



Liability and Limits for the *Rena* Pollution Incident

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The sad fate of the *Rena* and its burden of fuel oil, containers and hazardous wastes have turned New Zealanders' minds to the consequences of the environmental disaster that is brewing off the coast of Tauranga. Who bears liability to clean up the damage and can business owners claim compensation for their loss of earnings? In this article we identify some of the key legal issues involved in cleaning up after the *Rena*.

The regulatory framework governing pollution in the marine environment principally comprises the Maritime Transport Act 1994 (MTA) and the Resource Management Act 1991 (RMA). The cost of the environmental cleanup associated with damage caused by the *Rena* can be recovered from the owners of the vessel by the Crown under section 344 of the MTA. The owner of the vessel is defined under section 222(2) of the MTA as meaning any person who is the legal or equitable owner of the ship and also any charterer, manager or operator of the ship and the other person (except the pilot) responsible for the navigation of the ship.

However, the total liability of the owners in respect of all damage and loss resulting from the *Rena* is limited under section 85 of the MTA. Limitation of liability is a standard feature of maritime law and the limits provided for under the MTA implement New Zealand's international commitments under the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC). Limitation of liability is designed to encourage ship owners to operate in the risky world of international shipping, and to ensure that those with claims against ships will have certainty that the ship owner is insured in order to provide a specific level of compensation.

The LLMC imposes overall limits on claims against ship owners for loss of life or injury, damage to property and other losses consequential to the operation of the ship or the salvage of the ship. Limitation of liability is calculated according to the type of loss and the tonnage of the vessel under section 87 of the MTA. At 37,020 gross tonnes, the owners of the *Rena* are able to limit their liability in respect of environmental damage, property damage and pure economic loss – in the form of revenue from local businesses – to NZ\$12.1 million. Only in situations where the loss, damage or injury results from a personal act or omission *intended* to cause that loss, damage or injury, or *recklessly* and with knowledge that such loss, damage or injury would probably result, is a ship owner not entitled to limit

their liability (section 85(2) MTA). It must be the owner personally, and not the master of the vessel, who has acted with intention or recklessly. Requiring proof of owner intent or recklessness is an extremely high threshold. This means that it is very difficult to break the limit on liability.¹

In addition to civil liability, criminal proceedings have been initiated against the Captain and Navigation Officer of the *Rena* under section 65 of the MTA for operating or engaging in any other act in respect of a ship “which causes unnecessary danger or risk to any other person or any property”. The maximum penalty for an individual under section 65 of the MTA is a term of imprisonment not exceeding twelve months or a fine not exceeding \$10,000 (section 65(3)(a) MTA).

Criminal proceedings can also be taken under the RMA. Section 338(1B) of the RMA stipulates that “where any harmful substance or contaminant or water is discharged in the coastal marine area [which extends to the seaward limit of the territorial sea] in breach of section 15B” of the RMA both the master *and* the owner of the ship commit an offence (section 2(1) of RMA provides that “owner” has the same meaning as set out under section 222(2) of the MTA). Liability for breach of section 15B is strict and therefore fault or recklessness need not be proven. Moreover, the penalties provided for under section 339 of the RMA are rather more stringent than under the MTA. A natural person in breach of section 15B is liable to imprisonment for a term not exceeding two years or a fine not exceeding \$300,000. A non-natural person is subject to a fine not exceeding \$600,000. All persons, on conviction, are further liable to a maximum fine of \$10,000 per day for every day the offence continues. Significantly, no person can be imprisoned for a breach of section 15B involving a foreign ship unless the Court is satisfied that the person intended to commit the offence, or the offence occurred as the consequence of a reckless act/omission, likely to have a significant or irreversible effect on the coastal marine environment.

One question which has been raised in the media is whether the liability limits provided for under the MTA can be avoided through the initiation of proceedings under the RMA. Limitation under the LLMC applies to claims “whatever the basis of liability might be”². Section 86(1) of the MTA clarifies that liability (at least in New Zealand) is limited “in respect of claims for loss or injury or damage”. Section 86(3)(d) further stipulates that the limitation of liability applies “whether the liability arises at common law or under any other enactment, and notwithstanding anything in any other enactment.”³ On the face of it, limitation as set out in the MTA is applicable to proceedings brought under the RMA for loss, injury or damage, or indeed under any other statute or under the common law of negligence. However, a *penalty* imposed on the ship owner under the MTA or the RMA as a consequence of criminal proceedings is more appropriately characterised as a sanction as opposed to a claim. As such, the imposition of financial penalties under either section 65 of the MTA or section 339 of the RMA should not be set off against the NZ\$12.1 million fund.

¹ Aleka Mandaraka-Sheppard *Modern Maritime Law* (2ed, Routledge-Cavendish, Abingdon, 2007) 891.

² Article 2(1) LLMC.

