and preserve the marine environment.³¹ Therefore, the outmoded notion of flag State primacy needs serious reconsideration by the international community in order to provide States with the jurisdiction required to successfully regulate marine pollution.

1.2 MARPOL

The MARPOL Convention was originally adopted on 2 November 1973; however, as the 1973 Convention had not yet entered into force by 1978, it was essentially absorbed by the 1978 Protocol.³² The Convention is described as a framework agreement containing detailed standards pertaining to marine pollution regulation.³³ The Convention is now regarded as the primary international convention regulating marine pollution from ships. At present, '130 states representing 97.07 per cent of world shipping tonnage have acceded to or ratified MARPOL 73/78'.³⁴ Annex I, which entered into force on 2 October 1983, details regulations for the prevention of pollution by oil.³⁵ In contrast to OILPOL which concentrated on reducing oil pollution, the MARPOL convention desires the complete elimination of intentional discharges of oil and the reduction of accidental escapes.³⁶ In pursuit of these goals it has introduced a comprehensive regime detailing equipment standards and conferring upon port and coastal States greater authority to investigate oil discharges.³⁷ Furthermore, the

²¹ Alan Khee-Jin Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (Cambridge University Press, 2006) 25.

²² Wayne Mapp, *Marine Pollution and the Maritime Transport Bill* (1994) 3.

²³ Pozdnakova, above n 8, 6.

²⁴ Grant J Hewison, *A Guideline of New Zealand's International Obligations Affecting the Coastal Environment* (Department of Conservation, 1994) 33.

²⁵ Khee-Jin Tan, above n 21, 23.

²⁶ *Ibid.*

²⁷ *Ibid.* 203.

²⁸ UNCLOS, 1982, 1833 UNTS 3 art 228.

²⁹ Khee-Jin Tan, above n 21, 24.

³⁰ *Ibid.*

³¹ *Ibid.* 223.

³² Young, above n 13, 7-8.

³³ Hewison, above n 24, 26.

³⁴ Khee-Jin Tan, above n 21, 232-233.

³⁵ MARPOL, 1978, 1340 UNTS 61.

³⁶ De La Rue and Anderson, above n 6, 823.

³⁷ Charles S Pearson, *International Marine Environment Policy: The Economic Dimension* (Johns Hopkins University Press, 1975) 47.

MARPOL convention has introduced stricter pollution standards and the requirement that tankers carry pollution-reduction equipment.³⁸

From its inception, MARPOL adopted the most stringent standards available considering the political constraints it faces.³⁹ Under the Convention, port States are explicitly authorised to prevent non-compliant ships from entering their ports and they can detain them until they no longer pose ‘an unreasonable threat of harm to the marine environment’.⁴⁰ This development was revolutionary as previously the detainment of foreign tankers was prohibited under international law.⁴¹ MARPOL has consistently eroded the exclusive sovereignty of flag States, making unilateral action against offenders possible.⁴² Concessions made under the UNCLOS have also contributed to the greater detection and prosecution of marine pollution offences. Initially the coastal States’ authority was limited to its territorial zone; however, it has since been extended under the UNCLOS to the Exclusive Economic Zone (EEZ).⁴³ Furthermore, debatably one of the MARPOL convention’s greatest successes was the introduction of mandatory pollution-reduction equipment standards. Upon failing to meet these requirements, ships risk detainment or the prospect of being refused entry into ports.⁴⁴ This persuasively encouraged ship-owners to upgrade and install OWS systems as they could not afford having their vessels detained due to non-compliance.⁴⁵

Although the MARPOL convention has proven extremely successful, there remain fundamental flaws with its implementation. While violations of oil discharge standards are strictly prohibited, prosecution powers primarily remain with the flag State.⁴⁶ Only where a violation ‘occurs within an area under the jurisdiction of a party to the Convention’, can that party bring proceedings in its own right.⁴⁷ Furthermore, the lack of direction in regard to appropriate penalties has left many States reluctant in adopting stiff criminal penalties. This may be attributable to the fact that MARPOL does not expressly criminalise vessel-source pollution. Instead, it requires contracting States to adopt ‘adequately severe sanctions’ for discharge violations.⁴⁸ Consequently, States competently apply whatsoever penalties they desire, including administrative or civil law measures.⁴⁹ Unsurprisingly, this has contributed to lower levels of compliance.⁵⁰ Thus, the lack of comprehensive direction by the drafters in regard to penalties is one of the main flaws of the MARPOL convention. Furthermore, the continued reluctance by many contracting States in establishing port reception facilities has been a constant ailment plaguing the Convention’s success.⁵¹

2 MARPOL and the National Regime

2.1 New Zealand

Like many coastal states in the world, the ocean holds huge significance to New Zealand’s well-being and livelihood.⁵² Not only does the ocean provide food and an occupation for many New Zealanders it is fundamental to our tourism industry and recreational pursuits.⁵³ Marine pollution threatens these amenities while accidental and intentional discharges of oil go undeterred. Despite the patently obvious importance of the ocean and its resources to New Zealand, the government has been slothful in protecting the marine environment. This was evidenced by the legislature’s extremely lax approach in adopting the MARPOL convention,⁵⁴ and more recently, in failing to increase the limits of liability under the 1976 Convention on Limitation of Liability for Maritime Claims.⁵⁵ Admittedly, studies have shown that New Zealand is exposed to minor risks of oil pollution due to low shipping traffic density; however, even the slightest risk of marine pollution means there is

³⁸ Young, above n 13, 33.

³⁹ Ibid 40.

⁴⁰ MARPOL, 1978, 1340 UNTS 61 art 5(2).

⁴¹ Young, above n 13, 53.

⁴² Ibid.

⁴³ Wayne Mapp, above n 2, 10.

⁴⁴ Young, above n 13, 74-75.

⁴⁵ Ibid.

⁴⁶ Hewison, above n 24, 27.

⁴⁷ Ibid.

⁴⁸ Pozdnakova, above n 8, 8.

⁴⁹ Ibid 313-314.

⁵⁰ Young, above n 13, 57.

⁵¹ Khee-Jin Tan, above n 21, 132.

⁵² New Zealand Maritime Policy Branch, *Review of the Marine Pollution Act 1974: Discussion Paper* (1992) i.

⁵³ Ibid.

⁵⁴ Ibid ii.

⁵⁵ Bevan Marten, ‘The *Rena* and Liability’ [2011] *New Zealand Law Journal* 341, 341.

no room for complacency.⁵⁶ The disasters of the *Wahine*, the *Pacific Charger*, the *Mikhail Lermantov*, and most recently the *Rena*, demonstrate lucidly that pollution incidents are occurring in New Zealand waters.⁵⁷ While these accidental discharges occur infrequently they pose an enormous threat to New Zealand's environment which is only heightened by the occurrence of operational discharges. Therefore, it is crucial that New Zealand has at its disposal the most effective legislative instruments to prevent marine pollution.

2.2 Maritime Transport Act 1994 (NZ)

Criminal liability for marine pollution was first introduced through the *Marine Pollution Act 1974* (NZ), which gave effect to New Zealand's commitments under OILPOL. However, once OILPOL was superseded by the MARPOL convention, the New Zealand legislature had to overhaul its laws to comply with the increasingly rigorous standards and regulations imposed under MARPOL. The MTA is New Zealand's primary legislative instrument giving effect to the MARPOL convention.⁵⁸ The principal objective of the MTA is to provide an effective regime to prevent marine pollution and for the provision of oil pollution response systems.⁵⁹ Though, it is important to note that the MTA does not exercise exclusive jurisdiction over marine pollution offences, as there is considerable intersection between the MTA and the *Resource Management Act 1991* (NZ) (RMA). The main distinction between the Acts is that the RMA deals exclusively with marine pollution incidents within New Zealand's territorial sea.⁶⁰ In contrast, the MTA applies to all marine pollution offences that fall outside the jurisdictional ambit of the RMA. This primarily includes the EEZ and the continental shelf; however, confusingly it can also include the territorial sea.⁶¹ Consequently, the following analysis of New Zealand case law will reflect the overlap between the two Acts.

While there are numerous sections dealing with marine pollution under the MTA, exclusive emphasis will be placed on ss 237, 238, and 244. Section 237 of the MTA mandates that an offence occurs where there has been a discharge of harmful substances into the ocean from a ship.⁶² This is irrespective of recklessness or intention as the offence is one of strict liability.⁶³ Section 238 states that it is an offence where the master and/or owner of a ship fails to report the discharge of a harmful substance into the sea or seabed.⁶⁴ Penalties for offences against the aforementioned sections are prescribed under s 244. These include fines and prison sentences; however, for current purposes the maximum imprisonment terms will not be discussed. Where there has been an illegal discharge of a harmful substance pursuant to s 237 the offender is liable to a fine not exceeding NZD 200 000, and where the offence is a continuing one, they are liable to a further fine of NZD 10 000 for every day the offence continues.⁶⁵ Failure to report a discharge under s 238 brings a maximum fine of NZD 10 000 for an individual and a further fine of NZD 2000 per day where the offence is a continuing one.⁶⁶ In the case of a body corporate, liability is capped at NZD 100 000 for the failure to report, with an additional NZD 20 000 for every day the offence continues.⁶⁷ Similar provisions can be found under the RMA, though the maximum penalties are curiously higher.⁶⁸

⁵⁶ Helen R Hughes and Bill Armstrong, *The Control of Marine Oil Pollution in New Zealand: a Review of the System* (Parliamentary Commissioner for the Environment, 1991) 7.

