



CDPP

Australia's Federal Prosecution Service

**Commonwealth Director
of Public Prosecutions**

GPO Box 847, Brisbane QLD 4001
Level 20, 275 George Street
Brisbane QLD 4000

Telephone **(07) 3224 9444**
Facsimile (07) 3229 4124
www.cdpp.gov.au

Your Reference:

Our Reference:

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Mr Clinton McKenzie
General Counsel
Office of the Chief Executive Officer
Australian Maritime Safety Authority
82 Northbourne Avenue
CANBERRA ACT 2601

Dear Mr McKenzie

CDPP's view on the interpretation of section 18(1)(c) of the Maritime Safety (Domestic Commercial Vessel) National Law Act 2012

I refer to your letter date 4 April 2019. You request advice on the CDPP view of the proper interpretation of section 18(1)(c) of Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law 2012* ('the National Law'). As you note in your letter the question arose at a hearing of the Senate Standing Committee for Rural and Regional Affairs and Transport on 1 April 2019. At the hearing you said you would seek the CDPP's views on the question.

Relevant provision

Section 18(1) of the National Law provides:

18 Offences relating to contraventions of section 16 or 17

(1) A person commits an offence if:

- (a) the person does an act or omits to do an act; and
- (b) the act or omission contravenes section 16(1) or 17(1) or (2); and
- (c) the person intends the act or omission to be a risk to the safety of a person or the domestic commercial vessel concerned.

Penalty: Imprisonment for 2 years or 1,800 penalty units, or both.

This letter contains legal advice over which legal professional privilege can be claimed. Please liaise with this office prior to any decision to disclose the existence or content of this advice to a third party.

Principles of element analysis

As Chapter 2 of the *Criminal Code* provides, offences against Commonwealth law consist of physical elements and, where applicable, fault elements¹. Sometimes the law that creates an offence may provide that there are no fault elements for one or more physical elements of the offence². For present purposes, however, it is not necessary to consider offences where fault elements are not specified because the offence under consideration here is an offence that consists of physical elements with accompanying fault elements. The fault element for each physical element is ascertainable in 2 alternate ways. Either:

- the fault element will be specified in the law creating the offence; or
- if the law creating the offence does not specify a fault element for a physical element, a default fault element will apply according to rules set out in the Code.³

To apply those rules one must first ascertain the type of physical element under consideration. According to the Code physical elements are of 3 types:

- a. conduct;
- b. a result of conduct; or
- c. a circumstance in which conduct, or a result of conduct, occurs.⁴

The Code provides that in circumstances where no fault element is specified in the law creating the offence, certain 'default' fault elements apply to that element according to what types of physical element is under consideration. For example if the physical element under consideration is conduct and no fault element is specified in the section itself, the default fault element of intention will apply to that physical element.⁵

By applying this process, an offence may be broken down into its constituent physical elements. The accompanying fault elements may then be identified.

The High Court has confirmed that a fault element must always have an accompanying physical element. It is not possible for a fault element to exist without being attached to a physical element. This is because Part 2.2 the Code uses the formulation 'fault element for a physical element'.⁶

Application of element analysis to section 18(1) offence

The first physical element of the section 18(1) offence is, as per section 18(1)(a), that a person does an act or omits to do an act. This physical element is conduct.⁷

The second physical element of the section 18(1) offence is, as per section 18(1)(b), that the act or omission contravenes section 16(1) or 17(1) or (2).

¹ Code section 3.1.

² Code section 3.1.

³ Code sections 3.1, 5.1 and 5.6.

⁴ Code section 4.1.

⁵ Code section 5.6.

⁶ R v LK (2010) 241 CLR 177 at para 132.

⁷ Code section 4.1(2) definition of 'conduct'.

Having identified the physical elements, it is then necessary to consider which of the following applies to each physical element:

- is the fault element for the physical element specified in the section itself?; or
- does the law creating the offence not specify a fault element applicable to the physical element and a default fault element apply?

Section 18(1)(c) is a fault element specified in the section (i.e. in the law creating the offence). It is clear it is a fault element because it describes an intention of the person carrying out the act or omission referred to in both section 18(1)(a) and 18(1)(b). It must apply to one of those physical elements. Unfortunately it is not overtly clear which physical element the fault element in section 18(1)(c) attaches to. I consider the better view is that it applies to physical element in section 18(1)(a). That is because the physical element in section 18(1)(a) consists of the doing of an act or the omission to do an act. The fault element in section 18(1)(c) refers to the state of mind of the person doing that act or omitting to do that act. The physical element in section 18(1)(b) is more about the nature of the act or omission, namely whether it contravenes a specified provision and does not concern itself as much with the person carrying out or omitting to carry out conduct. As such the fault element in section 18(1)(c) sits more comfortably attaching to the physical element in section 18(1)(a).