³ Section 86(4) provides for a very small number of exceptions to this general rule, including liability for the removal of wrecks that constitute a hazard to navigation under Article 110 of the MTA. However, Article 110 only applies where the owner of the hazard has not made arrangements to secure and remove the hazard and this is unlikely to apply in the case of the *Rena* where the salvors are cooperating with Maritime New Zealand.

One of the strengths of the RMA is that it permits the Environment Court to issue enforcement orders under section 314 of the Act in order to require a person to “remedy or mitigate any adverse effect on the environment caused by or on behalf of that person” (section 314(1)(c)), or to require a person to “pay money to or reimburse any other person for any [actual and] reasonable costs and expenses which that other person has incurred or is likely to incur in avoiding, remedying or mitigating any adverse effect” on the environment (section 314(1)(d)). However, in the case of a breach of section 15B of the RMA, only the Minister, the Director of Maritime New Zealand, a local authority or a consent authority can apply for an enforcement order (section 325B(2)). This remedy is therefore not available to individuals suffering property damage or local businesses. In any case, orders to remedy or mitigate the oil damage are not a practicable option given that the cleanup has been ongoing for several days under the direction of Maritime New Zealand, that the owners and their salvors are cooperating with Maritime New Zealand and that clear provision is made for the recovery of these costs under the MTA (and indeed the RMA). Moreover, it is highly likely that any direction to reimburse Maritime New Zealand or the local authorities for the environmental cleanup costs would be subject to the limitation provisions under the MTA by virtue of section 86(3)(d) of that Act.

What has been highlighted by the *Rena* disaster is a level of tension between the philosophies and approaches of the RMA and the MTA with respect to marine pollution in the coastal marine area. The aim to minimise the need to prove fault and provide for full restoration of environmental damage under the RMA contrasts somewhat uncomfortably with the emphasis on limitation of liability under the MTA. The philosophical tension between these two approaches might (at least in the first instance) benefit from some consideration prior to enactment of the recently proposed (Environmental Effects) Bill 2011.

More prosaically, this disaster has also highlighted that New Zealand’s reluctance to ratify and implement key International Maritime Organisation (IMO) liability conventions has had significant financial implications.⁴ In 2008 the Transport and Industrial Relations Select Committee considered whether New Zealand should become a party to the 1996 Protocol to Amend the LLMC.⁵ This Protocol was negotiated when it became clear that the limits in the LLMC were inadequate and did not permit appropriate compensation of claimants in the event of a maritime disaster. Although the Select Committee agreed that New Zealand should accede to the Protocol, this has not yet occurred owing to delays in drafting legislation designed to amend the MTA and implement the Protocol. This delay is highly significant in light of the *Rena* grounding. Had New Zealand implemented the 1996 Protocol, the limited liability of the owners of the *Rena* would have been increased to around NZ\$29 million.

It is also worth noting that New Zealand has not yet become a party to the International

⁴ The IMO is an intergovernmental organization established by the United Nations and tasked with maritime safety and the control of marine pollution. Most international maritime conventions, including the LLMC and Bunkers Convention, have been adopted under the auspices of the IMO.

⁵ http://www.parliament.nz/NR/rdonlyres/33AFC246-5C6D-410F-B830-C295B441098B/94265/DBSCH_SCR_4181_6373.pdf.

Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention) despite a recommendation that it do so from the Transport and Industrial Relations Select Committee in 2008.⁶ This Convention provides for strict but limited liability for damage from bunker oils (oils used for the operation and propulsion of a ship). Under this Convention New Zealand could hold the owners of the *Rena* strictly liable for the damage caused by the pollution damage (with no need to prove fault) up to the limits as provided for in the LLMC 76/96 (the 1976 LLMC as amended by the 1996 Protocol).

Finally, it is ironic that at the same time that Maritime New Zealand began to respond to the *Rena* disaster a proposal was submitted to the IMO by twenty states to increase the liability limits under the LLMC 76/96.⁷ The co-sponsors of the proposal, which include Australia but not New Zealand, argue that the liability limits under the LLMC 76/96 do not reflect the increasing costs of responding to bunker spills. In short, had the latest proposal been promoted and ratified prior to the *Rena* incident the owners would be liable for a greater amount than NZ\$29 million. It is clear in light of the *Rena* that it is in New Zealand's interest to not only ratify the 1996 Protocol to the LLMC, but to also support the proposal to increase the 1976/96 LLMC limits when it is considered by the Legal Committee of the IMO in April 2012.

⁶ http://www.parliament.nz/NR/rdonlyres/C901FD34-146E-43A8-A8CD-3EE643C293CB/94261/DBSCH_SCR_4183_6372.pdf

⁷ LEG 99/4 (11 October 2011) *Consideration of a Proposal to Amend the Limits of Liability of the Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 96), in Accordance with Article 8 of the LLMC 96.*