⁵⁷ *Ibid.*

⁵⁸ Explanatory Note, Transport Law Reform Bill 1993 (NZ) (243-1) viii.

⁵⁹ Paul Myburgh 'Maritime Transport and Marine Pollution: Law Reform in New Zealand' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 167, 167.

⁶⁰ *Resource Management Act 1991* (NZ) s2.

⁶¹ Toni Dobson, 'The Maritime Transport Act 1994 and the *MV Rena* disaster - How effective is the Act in dealing with bunker oil spills?' [2013] *Resource Management Theory & Practice* 174, 178.

⁶² *Maritime Transport Act 1994* (NZ) s237(a).

⁶³ Dobson, above n 61, 195.

⁶⁴ *Maritime Transport Act 1994* (NZ) s238(a).

⁶⁵ *Ibid* s244(1)(a).

⁶⁶ *Ibid* s244(3)(a).

⁶⁷ *Ibid* s244(3)(b).

⁶⁸ Under the RMA the maximum penalties for discharging harmful substances from a ship into the coastal marine area are NZD 300 000 for an individual and NZD 600 000 for a body corporate. This appears to be the result of political oversight as the penalties under the MTA initially mirrored those under the RMA. However, the penalties under the MTA subsequently fell out of step in 2009 when the *Resource Management (Simplifying and Streamlining) Amendment Act 2009* was introduced. One of the reasons for the increases under the RMA was the growing awareness that the regime was not effectively deterring non-compliance (see Explanatory Note, *Resource Management (Simplifying and Streamlining) Amendment Bill* (18-1) 27). However, no similar amendments were made to the corresponding provisions under the MTA. This is nonsensical when one considers that a marine pollution incident can result in a vastly different penalty depending on which regime applies. While there is the arguably the potential for greater damage within the coastal marine area the distinction appears unjustified. Certainty of the law demands similar offences to be treated alike and, consequently, the penalties under the MTA need to conform with those under the RMA.

2.3 Objective

In assessing whether the MTA effectively inhibits marine pollution, the aims and objectives of the Act need to be identified. The Act can only be defined as effective if these goals are being achieved. The MTA is vaguely described as an Act to ‘protect the marine environment’.⁶⁹ Unfortunately, the Act does not elaborate on how this is to be achieved and the only real assistance, albeit indirect, is provided under s 5 of the Act which states that the primary concern is ‘to ensure that New Zealand’s obligations under the conventions are implemented’.⁷⁰ Consequently, one must look to the MARPOL convention to identify what the MTA seeks to achieve.⁷¹ Parties to the MARPOL convention are described as desiring ‘*the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances*’.⁷² In pursuit of these goals, contracting parties to the convention are obliged to give effect to the provisions of the Convention, the Annexes, and any subsequent amendments in order to ‘prevent the pollution of the marine environment by the discharge of harmful substances’.⁷³ Any violation of the Convention must be prohibited by contracting States and they are required to establish sanctions for any offence.⁷⁴ These sanctions are required to be ‘*adequate in severity to discourage violations*’, thus reflecting the paramount importance of deterrence and denunciation when sentencing.⁷⁵ Furthermore, parties to the Convention have to use all ‘appropriate and practicable measures of detection and environmental monitoring’.⁷⁶

2.4 Benchmark

As the MTA is vague in elucidating the legislature’s aims and objectives, one is required to look to the MARPOL convention for clarification. Fortuitously, the MARPOL convention is not afflicted by similar obscurities. The MARPOL convention clearly expresses its desire for the complete elimination of intentional discharges and the minimization of accidental discharges. It is these standards which the New Zealand legislature strives to give effect to under the MTA. Consequently, these objectives define ‘effectiveness’ and inform the benchmark test which the Courts need to apply. In promoting a zero-drop policy, the convention has made a clear intimation that any pollution incident must be adequately condemned and deterred. Therefore, the courts are required to adopt a sentencing approach that *effectively deters and denounces all forms of marine pollution, regardless of the volume*. It is these objectives that inform the approach to sentencing, and consequently, the following cases will be analysed according to this benchmark. Australian and Canadian cases can also be measured against this benchmark as they too have adopted similar goals. Furthermore, the Acts of each country all rely heavily on the criminological theory of deterrence to tackle the problem of marine pollution. This makes the cases ideal for comparative analysis as the courts in each country are attempting to achieve the same deterrence goals. However, before proceeding to test the cases against this benchmark, a brief overview of the legislative instruments in Australia and Canada will be provided so as to give some context for the comparative analysis that ensues.

3. MARPOL and Comparable Regimes

3.1 Australia

Like New Zealand, virtually all Australian domestic legislation governing marine pollution derives from international conventions.⁷⁷ The position is no different in regards to the MARPOL convention which was adopted by the Australian government on 14 January 1988 as a means to prohibit the discharge of oil into the sea.⁷⁸ The primary legislative instrument giving effect to the MARPOL convention and creating offences for marine pollution is the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth).⁷⁹ Section 6 provides that the Act has effect both inside and outside Australia, including the EEZ.⁸⁰ However, provision is made for the Northern Territory and States to exercise jurisdiction over the adjacent territorial sea provided they

⁶⁹ Maritime Transport Act 1994 (NZ).

⁷⁰ Ibid s 5(b).

⁷¹ Ibid s 225.

⁷² 1978, 1340 UNTS 61 art 1 (emphasis added).

⁷³ Ibid art 1.

⁷⁴ Ibid art 4(1).

⁷⁵ Ibid art 4(4) (emphasis added).

⁷⁶ Ibid art 6(1).

⁷⁷ Martin Davies and Anthony Dickey *Shipping Law* (Thomson Reuters, 3rd ed, 2004) 551.

⁷⁸ Michael White ‘Case Study of Australia’ in Erik Franckx (ed) *Vessel-source Pollution and Coastal State Jurisdiction: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)* (Martinus Nijhoff, 2001) 147, 154.

⁷⁹ MWD White, *Australasian Marine Pollution Laws* (Federation Press, 2nd ed, 2007) 113.

⁸⁰ Davies and Dickey, above n 77, 555.

have legislation giving effect to the MARPOL convention.⁸¹ Nevertheless, this conferment of jurisdiction is piecemeal as the *Coastal Waters (State Powers) Act 1980* (Cth) and the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) effectively limits the territorial sea to three nautical miles.⁸² This jurisdictional separation often results in vexing questions as to which piece of legislation governs a particular offence due to the competing claims to jurisdictional competency.⁸³ And while this may seem innocuous, the relevance as to which Act applies can be striking due to the wide divergence in maximum penalties as demonstrated in Tables 1.1 and 1.2.⁸⁴

Table 1.1: Maximum Penalties (AUD) for the Discharge of Oil into the Sea or Seabed under Australian Law⁸⁵

STATE	NATURAL PERSON	BODY CORPORATE
Commonwealth – Strict Liability	3 400 000	3 400 000
Northern Territory	11 473	57 365
Northern Territory – intentionally or knowingly discharging	573 650	2 866 760
Western Australia	50 000	250,000
Queensland	569 250	11 385 000
South Australia	200 000	1 000 000
Victoria	295 220	1 476 100
Tasmania	325 000	1 300 000
New South Wales	500 000	10 000 000

Table 1.2: Maximum Penalties (AUD) for Failure to Report Discharges under Australian Law

STATE	NATURAL PERSON	BODY CORPORATE
Commonwealth	85 000	85 000
Western Australia	5 000	25 000
Tasmania	65 000	65 000
Queensland	96 772.50	96 772.50
Northern Territory	149 000	149 000
Victoria	73 805	369 025
South Australia	50 000	250 000
New South Wales	121 000	2 750 000

3.2 Canada

Prior to the adoption of the MARPOL convention, Canada charted its own course in marine pollution regulation. Excepting the *Canada Shipping Act* which essentially gave effect to the OILPOL convention, no statute addressed legal responsibility for marine pollution offences.⁸⁶ This caused widespread dissatisfaction, prompting the Canadian legislature to adopt its own unilateral approach to pollution liability.⁸⁷ This development was principally responsive to numerous pollution disasters and increasing vessel traffic experienced in the vulnerable waters of the Arctic and on the East and West coasts of Canada.⁸⁸ However, after adopting an independent approach for almost 20 years, Canada has since realigned with the international community, with the MARPOL convention entering into force in Canada on 16 February 1993. This was eventually followed by the ratification of the UNCLOS on 7 November 2003.⁸⁹ These two conventions now inform the current approach to marine pollution regulation in Canada.