One consequence of this interpretation is that there is no fault element specified in the law creating the offence for the physical element contained in section 18(1)(b). That means it is necessary to classify the physical element in section 18(1)(b) in order to work out what default fault element applies.⁸

The physical element in section 18(1)(b) is best classified as a result. The act or omission referred to in the first physical must be identifiable as a specific contravention of either section 16(1) or 17(1) or (2). For instance, a failure by a master to implement or comply with the safety management system for the vessel and for the operation of the vessel would, by virtue of section 16(2) of the National Law, be a contravention of section 16(1). This state of affairs (or 'result' of the defendant's conduct) would be sufficient to satisfy the physical element in section 18(1)(b).

Element analysis

If the above analysis is correct the elements of the offence in section 18(1) would be:

- a. D does an act or omits to do an act (conduct)

Fault: The person intends the act or omission to be a risk to the safety of a person or the domestic commercial vessel concerned (section 18(1)(c) of the National Law)

- b. The act or omission contravenes section 16(1) or 17(1) or 17(2) (result)

Fault: recklessness (Code section 5.6(2))

I note this is contrary to the analysis currently published in the section 18(1) offence guide published on the CDPP partner portal. In that analysis the fault element for the physical element in section 18(1)(a) is intention and the fault element for the physical element in section 18(1)(b) is the fault

⁸ As per Code section 5.6.

element in section 18(1)(c). As a result of this advice, the offence guide will be amended to align with the views expressed in this advice.

Ultimately, irrespective of which analysis of the offence is right, the fault element in section 18(1)(c) is applicable to a physical element of the offence. It requires proof that a specific intention by the defendant was present when the offence was committed.

Meaning of section 18(1)(c)

Given that section 18(1)(c) is a fault element, what does it require to be proved to make out its existence in any given case?

In your letter you have referred to 2 possible interpretations of the fault element in section 18(1)(c). The first interpretation is that the intention required is that the defendant did the act or omission intending that it be a risk to the safety of a person. The second interpretation, posited by Senator Patrick at the RRAT Senate Standing Committee hearing on 1 April 2109, is that all that is necessary to satisfy the fault element is proof that the person's act or omission was intentional.

The words used to describe the fault element in section 18(1)(c) go beyond mere intention to do the act or omission. If mere intention to do the act or omission was all that was intended, the section could have stopped after the word 'omission'. Alternatively, if the intention of the Legislature had been to require mere intention, the default fault elements could have been relied on and no fault element would need to have been specified in the section at all. The fact that a fault element has been specified in the section supports the argument that the fault element has content that is different from the default fault element that would otherwise be applicable.

The form of words used to describe the fault element in 18(1)(c) are unique to the National Law. Apart from section 18, the words appear in the offence provisions in sections 13, 15, 20, 22, 24 and 161 of the National Law. I have been unable to locate any similarly worded fault elements in any other Commonwealth law.

Exposure Draft

Analysis of publicly available extrinsic material may also assist in interpreting the provision. A review of the Exposure Draft of the Bill that became the National Law suggests that the form of words used in section 18(1)(c) developed during the legislative process that culminated in the enactment of the National Law in 2012. Review of the Exposure Draft for the bill reveals that the provision which became section 18(1) of the National Law was originally drafted as follows:

15 Duty of masters of domestic commercial vessels to take reasonable care for safety of persons

(1) The master of a domestic commercial vessel, other than a hire and drive vessel used wholly for recreational purposes, must, when carrying out duties as master of the vessel:

(a) take reasonable care for his or her own safety; and

(b) take reasonable care for the safety of persons who may be affected by his or her acts or omissions.

(2) The master of a domestic commercial vessel must not unreasonably place the safety of another person at risk when carrying out duties as master of the vessel.

(3) A person commits an offence if the person:

- (a) intentionally engages in conduct that contravenes subsection (1) or (2); and
- (b) is reckless as to whether the conduct is a risk to the safety of a person or the domestic commercial vessel concerned.

Penalty: 1,800 penalty units.

This is a more traditional form of criminal offence, in that the fault element of intention is attached to conduct and recklessness is specifically identified as the fault element related to the resultant consequences of the conduct.

Is it permissible to take into account the form of the Bill as it existed before an Act becomes law?

The *Acts interpretation Act* provides that:

...in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision...⁹

If it was intended for the provision operate in accordance with the second interpretation above (i.e. Senator Patrick's interpretation) one would have expected these original words or something similar to have been retained. Instead, a different approach has been taken, suggesting a different content of the fault element was intended. The fact that the Exposure Draft of the Bill had a clear separation of the intention to do the act or omission and recklessness as to whether the conduct resulted in a risk and that this form of words did not appear in the Act as passed suggests that the form eventually enacted was intended to have some operation that was different from that which originally appeared.