The *Canada Shipping Act 2001* (CAN) (CSA) is the principal Act giving effect to the MARPOL convention, representing the largest body of rules addressing marine pollution on the federal level.⁹⁰ Part VIII consists of

⁸¹ Leddy, above n 10, 124.

⁸² Ibid.

⁸³ White, above n 79, 166.

⁸⁴ Davies and Dickey, above n 77, 556.

⁸⁵ Maximum penalties current as of 13 May 2015.

⁸⁶ Colin M De La Rue (ed), *Liability for Damage to the Marine Environment* (Lloyd's of London Press, 1993) 110.

⁸⁷ Ibid.

⁸⁸ C Odidi Okidi, *Regional Control of Ocean Pollution: Legal and Institutional Problems and Prospects* (Sijthoff & Noordhoff, 1978) 45.

⁸⁹ David Van der Zwaag, *Canada and Marine Environmental Protection: Charting a Legal Course Towards Sustainable Development* (Springer, 1995) 208.

⁹⁰ William Tetley, *International Maritime and Admiralty Law* (Éditions Y. Blais, 2002) 457.

prevention and control provisions that apply to all 'Canadian internal, territorial and fishing zone waters except for shipping safety control zones in the Arctic where more stringent requirements generally apply'.⁹¹ The Act expressly provides for the implementation of MARPOL provisions by annexing the complete convention to the CSA.⁹² This approach sharply contrasts with New Zealand and Australia where a selective approach has been adopted to the implementation of their international obligations. Of particular import is s 191(2) of the CSA which closely resembles s 237 of New Zealand's MTA. Under the CSA, where a person or ship is found to have illegally discharged a pollutant, they face, on summary conviction, fines up to CAN 1 000 000 and a potential term of imprisonment not exceeding eighteen months.⁹³ Significantly, the failure to report a pollution incident is not an offence, though it is treated as a relevant factor when imposing sentences under s 191.⁹⁴ This discretionary nature underlies the Canadian approach to marine pollution regulation which is further evinced by the conferment of creative sentencing discretions. Courts have been afforded powers to order offenders to pay for research into marine pollution and also to publicize the offences committed.⁹⁵ These discretions were afforded to the courts following an extensive review of the CSA which recommended among other things: greater investigative and prosecution efforts, harsher criminal sanctions, and creative sentencing.⁹⁶

4 Sentencing Practices

4.1 Case Law

Due to a scarcity of case law dealing with the provisions of the MTA, the following examination will also draw upon the sentencing approach adopted under the RMA. Consequently, recognition must be given to the fact that the RMA does not expressly purport to give effect to the MARPOL convention.⁹⁷ Nonetheless, the RMA and the MTA are both informed by an environmental philosophy that places considerable emphasis on environmental protection.⁹⁸ However, one significant point of difference is that the RMA endorses a more flexible and innovative approach to sentencing as evidenced by the power to order community service.⁹⁹ This deliberate move by parliament to provide greater flexibility to the courts was implemented to ensure that offenders were adequately punished, but also to serve educative and communal goals.¹⁰⁰ Despite these differences, the sentencing principles applicable under the RMA apply generally to marine pollution offences and the following discussion will reflect this.¹⁰¹ The involuntary reliance on RMA cases for sentencing practice is also enlightening as it reveals that there is an abundance of marine pollution cases governed by the RMA. This is somewhat perplexing considering the dearth of case law imposing penalties under the MTA. Two possible explanations follow from this anomaly. Either, there are very few or no instances of marine pollution occurring in New Zealand waters outside the coastal marine area. Or, the scarcity of case law reflects a widespread failure on the part of ocean users to report marine pollution incidents outside this zone. If the former is true, then revision of the MTA appears redundant and increased penalties would not serve any deterrent purpose. However, if the latter reflects reality, then the penalties for failing to report a marine pollution incident do not adequately encourage reporting.¹⁰²

4.1.1 Northland Regional Council v Australia Direct New Zealand Direct Line Ltd

Like many foreign jurisdictions, New Zealand courts have adopted a feeble sentencing approach towards environmental offences as demonstrated in the case of *Northland Regional Council v Australia Direct New Zealand Direct Line Ltd*.¹⁰³ In this case, the defendants discharged five cubic metres of bilge contents and two cubic metres of the contents of the purifier slop tank into the sea between the Tutukaka Coast of Northland and the Poor Knights Islands.¹⁰⁴ The defendants were charged under s 338(1B)(a) of the RMA for the illegal

⁹¹ Van der Zwaag, above n 89, 348-349.

⁹² Edgar Gold, Aldo Chircop and Hugh Kindred, *Maritime Law* (Irwin Law, 2003) 676.

⁹³ *Canada Shipping Act 2001* (CAN) s191(2).

⁹⁴ *Ibid* s191(4).

⁹⁵ Van der Zwaag, above n 89, 352.

⁹⁶ *Ibid* 358-359.

⁹⁷ But see, *Resource Management Act 1991* (NZ) s360(2B).

⁹⁸ *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492, 499 ('*Machinery Movers*').

⁹⁹ *Resource Management Act 1991* (NZ) s339(4).

¹⁰⁰ *Machinery Movers* [1994] 1 NZLR 492, 501.

¹⁰¹ *Wavish v Northland Port Corporation (NZ) Ltd* (AP 47/94, High Court of Whangarei, Robertson J, 24 March 1995).

¹⁰² The latter is a more realistic interpretation considering how effortless it would be to avoid detection outside the coastal marine area as opposed to concealing an offence within the coastal marine area. This is particularly so when one accounts for the strained resources available for marine pollution detection in New Zealand waters.

¹⁰³ *Northland Regional Council v Australia Direct New Zealand Direct Line Ltd* (Unreported, CRN9088018862, District Court of Whangarei, Whiting J, 28 June 2000) ('*Australia Direct*').

¹⁰⁴ *Ibid* [25].

discharge of petroleum into New Zealand's territorial sea. At the time this offence carried a maximum penalty of NZD 200 000 for a body corporate.¹⁰⁵ The defendants were also charged under s 238 of the MTA for the failure to report the illegal discharge which carried a maximum penalty of NZD 100 000 for a body corporate. Despite the fact that the pollution offence occurred in ecologically sensitive waters and the Master and Owner of the ship failed to report the illegal discharge, Whiting J imposed a total fine of \$60,000. This is somewhat mystifying considering that his Honour referred to the well settled principles in *Machinery Movers Ltd v Auckland Regional Council* which call for higher penalties to provide the required deterrent effect for future offenders.¹⁰⁶

Whiting J stated that the starting point for environmental offences is the High Court decision of *Machinery Movers*.¹⁰⁷ In this case, the High Court found that the amendments to the RMA signalled a clear legislative direction to the courts to impose higher penalties for environmental offences to ensure they have a significant deterrent effect.¹⁰⁸ This development reflected a growing concern that lower fines were being regarded as a minor license for offending which consequently conveyed the idea that the law could be broken with relative impunity.¹⁰⁹ In addition to the desire for the courts to impose higher fines, his Honour went on to state that three further principles needed consideration. The first principle related to the need to account for clean-up expenses when imposing any fine. The second consideration for the courts to determine is 'the appropriate penalty in the round', and, thirdly, discounts should be made for early guilty pleas.¹¹⁰ Whiting J then proceeded to identify various other important matters to be considered when sentencing for environmental offences. These included: the nature of the environment, the extent of the damage, the deliberateness of the offence, the attitude and history of the accused, and the need for deterrence.¹¹¹

Application

In applying these principles and taking into account the relevant factors, Whiting J remarked that the environment held extreme ecological significance.¹¹² Nonetheless, the extent of the damage was not long-term and had to a large degree been remedied.¹¹³ The next factor considered was the deliberateness of the offence.¹¹⁴ This factor was crucial to the decision as his Honour found that the offence was not deliberate and it was a failure of the OWS which was unknown to the crew which resulted in the illegal discharge of oil.¹¹⁵ This finding was supplemented by the attitude of the accused. The defendants were deemed to be responsible corporations with no previous convictions, entitling them to 'the credit they have built up in the bank of good corporate citizenship'.¹¹⁶ Account was also given to the early guilty plea indicating that the defendants were accepting responsibility for their offending. A further mitigating factor was that the defendants had upgraded their vessel considerably and implemented new standing orders in order to ensure an offence like this would not reoccur.¹¹⁷ Whiting J then expressed the need to provide a deterrent effect in order to send a clear message that any discharge of harmful substances into the ocean would not be countenanced.¹¹⁸ Finally, his Honour said that he was required to look at the offending in its totality, with regard to the NZD 159 067.00 clean-up costs paid by the offender, in order to determine what would be a 'fair, proper and adequate penalty for the offending'.¹¹⁹ Whiting J concluded that a total penalty of NZD 90 000 should be imposed, but due to the early guilty plea this was reduced substantially to NZD 60 000.¹²⁰ In apportioning this amount, his Honour fined the defendants NZD 10 000 for the failure to report, and NZD 50 000 for the illegal discharge.¹²¹

This case illustrates impeccably the weaknesses afflicting the current regime. In this case the defendant had two options. The first being, report the illegal discharge and pay a fine for the illegal discharge and clean-up costs which in this case totalled to NZD 209 067. Or alternatively, risk a fine of up to NZD 100,000 for failing to report the incident, but which in this case was only NZD 10,000, and escape all liability. While many

¹⁰⁵ Ibid [1]. Fines have since been increased to NZD 600 000 for a body corporate.

¹⁰⁶ Ibid [7]. See generally, *Machinery Movers* [1994] 1 NZLR 492, 500-504.

¹⁰⁷ *Australia Direct* (Unreported, CRN9088018862, District Court of Whangarei, Whiting J, 28 June 2000) [7].

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid [8].

¹¹¹ Ibid [11], [[16], [18], [20], [21].

¹¹² Ibid [12].

¹¹³ Ibid [16].

¹¹⁴ Ibid [18].

¹¹⁵ Ibid.

¹¹⁶ Ibid [20].

¹¹⁷ Ibid.

¹¹⁸ Ibid [21].

¹¹⁹ Ibid [22].

¹²⁰ Ibid [25].

¹²¹ Ibid [26] and [27].

responsible ship owners and operators would report the offence, unscrupulous ship operators will not feel so disposed. This conclusion becomes even more acute when one anticipates that many of these offenders are foreign operators with no direct connections to New Zealand. Consequently, they risk little damage to their business reputation if caught offending. It makes too much financial sense to remain quiet when fines remain as low as NZD 10 000 for the failure to report an illegal discharge. This is particularly so when it is recognised that those who do report their offending expose themselves to a possible maximum penalty of NZD 200 000 and clean-up costs which can reach into the millions. This demonstrates that the fines for the failure to report pollution offences promote a culture of concealment which in turn reduces the effectiveness of the MTA in inhibiting marine pollution. The risks associated with failing to report a marine pollution incident are heavily outweighed by the ability to avoid penalties for causing oil discharges and the associated clean-up costs. Furthermore, the penalties for marine pollution offences themselves fail to reflect the gravity of the offending. Fines are required to send a deterrent message to offenders that all marine pollution will not be tolerated. Unfortunately, the current regime fails to deliver on this account as it only deters offenders from reporting pollution offences.

Furthermore, the decision raises concerns in regard to the reduction in fines where there are clean-up costs. While reductions in fines may be reasonable in some circumstances, this approach should not represent the general rule.¹²² It may be reasonable where the clean-up costs are disproportionately severe and the offence does not warrant censure; however, it is a moot point whether defendants in morally culpable circumstances should be given a lighter fine because their offending has caused their own impecuniosity. This reflects principle 16 of *The Rio Declaration on Environment and Development* which embodies the ‘polluter pays’ approach.¹²³ Despite this declaration, a contrary view has been adopted in Canada, where it has been held that clean-up costs are always relevant in imposing fines as the clean-up costs provide specific and general deterrence.¹²⁴ This approach has since been adopted by a full New Zealand High Court in *Machinery Movers* which involved a pollution offence on land.¹²⁵ Although, doubts have been raised concerning the applicability of this principle in marine pollution offences.¹²⁶ This is because most ship-owners are indemnified by P&I Clubs which often foot clean-up costs. Consequently, as a general rule, concessions should not be made for offenders facing substantial clean-up expenses for marine pollution offences they themselves have created. Only where the defendant’s behaviour is irreproachable and their response immediate should reductions be made.¹²⁷ In reducing fines, the courts are compromising the deterrent message of criminal penalties which serve a wholly separate function to remedial clean-up costs.

4.1.2 *R v The Tahkuna*

While *R v The Tahkuna* is concerned with the *Canada Shipping Act 1985* (CAN), it remains invaluable for comparative purposes as it reflects the Canadian sentencing approach that is still applied today.¹²⁸ Furthermore, it deals with a similar spill volume as *Australia Direct*. In this case the *Tahkuna* was being re-fuelled at wharf when 1 000 litres (one cubic metre) of fuel spilled into the ocean through an open tank valve.¹²⁹ The vessel was charged under s 664 of the CSA and a fine of CAN 20 000 was imposed despite the maximum penalty of CAN 250 000 being available.¹³⁰ Upon sentencing, Thompson J identified that the relevant factors to be taken into consideration when sentencing were to be found under s 664(2) of the CSA:¹³¹ These included: the harm or risk caused by the offence, the costs of clean-up, the best available mitigation measures, remedial action taken by the offender, the timeliness of reporting, whether the offence was deliberate or inadvertent, the incompetence or lack of concern of the offender, any precautions taken by the offender to avoid the offence, whether an economic benefit was gained, and the offending history of the accused.¹³² His Honour then remarked that the overriding objective of sentences was to act as a deterrent both specifically and generally.¹³³ Following this, Thompson J took into account the mitigating and aggravating factors as well as the need to send a deterrent

¹²² Ibid [8].

¹²³ *Machinery Movers* [1994] 1 NZLR 492, 502.

¹²⁴ *R v Bata Industries Ltd* (1992) 9 OR (3d) 329; 7 CELR (NS) 293.

¹²⁵ *Machinery Movers* [1994] 1 NZLR 492, 505.

¹²⁶ See also *Canterbury Regional Council v Sanford Ltd* (Unreported, CRI-2012-076-001288, District Court of Christchurch, Kellar J, 24 April 2013) [22].

¹²⁷ *Southern Storm (2007) Limited v Nelson City Council* (Unreported, CRI-2009-042-2680, High Court of Nelson, Ronald Young J, 15 December 2010) (*‘Southern Storm’*) [48].

¹²⁸ *R v The Tahkuna* (Unreported, Supreme Court of Newfoundland and Labrador, Thompson J, 4 March 2002) (*‘The Tahkuna’*).

¹²⁹ Ibid [4].

¹³⁰ Ibid [7].

¹³¹ These relevant considerations are now found under *Canada Shipping Act 2001* (CAN) s191(4).

¹³² *The Tahkuna* (Unreported, Supreme Court of Newfoundland and Labrador, Thompson J, 4 March 2002) [11].

¹³³ Ibid [12].

message, holding that a CAN 20 000 fine was appropriate in the circumstances.¹³⁴ This sentence lends considerable support to the decision of *Australia Direct*, as the approach and sentences imposed are complementary of one another. However, *R v The Tahkuna*, like *Australia Direct*, failed to send a clear message to offenders that marine pollution offences will not be tolerated. The low fines were viewed by many in the shipping industry as a license for offending, which prompted the Canadian government to make numerous amendments to the CSA, including an increase in the maximum penalties. Unfortunately, the New Zealand legislature has not revised the maximum penalties under the MTA since its inception and when they did revise the penalties under the RMA they did not increase the penalties to the same extent as Canada.

4.1.3 Morrison v Defence Maritime Services Pty Ltd

Australia Direct can be juxtaposed with the New South Wales decision of *Morrison v Defence Maritime Services Pty Ltd*.¹³⁵ In this case the owner and master of the *Seahorse Horizon* both pleaded guilty to an offence against s 8(1) of the *Marine Pollution Act 1987* (NSW). The maximum penalties for this offence were recently increased to AUD 500 000 for an individual and AUD 10 000 000 for a body corporate. Each defendant was found guilty of illegally discharging an estimated five to fifteen litres of oil into the Sydney Harbour.¹³⁶ The main points of interest in the case were the relevant sentencing considerations and the discussion concerning maximum penalties. Biscoe J stated that the substantial increase in penalties that occurred in November 2002 reflected a legislative intention to incentivise masters and owners of vessels to comply with the pollution provisions.¹³⁷ It was further observed that fines needed to be severe enough to have a real financial impact on corporate offenders.¹³⁸ His Honour then went on to identify relevant factors to be taken into consideration when sentencing. These were to be found under s 21A(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which included: the damage caused, motivations behind the offence, previous record and good character, likelihood of reoffending, remorse and assistance given, guilty pleas, and whether precautionary steps had been taken.¹³⁹

Biscoe J held that because the pollution offence was: accidental, caused minor damage, there was no previous history of offending, the spill was reported, the defendants were unlikely to reoffend, there was remorse and contrition shown, and an early guilty plea was entered, an AUD 30 000 fine for the Master and a AUD 35 000 fine for the owner would effectively deter future offences.¹⁴⁰ Despite the spill being relatively modest, his Honour gave effect to parliaments intentions and imposed adequately severe penalties, demonstrating that any volume of oil spilled would not be countenanced. To put this into context, five cubic metres of bilge contents were spilled by *Australia Direct*, in contrast to the estimated maximum of fifteen litres (0.015000 cubic metres of oil) spilt from the *Seahorse Horizon*. Yet, the master and owner of the *Seahorse Horizon* were fined a total of AUD 65 000 in comparison to the NZD 60 000 imposed in *Australia Direct*. This is made even harder to explain when one recalls that in *Australia Direct* NZD 10 000 of this fine was imposed for the failure to report the offence. These decisions are only comprehensible when considered in isolation and with regard to the respective maximum penalties under the particular Acts. However, the fines imposed in New Zealand are still concerning when one recognises that the courts in New Zealand and Australia are both taking into account similar sentencing considerations and more importantly, both courts are motivated by the same objectives of deterrence and denunciation. Clearly, there is a need to increase the maximum penalties in New Zealand to reflect the gravity of the offending. This is even more pressing following the increase in penalties under the *Marine Pollution Act 1987* (NSW) in 2002.¹⁴¹ These amendments were introduced as the New South Wales Legislative Council believed that the previous maximum penalties were failing to sufficiently deter marine pollution.¹⁴² This speaks volumes when the maximum penalties under the MTA (NZ) remain lower than the levels in New South Wales in 1995.