Explanatory Memorandum

The explanatory memorandum for the Bill that became the National Law provides some background to the consultation process that led to the enactment of the Bill:

DEVELOPMENT OF THE BILL

This Bill has been developed with the State and Territory jurisdictions to implement the decision of COAG on 19 August 2011 to create a single National Law to regulate the safety of all commercial vessel operations in Australian waters and to establish a single National Regulator for commercial vessel safety from 1 January 2013 .

Extensive consultation has been undertaken on the development of the Bill with the States and Territories, including through the Standing Council on Transport and Infrastructure (SCOTI), the Transport and Infrastructure Senior Officials Committee (TISOC), the Maritime Agencies Forum, the National Marine Safety Committee, seven workshops with jurisdiction officials and numerous discussions and correspondence with State and Territory agency contacts.

Public consultation has also informed the development of the Bill, including consultation on the Regulatory Plan from June to October 2011 (outlining the proposed elements of the Bill),

⁹ *Acts Interpretation Act 1901* section 15AB(1).

a detailed discussion paper in mid-December 2011 (providing an overview of the Bill) and the draft Bill itself (released in February 2012). Comments and feedback from 19 formal public submissions that were received on the draft Bill have been considered and incorporated into the Bill as appropriate. A report detailing the responses to these submissions (including the changes made to the Bill as a result) was also released in May 2012.

Government agencies have also been consulted on the development of the Bill, including the Department of Prime Minister and Cabinet, the Attorney General's Department, the Department of Education, Employment and Workplace Relations, SafeWork Australia, and the Australian Maritime Safety Authority.

The text of the Bill has been unanimously agreed by SCOTI at its meeting of 18 May 2012.

It may have been during the process described above that the format of the relevant section was altered from the form contained in the Exposure Draft and the form ultimately enacted in the National Law. I have been unable to locate any material from this process and have therefore not been able to refer to it in reaching the conclusion expressed in this advice. If any of that material is able to be located, I would be happy to review it.

The part of the explanatory memorandum that refers to clause 18 of the Bill merely notes that sub clauses 1, 2 and 3 of clause 18:

... provide that the master of a domestic commercial vessel is guilty of an offence if the master's action or inaction breaches sub-clauses 16(1), 17(1) or 17(2) and was intentional, reckless or negligent.

This description of the fault elements in section 18 does not provide any definitive support for either interpretation. Importantly though, it is not inconsistent with the fault element in section 18(1)(c) consisting of an intention that 'the act or omission... be a risk to the safety of the person or the domestic commercial vessel'. Such a fault element may still be described as an 'intentional' fault element.

Uncommenced National Law provisions

A review of the uncommenced provisions of the National Law also supports the view that the first interpretation above is the preferred one.

Schedule 2 of the *Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments) Act 2012* ('the Consequential Amendments Act') contains significant amendments to the National Law that have not yet commenced. In particular, section 18 is proposed to be repealed and replaced. Proposed new section 18(1) provides:

18 Offences relating to contraventions of section 16 or 17

(1) A person commits an offence if:

- (a) the person does an act, or omits to do an act, without reasonable excuse; and
- (b) the act or omission contravenes section 16(1) or 17(1) or (2); and

(c) the act or omission exposes an individual to a risk of death or serious injury or illness; and

(d) the person is reckless as to the risk to an individual of death or serious injury or illness.

Penalty:

(a) if the offence is committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking)—\$300,000 or 5 years imprisonment, or both; or

(b) if the offence is committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—\$600,000 or 5 years imprisonment, or both; or

(c) if the offence is committed by a body corporate—\$3,000,000.¹⁰

This version separates intention from the awareness of the risk and specifies that the defendant has to be reckless as to the risk. It is also suggestive that the current section 18(1)(c) operates in a way that is different from the uncommenced provision.

Conclusion

In summary, I agree with your view that section 18(1)(c) of the National Law operates to require the defendant to intend his or her act or omission and intend that the act or omission be a risk to the safety of a person or the domestic commercial vessel concerned. This interpretation is supported by:

- the plain meaning of the words;
- the legislative history including the exposure draft of the Bill that became the National Law; and
- the uncommenced provisions contained in the Consequential Amendments Act.

Please contact me if you wish to discuss this advice.

Yours sincerely

David Adsett

Deputy Director

International Assistance and Specialist Agencies

¹⁰ The EM for the Consequential Amendments Act states that the amendments contained in Schedule 2 amends general safety obligations in the National Law to align the duties with those contained in the *Work Health and Safety Act 2011* (the Model WHS laws) i.e. the changes align the offences with the Category 1, 2 and 3 offence approach contained in the *WHS Act*. As not all jurisdictions have enacted the Model WHS legislation, it was proposed that the amendments under Schedule 2 would commence when all jurisdictions have enacted the Model WHS laws. This has not yet occurred.