4.2 Evidential Difficulties

Before proceeding to the case law dealing with larger oil spills it is important to recognise the evidential difficulties faced where the spills are not obvious or catastrophic. In these cases, the successful regulation of

¹³⁴ Ibid.

¹³⁵ *Morrison v Defence Maritime Services Pty Ltd* [2007] NSWLEC 421 (18 July 2007) ('*Defence Maritime Services*').

¹³⁶ Ibid, [1].

¹³⁷ Ibid [39].

¹³⁸ *Filipowski v Magnavia Schiffahrtsgesellschaft Mbh & Co Kommanditgesellschaft* [2007] NSWLEC 404 (5 July 2007).

¹³⁹ *Defence Maritime Services* [2007] NSWLEC 421 (18 July 2007) [41].

¹⁴⁰ Ibid [41]-[48].

¹⁴¹ *Marine Legislation Amendment (Marine Pollution) Act 2002* (NSW) Sch 1.

¹⁴² *Newcastle Port Corporation v MS Magdalene Schiffahrtsgesellschaft MBH* [2013] NSWLEC 210 (11 December 2013) [224] ('*Newcastle Port Corporation*').

marine pollution is heavily dependent on individuals reporting their own offences. Unfortunately, only the environmentally responsible ship-owners and operators are likely to report illegal discharges. Consequently, there is a pressing need for penalties to adequately deter offenders from remaining silent and failing to report their offences. This necessity is further crystallised by the extreme difficulty in drawing a sufficient connection between a discharge and a particular ship. In *Northern Regional Council v Qiang* these difficulties prevented a successful conviction.¹⁴³ In this case it was alleged that a harmful substance was discharged into the ocean from the *MV Eastern Forest*, a Hong Kong registered vessel captained and crewed by Chinese nationals.¹⁴⁴ In addition, it was alleged by the Northland Regional Council that there was a failure to report the discharge of the harmful substance.¹⁴⁵ The defendants denied any illegal discharge and therefore they claimed that there was no failure to report.¹⁴⁶ Evidence relied upon included eye witness observations, evidence of council officers who boarded the vessel, expert scientific evidence and aerial surveillance showing a slick of 4 or 6 kilometres long and between 400 and 500 metres wide in the same area where the suspected vessel had been.¹⁴⁷

Despite eye witness evidence putting the discharge and the *MV Eastern Forest* within the same vicinity at the same time, due to the lack of an evidential connection between the two, and competing expert evidence, the offence went unpunished.¹⁴⁸ These evidential difficulties further illustrate the need to improve surveillance measures and for increased penalties for the failure to report illegal discharges. Marine pollution regulation is heavily dependent upon self-incrimination and resultantly, offenders must be incentivised into reporting marine pollution offences. Therefore, fines for the failure to report should be greater than fines for the discharge offence itself. If fines for failing to report were at this deterrent level, evidential difficulties would lessen considerably due to increased levels of reporting. The need to revise fines is made patently clear through cases such as *Southern Storm (2007) Limited v Nelson City Council*.¹⁴⁹ In this case Southern Storm was fined a trifling NZD 10 500 for the failure to report two illegal discharges of oil.¹⁵⁰ This was despite Maritime New Zealand inspectors discovering ‘a concealed piping arrangement aboard the *Oyang 75* that allowed unfiltered bilge effluent, containing oil, to be discharged directly into the sea when a hidden pump switch was turned on’.¹⁵¹ The clandestine and well-designed apparatus evidently served to avoid discharge standards on a regular basis and these activities will continue unrelentingly until fines adequately deter this type of offending. This candidly demonstrates the deceptive activities being engaged in by vessels plying New Zealand waters. Therefore, harsher fines for marine pollution offences and the failure to report such offences need to be adopted along with provisions that reward whistle blowers if the MTA is to effectively inhibit marine pollution.

4.3 A New Sentencing Approach

While the aforementioned cases illustrate that the current regime fails to adequately deter marine pollution offences, these problems were only exacerbated with the introduction of the *Sentencing Act 2002* (NZ). The Sentencing Act ushered in a modified approach to sentencing as alluded to in *Maritime New Zealand v Prosafe Production Services PTE Ltd*.¹⁵² Although the case primarily focuses on the complications of a sentencing model based on oil spill volumes, it is instrumental in demonstrating the revised approach following the introduction of the *Sentencing Act*.¹⁵³ In the decision, Thorburn J states that it is established practice that the provisions of the *Sentencing Act* apply to the MTA.¹⁵⁴ Accordingly, the courts are required to consider the wide array of factors outlined in the Sentencing Act.¹⁵⁵ This approach has since been reaffirmed by Wolff J in *Maritime New Zealand v Balomaga* where his Honour held that the provisions of the *Sentencing Act* apply notwithstanding that not all of the ‘the purposes, principles or factors set out in the Act are relevant in environmental cases’.¹⁵⁶ Consequently, the current approach to be adopted by the courts reflects an amalgamation of the factors as set out in *Machinery Movers* and applied in *Australia Direct*, and the Sentencing Act.¹⁵⁷ While this development may appear immaterial, the implications can be far-reaching. For example,

¹⁴³ *Northern Regional Council v Qiang* (Unreported, CRN-88007931-7939, District Court of Whangarei, Whiting J, 5 April 2001).

¹⁴⁴ *Ibid* [3].

¹⁴⁵ *Ibid* [4].

¹⁴⁶ *Ibid* [5].

¹⁴⁷ *Ibid* [16].

¹⁴⁸ *Ibid* [39].

¹⁴⁹ *Southern Storm* (Unreported, CRI-2009-042-2680, High Court of Nelson, Ronald Young J, 15 December 2010).

¹⁵⁰ Maritime New Zealand ‘Fine sends clear message to polluters’ (2013) 43 *Safe Seas Clean Seas* 5, 5.

¹⁵¹ *Ibid*.

¹⁵² *Maritime New Zealand v Prosafe Production Services PTE Ltd* (Unreported, CRI-2008-043-002447, District Court of New Plymouth, Thorburn J, 7 July 2009) (*Prosafe Production Services*).

¹⁵³ *Ibid* [14].

¹⁵⁴ *Ibid* [29].

¹⁵⁵ *Ibid* [32].

¹⁵⁶ *Maritime New Zealand v Balomaga* (Unreported, District Court of Tauranga, Wolff J, 25 May 2012), as cited in Teresa Weeks and Amanda Stoltz ‘Sentencing for the Rena disaster: Just a drop in the ocean?’ (2013) 10 *Brookers Resource Management Bulletin* 5, 7.

¹⁵⁷ *Ibid*.

Thorburn J identifies the pressing need in this area of the law to assertively denounce and promulgate a message of deterrence.¹⁵⁸ However, the *Sentencing Act* constrains the courts from imposing severe penalties for minor offences despite the zero-drop policy that the MTA strives to give effect to.

4.3.1 *Maritime New Zealand v Daina Shipping Company*

The *Rena* illustrates impeccably the inherent contradiction between the regimes when sentencing. While an estimated 350 tonnes of oil was discharged from the *Rena* into the sea, because the Judge had to leave room for the most catastrophic of cases, Wolff J imposed a fine of NZD 300 000.¹⁵⁹ This sentence was handed down despite the maximum fine available of NZD 600 000 under the RMA.¹⁶⁰ While the decision was well reasoned, his Honour was inhibited from imposing a harsher fine due to the principles of the *Sentencing Act*,¹⁶¹ demonstrating how the *Sentencing Act* frustrates the objectives of the MTA and the RMA. While judges must have regard to the size of the spill, the extent of culpability, and the value of the environment effected when determining the quantum of fines, these factors are ultimately at the mercy of the *Sentencing Act*.¹⁶² Penalties at the current levels continue to reinforce the idea that the fines are a mere license for offending. Even though deterrence and denunciation were identified by Wolff J as the relevant purposes of the *Sentencing Act*, the inherent contradictions between the regimes prevented these principles from being adequately expressed.¹⁶³ As Wolff J noted, it is of paramount importance to send a deterrent message to the individual, but also to potential offenders.¹⁶⁴ However, the imposition of a NZD 300 000 fine does not send the required message of deterrence when many international corporations can pay these fines without batting an eyelid. As Teresa Weeks and Amanda Stoltz allude to, the NZD 300 000 fine was a drop in the ocean compared to costs of clean-up which reached well into the millions.¹⁶⁵

4.3.2 *Filipowski v Fratelli D'Amato*

The case of *Filipowski v Fratelli D'Amato* presents striking similarities to the *Rena* disaster in terms of the volume of oil spilt and the damage to the marine environment, thus rendering the decision favourable to comparison.¹⁶⁶ On 3 August 1999, the vessel *Laura D'Amato*, while discharging its cargo, lost 294 000 litres (294 tonnes) of Murban oil into Sydney Harbour.¹⁶⁷ The Owner, Chief Officer, and the Master were all charged for an offence against s 27(1) of the *Marine Pollution Act 1987* (NSW). At the time, under the New South Wales legislation the maximum penalties for a natural person were AUD 220 000 and AUD 1.1 million for a body corporate.¹⁶⁸ The Court remarked that the adoption of strict liability and substantial maximum penalties showed a clear intimation that marine pollution was a serious offence.¹⁶⁹ While accepting that the incident was uncharacteristic of the defendants, Talbot J held that the Chief Officer had not followed good marine practice in failing to properly test the sea chest valves which caused the escape of oil.¹⁷⁰ Like the *Rena*, widespread and serious harm resulted from the offence, with complaints being made throughout the Sydney metropolitan area about noxious smells of oil and gas, which even caused the suspension of a performance in the Sydney Opera House.¹⁷¹ Despite this, his Honour recognised that the offence was not at the top of the scale and therefore, as in the *Rena*, room had to be left for more serious offences.¹⁷² Nonetheless, as the *Marine Pollution Act* demanded substantial penalties to deter future offending the owner was fined AUD 510 000.¹⁷³ This contrasts sharply with the AUD 300 000 fine imposed on the owners of the *Rena* despite less oil being spilled. While Talbot J was precluded from imposing the maximum penalty, the upper limit allowed him to impose a fine which was close to the maximum penalty available under New Zealand law.

¹⁵⁸ *Prosafe Production Services* (Unreported, CRI-2008-043-002447, District Court of New Plymouth, Thorburn J, 7 July 2009) [37].

¹⁵⁹ *Maritime New Zealand v Daina Shipping Company* (Unreported, CRI-2012-070-001872, District Court of Tauranga, Wolff J, 26 October 2012) ('*Daina Shipping Company*') [17].

¹⁶⁰ *Ibid* [5].

¹⁶¹ Bevan Marten 'Limitation of Liability in Maritime Law and Vessel-Source Pollution: A New Zealand Perspective' [2013] *New Zealand Law Review* 199, 207.

¹⁶² *Ibid* 208.

¹⁶³ Weeks and Stoltz, above n 156, 5.

¹⁶⁴ *Daina Shipping Company* (Unreported, CRI-2012-070-001872, District Court of Tauranga, Wolff J, 26 October 2012) [13].

¹⁶⁵ Weeks and Stoltz, above n 147, 7.

¹⁶⁶ *Filipowski v Fratelli D'Amato* [2000] NSWLEC 50 (16 March 2000).

¹⁶⁷ *Ibid*, [6].

¹⁶⁸ *Ibid* [90].

¹⁶⁹ *Ibid* [94].

¹⁷⁰ *Ibid* [60].

¹⁷¹ *Ibid* [65]-[72].

¹⁷² *Ibid* [99].

¹⁷³ *Ibid* [127].

4.3.3 Newcastle Port Corporation v MS Magdalene

Interestingly, following *D'Amato* several inquiries were made into the regulation of marine pollution offences and as a result, the penalties under the *Marine Pollution Act 1987* were revised substantially.¹⁷⁴ The increases intimated a clear expression by parliament that the current penalties were failing to adequately deter oil spills.¹⁷⁵ These amendments can be seen in operation in *Newcastle Port Corporation v MS Magdalene* where the ship-owners were fined AUD 1.2 million for breaching s 8(1) of the Act.¹⁷⁶ In the course of de-ballasting, *Magdalene* discharged into Newcastle Harbour 72 000 litres of heavy fuel oil.¹⁷⁷ Despite acknowledging that the offence was not as serious as *D'Amato* in volume or damage caused, Sheahan J found AUD 1.8 million to be an appropriate starting point.¹⁷⁸ However, due to: an early guilty plea, the unlikelihood of reoffending, the cooperation and assistance provided, AUD 1.7 million clean-up costs paid by the defendants, and genuine contrition and remorse being shown, the penalty was reduced to AUD 1.2 million.¹⁷⁹ This penalty sends an extremely strong message that no amount of oil spilt will be countenanced. His Honour emphasized that fines need to have a strong financial impact on the offenders to ensure that future incidents are avoided. With fines at these levels, the New South Wales government is encouraging ship owners and their masters to take every precaution available to protect the marine environment.¹⁸⁰ Unfortunately, the same cannot be said for New Zealand. The fine imposed for the *Magdalene* was four times that imposed for the *Rena* disaster which has been labelled as the greatest environmental disaster in New Zealand's history. This is disturbing when one considers the environmental damage caused and the culpability of the offenders in each case. A stronger case could not be made for similar levels of penalties to be adopted in New Zealand. Only with an increase in maximum penalties will the New Zealand legislature provide the requisite incentive to comply with the MTA and RMA.

4.3.4 R v The CSL Atlas

While the case of *R v The CSL Atlas* does not lend itself to a direct comparison to the *Rena* and *Laura D'Amato* disasters, as the spill is comparatively smaller, it is valuable in the sense that it represents a break from the traditional deterrence centred approach towards marine pollution. Although the case still has strong deterrence ideologies resonating through the judgment, the Judge also incorporates a creative sentencing approach in his decision. Following the identification of a 15 metre wide and 23 nautical mile long oil slick, the Bahamian registered vessel *CSL Atlas* was summarily convicted of an offence against s 664 of the CSA.¹⁸¹ Evidence indicated that the OWS was not operating to the required specifications which resulted in the discharge of prohibited quantities of oil.¹⁸² After assessing the mitigating and aggravating factors of the case, the Judge discussed the increase in penalties emerging in the case law. It was stated that this was due to an increasing awareness that previous fines were failing to send the required deterrent message.¹⁸³ For these reasons, Sherrar J found that a CAN 125 000 fine was required to provide a message of denunciation and deterrence. Though, what is significant about the decision is that the fine was divided into two components pursuant to s 664(1)(d) of the *Canada Shipping Act 2001* (CAN). Under this provision the Court was able to require the offender to pay an amount for the purpose of conducting research into the ecological use and disposal of the pollutant in respect of which the offence was committed.¹⁸⁴ Consequently, from the CAN 125 000, the Court ordered that the defendant pay \$50,000 of this into a research fund for the benefit of the affected community.¹⁸⁵ This creative sentencing model serves simultaneous and complementing functions as the fine not only deters but it also serves educative purposes. Academics have strongly supported this approach, claiming that the affected community receives greater value from creative sentencing as the funds are used for local research rather than being diverted to the Crown's coffers.¹⁸⁶ This approach is quite appealing for New Zealand considering the limited research into the effects of marine pollution affecting our waters.

¹⁷⁴ *Newcastle Port Corporation* [2013] NSWLEC 210 (11 December 2013) [223].

¹⁷⁵ *Ibid* [131]-[245].

¹⁷⁶ *Ibid* 210.

¹⁷⁷ *Ibid* [25].

¹⁷⁸ *Ibid* [249].

¹⁷⁹ *Ibid* [279].

¹⁸⁰ *Ibid* [224].

¹⁸¹ *R v The CSL Atlas* (Unreported, Nova Scotia Provincial Court, Sherrar J, 6 January 2003) ('*The CSL Atlas*') [2].

¹⁸² *Ibid*.

¹⁸³ *Ibid*.

¹⁸⁴ *Canada Shipping Act 2001* (CAN) s664(1)(d).

¹⁸⁵ *The CSL Atlas* (Unreported, Nova Scotia Provincial Court, Sherrar J, 6 January 2003) [4].

¹⁸⁶ Cecily Y Strickland and Scott Miller, 'Creative Sentencing, Restorative Justice and Environmental Law: Responding to the Terra Nova FPSO Oil Spill' (2007) 30 *Dalhousie Law Journal* 547, 566.

5 Future Directions

5.1 Criminological Theory

This paper suggests that the current regime fails to effectively inhibit marine pollution, so what can be done? In attempting to elucidate some potential answers to the problem of marine pollution, the following discussion will draw upon the criminological theories of deterrence, reintegrative shaming, and incapacitation. However, before making some recommendations, recognition must be given to the underlying social, political and economic constraints faced by regulatory bodies attempting to eliminate oil pollution.¹⁸⁷ The excessive reliance on international shipping for commerce and trade, and the continued recognition of flag State sovereignty limits the policies that can be implemented under the MTA. Furthermore, the fact that corporate crime still enjoys a special status in contrast to ‘blue collar’ crime continues to hinder the regulation of marine pollution.¹⁸⁸ ‘White collar’ crime evades the criminal justice system in many respects as it is exposed to far less surveillance and policing.¹⁸⁹ And, even when corporations are found to have committed offences, they are often punished with administrative or civil law penalties.¹⁹⁰ These are only a few of the constraints lurking behind marine pollution regulations and consequently, it is important to keep these in mind when offering any future solutions.

5.2 Deterrence

The criminological theory of deterrence builds upon classical theory, arguing that individuals make rational, self-interested choices to commit crime.¹⁹¹ Where constraints against crime are insignificant compared to the motivations, crime is more likely to occur.¹⁹² While studies initially confirmed that offenders are primarily responsive to the likelihood of detection and the severity of the punishments that could follow, recent studies have since disproven this premise.¹⁹³ Rather, studies have shown that there is no connection between the severity of punishment and the reduction in crime.¹⁹⁴ In fact, several studies have shown that more severe punishments increase the chance of repeat offending.¹⁹⁵ Despite this evidence, there remains a strong belief that deterrence in the form of adequately severe penalties is the most effective tool for preventing marine pollution.¹⁹⁶ This explains why New Zealand, Australia, and Canada continue to adopt deterrence ideologies in their marine pollution regimes. Therefore, solutions coloured by deterrence theory warrant further treatment as the model continues to enjoy a stronghold in contemporary law.

5.2.1 Harsher fines?

National and international calls for the adoption of harsher criminal penalties have continued unabated for the last few decades. Despite these calls, States remain apprehensive about enforcing stricter penalties. This is potentially due to the widely divergent ways in which vessel-source pollution can occur, which in turn affects the culpability of offenders.¹⁹⁷ This possibly explains why penalties and criminal charges have been relatively modest in New Zealand in spite of the alarming need to deter marine pollution offences. Academics argue that harsher fines have the potential to deter offending, but also to incentivise ship-owners into adopting programmes that will reduce the prospects of future pollution incidents.¹⁹⁸ The regulation of marine pollution presents an anomaly though, as it is essentially a self-regulated crime. The requirement to report illegal discharges places the onus on offenders to criminalise one’s own actions. This seems paradoxical as most offenders are unlikely to report their own illegal discharges only to face severe penalties. Therefore, fines for the failure to report should be harsher than the fines for the illegal discharge itself in order to provide the required

¹⁸⁷ Peter Cleary Yeager and Sally S Simpson, ‘Environmental Crime’ in Michael Tonry (ed) *The Oxford Handbook of Crime and Public Policy* (Oxford University Press, 2011) 325, 342.

¹⁸⁸ Dave Whyte, ‘Regulation and Corporate Crime’ in John Muncie and David Wilson (eds) *Student Handbook of Criminal Justice and Criminology* (Routledge, 2004) 133, 133.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid 134.

¹⁹¹ Francis T Cullen and Robert Agnew (eds), *Criminological Theory: Past to Present: Essential Readings* (Oxford University Press, 3rd ed, 2006) 5.

¹⁹² Robert Agnew, ‘Why Criminals Offend: A General Theory of Crime and Delinquency’ in Francis T Cullen and Robert Agnew (eds) *Criminological Theory: Past to Present: Essential Readings* (Oxford University Press, 3rd ed, 2006) 592, 593.

¹⁹³ Mark Cohen, ‘Oil Pollution Prevention and Enforcement Measures and their Effectiveness: A Survey of Empirical Research from the US’ in Michael Faure and James Hu (eds) *Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the US* (Kluwer Law, 2006) 25, 27.

¹⁹⁴ Cullen and Agnew, above n 191, 408.

¹⁹⁵ Ibid 405.

¹⁹⁶ Sophia Kopela ‘Civil and Criminal Liability as Mechanisms for the Prevention of Oil Marine Pollution: The *Erika* Case’ (2011) 20(3) *Review of European Community and International Environmental Law* 313, 313.

¹⁹⁷ De La Rue and Anderson, above n 6, 1073.

¹⁹⁸ Ibid.

deterrent effect. Furthermore, reporting should be incentivised in two additional ways. Firstly, New Zealand should adopt similar provisions to the United States and reward whistle blowers who report marine pollution offences.¹⁹⁹ An example can be found in *United States v Hal Beecher BV* where the assistant engineer was awarded USD 500,000 for reporting that fellow crew had illegally discharged oil bilge water overboard.²⁰⁰ Secondly, fines for illegal discharges should be reduced substantially for those who expediently report pollution incidents in order to reduce the environmental damage.

While deterrence theory and the associated increase in fines offers some potential solutions to the regulation of marine pollution, it is not an all-encompassing resolution. The risk of insolvency and general notions of fairness precludes governments from adopting draconian policies and implementing excessively severe penalties.²⁰¹ Therefore, alternative criminological theories must be given adequate consideration and application. Furthermore, one must remember that deterrence can also be attained through the adoption of social and political policies that have regard to the 'motivations and incentives of both polluters and enforcement agencies'.²⁰² For example, the lack of accountability and responsibility felt by foreign vessel operators in foreign waters needs to be addressed in innovative ways to ensure a culture of responsibility is fostered. Publication of pollution offences should be coupled with criminal sanctions to engage the public and illustrate the abhorrence felt for this type of offending.²⁰³ This will increase awareness among society whilst posing a serious threat to the image of environmentally conscious corporations. Furthermore, in disclosing offences publicly, the media can create ties between the offending vessel and the State affected, which in turn will promote accountability.²⁰⁴

5.3 Reintegrative Shaming

In contrast to deterrence theorists, John Braithwaite argues that tools of shaming are the most effective means of social control that can be used to reduce crime.²⁰⁵ Reintegrative shaming theory claims that individuals are more receptive to shaming than formal punishment due to the socially attuned consciences shaped by society.²⁰⁶ Braithwaite employs deterrence research to demonstrate that informal sanctions have a far greater effect on deviance than formal legal sanctions.²⁰⁷ This he claims is 'because repute in the eyes of close acquaintances matters more to people than the opinions or actions of criminal justice officials'.²⁰⁸ Braithwaite relies heavily on the idea that conscience is a powerful tool of control in contrast to punishment.²⁰⁹ Shame deters criminal behaviour because individuals are dissuaded from committing crimes when social disapproval will follow.²¹⁰ Furthermore, shaming not only deters offenders from repeat offending through social shaming processes but it also creates a social conscience within individuals which internally deters them from committing crime in the first place.²¹¹

While shaming holds great promise when dealing with individuals, the applicability of this approach is moot when dealing with foreign offenders, particularly when they are corporations. This is largely due to the ownership and management structures that underpin the shipping industry. However, this can be remedied to some extent by shaming not only the individual, but also the company they represent.²¹² When shaming is directed at an individual and their company, the collective is put on warning that they have failed to meet their social obligations to the community.²¹³ This reflects on the collective as well as the individual which has proven to be exceptionally effective in reducing crime. White collar criminals have proven to be highly deterrable through shaming as their respectability and image is deemed fundamental to their corporation.²¹⁴ Therefore,

¹⁹⁹ New Zealand already has a whistle blowing provision under s 259 of the *Fisheries Act 1996* (NZ), yet no similar provision exists under the *Maritime Transport Act 1994* (NZ).

²⁰⁰ *United States v Hal Beecher BV* (D. Alaska 1998) (No. A-98-108-CR (HRH)), as cited in Dickman, 'Recent Developments in the Criminal Enforcement of Maritime Environmental Laws', above n 1, 19.

²⁰¹ Cohen, above n 193, 31.

²⁰² *Ibid.* 36.

²⁰³ *Ibid.* 37.

²⁰⁴ *Ibid.*

²⁰⁵ John Braithwaite, 'Crime, Shame, and Reintegration' in Francis T Cullen and Robert Agnew (eds) *Criminological Theory: Past to Present: Essential Readings* (Oxford University Press, 3rd ed, 2006) 277, 278.

²⁰⁶ Cullen and Agnew, above n 191, 6.

²⁰⁷ Braithwaite, above n 205, 69.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.* 71.

²¹⁰ *Ibid.* 75.

²¹¹ *Ibid.*

²¹² *Ibid.* 83.

²¹³ Braithwaite, above n 205, 280.

²¹⁴ Braithwaite, above n 207, 73.

society needs to demonstrate that corporate marine pollution will not be tolerated.²¹⁵ Such an instance of corporate shaming can be found in the Canadian case of *R v Bata Industries Ltd* where the defendants were ordered to publish on the front page of the Bata newsletter, for national distribution, the facts leading to the conviction of the company and the penalties that ensued.²¹⁶ This decision vividly demonstrates the appeal of shaming tools for the regulation of marine pollution. Not only does this approach appease advocates who claim that environmental offences should not be subject to criminal liability, it also includes society within the regulation of marine pollution which in turn creates links between the offender and the affected community. However, where this fails to work – particularly where the corporate offender is foreign – more formal punishments should be implemented.

5.4 Incapacitation

The criminological theory of incapacitation has considerable potential for the regulation of marine pollution. Incapacitation is founded on the idea that simple restraint will render the offender incapable of offending again.²¹⁷ This theory assumes that offenders will continue to commit crimes regardless of penalties and the only way to reduce the total crime rate is through removing those individuals from society.²¹⁸ Incarceration need not only occur through imprisonment though, provided that barriers are erected in some form that impedes the future commission of crime.²¹⁹ This criminological theory seems quite apt for marine pollution regulation, as numerous offenders continue to commit pollution offences as the chances of detection are dismally low and the negative costs fail to adequately deter the offending. Therefore, incapacitation could be adopted as a means to reduce marine pollution offences by removing the repeat offenders from society. The main point of difference though is that the incarceration would apply to the offending vessel rather than an individual. This has numerous advantages as it does not require the detainment of an individual, which in some circumstances is precluded by the UNCLOS convention, whilst providing strong incentives for corporations to comply with pollution standards.

5.4.1 Old Path, New Direction

While a case could be made that the forfeiture of vessels is disproportionate to the offence of marine pollution, the approach is not unprecedented in New Zealand. The adoption of incapacitation practices has already been adopted under the *Fisheries Act 1996* (NZ). Under ss 255C and 255D of the *Fisheries Act*, ships used in the commission of certain fisheries offences are forfeit to the Crown, subject to two exceptions. The first is found in ss 255C(2) and 255D(2), where the court can order relief from the effect of forfeiture where there are special reasons relating to the offence which justify the court exercising its discretion.²²⁰ Alternatively, the court may order relief where it is necessary to avoid manifest injustice which has been defined as ‘clear or obvious injustice’.²²¹ These discretions afforded to the courts under the Fisheries Act demonstrate that the provisions are flexible enough to be exercised in a principled manner. The ameliorative effect of the discretionary powers address the risk of repressive sentencing whilst balancing the competing interests involved. Furthermore, it has been argued that the requirement of fairness in sentencing can be overcome by important competing interests.²²² As the ocean is communal property to be enjoyed by everyone, it must be preserved and protected. Where ship-owners or operators intentionally or recklessly pollute the marine environment, the forfeiture of their vessels seems a reasonable consequence to their offending. Additionally, a sentencing regime based on bands reflecting the seriousness of the offence, like that adopted under the *Fisheries Act*, could be adopted under the MTA to ensure that only the most serious offences expose owners to the forfeiture provisions.²²³

²¹⁵ Ibid 127.

²¹⁶ *Machinery Movers* [1994] 1 NZLR 492, 505.

²¹⁷ Andrew von Hirsch, Andrew Ashworth and Julian Roberts (ed), *Principled Sentencing: Readings on Theory and Policy* (Hart, 3rd ed, 2009) 75.

²¹⁸ John Muncie, ‘Contemporary Criminology, Crime and Strategies of Crime Control’ in John Muncie and David Wilson (eds) *Student Handbook of Criminal Justice and Criminology* (Routledge, 2004) 3, 7.

²¹⁹ von Hirsch, Ashworth and Roberts, above n 217, 75.

²²⁰ *Fisheries Act 1996* (NZ) s2 55C(2).

²²¹ *Macedonski v Ministry of Fisheries* (Unreported, High Court of Hamilton, Rodney Hansen J, 26 August 2005).

²²² Andrew von Hirsch and Andrew Ashworth, ‘Extending sentences for Dangerousness: Reflections on the Bottoms-Brownsword Model’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds) *Principled Sentencing: Readings on Theory and Policy* (Oxford University Press, 3rd ed, 2009) 85, 86.

²²³ See *Auckland Regional Council v K/S Dania Spring Antpartsselskab* (Unreported, CRI-2009-004-010567, District Court of Auckland, McElrea J, 15 March 2010) [34] where the Court adopted a sentencing approach based on bands according to the seriousness of the offence in a marine pollution case. Contrast, *Southern Storm* (Unreported, CRI-2009-042-2680, High Court of Nelson, Ronald Young J, 15 December 2010) [36] where Ronald Young J rejected this approach to sentencing based on the volume of the oil spill.

Despite initial consternation following the introduction of forfeiture provisions under the *Fisheries Act*, it has enjoyed widespread success. This reason alone justifies the legislature in adopting a similar approach under the MTA. Additionally, further evidence indicates that the threat of forfeiture serves as a strong incentive to ship-owners. The success of the MARPOL convention when introducing mandatory OWS for port entry illustrates the potential forfeiture provisions could have under the MTA. With the risk of detainment or refusal of entry into port where a ship did not satisfy the mandatory equipment standards, there was a widespread implementation of OWS. Ship-owners could not risk having their ships being detained or being refused entry into port as they needed to deliver time-sensitive goods. Thus, illustrating that with the risk of forfeiture, the MTA could introduce a huge incentive to comply with the zero discharge standards. This instrument of regulation has already been adopted in America, with vessels who fail to produce evidence of financial responsibility for any potential pollution disasters 'subject to seizure by and forfeiture to the United States'.²²⁴ This demonstrates that this approach is not unparalleled and, with the scarcity of New Zealand resources, it is likely to be the most encouraging tool in the armoury, particularly when dealing with corporate offenders with deep pockets. This approach is all the more appealing when one considers that due to the obligations under UNCLOS, New Zealand courts can only imprison foreign offenders in limited circumstances.²²⁵ This leaves fines, social condemnation or forfeiture provisions as the only real means of deterring marine pollution.

Penalties continue to be viewed as part and parcel of international shipping, prompting many States to adopt new measures. While increased fines may be effective for the smaller operators, these measures do not hold the same deterrent effect for larger corporate offenders. Studies have repeatedly, though tentatively, found that corporate deterrence is largely ineffectual in inhibiting crime.²²⁶ New measures need to be adopted in New Zealand that remove all incentive from polluting. This can be done in numerous ways, one of which is by introducing reintegrative shaming methods. Informal methods such as shaming have proven extremely successful in deterring corporations who are image conscious.²²⁷ However, where the management and ownership structures are not compatible with this approach, formal punishments should be adopted. When it is clear that an individual or corporation's conscience is beyond shaming due to their personal characteristics or due to complex ownership structures, formal punishment must be adopted.²²⁸ This can entail harsher fines, but more importantly, the forfeiture of vessels. This incapacitation will not only prevent pollution of the seas from the detained vessel but it will also send a very clear message that New Zealand waters are not to be spoiled.

6 Conclusion

The inescapable reality of marine pollution regulation is that it is principally motivated by accidental discharges of oil, particularly following devastating tanker accidents. Due to misplaced focus on accidental discharges, the measures adopted have frequently proved unsuccessful. Despite the increase in marine pollution regulation, operational discharges and tanker incidents continue unabated due to sub-standard shipping, poor surveillance measures and low prosecution rates.²²⁹ This suggests that the current regime remains ineffective on both the international and national level. Ultimately, there are two wider reasons for this result. On the national level, the MTA promotes concealment as ship owners and operators have more incentive to stay silent regarding operational discharges rather than report. On the international level, continued flag State primacy and the resulting lack of enforcement of internationally accepted standards continues to hinder the successful regulation of marine pollution.²³⁰ Only with greater enforcement measures, increased fines and alternative sentencing approaches can marine pollution regulation start making significant inroads into marine pollution offending. Increased fines, forfeiture provisions, public shaming, and whistle-blower rewards like those adopted in the United States and Canada need to be replicated in New Zealand if the MTA is to effectively inhibit marine pollution. Hopefully, with the increased scrutiny following the *Rena* disaster, the time is ripe for legislative review and a strengthening of New Zealand's marine pollution laws.²³¹

²²⁴ John E Noyes, 'Case Study of the United States of America' in Erik Franckx (ed) *Vessel-source Pollution and Coastal State Jurisdiction: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)* (Martinus Nijhoff, 2001) 357, 375.

²²⁵ *Ibid* 390.

²²⁶ Yeager and Simpson, above n 187, 335.

²²⁷ *Ibid* 336.

²²⁸ Braithwaite, above n 207, 73.

²²⁹ Khee-Jin Tan, above n 21, 5.

²³⁰ *Ibid*.

²³¹ Similar views have been expressed by Marten, above n 55, 341.