CRIMINAL JURISDICTION OF THE LAND AND ENVIRONMENT COURT OF NSW

Criminal negligence in the Land and Environment Court

ICAC and Local Government

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Protection of the Environment Operations Act 1997 [POEO Act]

- Chapter 5
  Part 5.2 Tier 1 offences

  s.116(1) If a person wilfully or negligently causes any substance to leak…

  s.116(2) If (a) the person in possession of the substance at the time of the leak… or (b) the owner of any container or (c) the owner of the land … or (d) the occupier of the land …
  wilfully or negligently, in a material respect, caused or contributed to the conditions that gave rise to the commission of the offence under subsection (1), that person, owner or occupier is guilty of an offence.

- EPA v Orica Australia Pty Ltd (the Nitric Acid Air Lift Incident) [2014] NSWLEC 103 per Pepper J at [127] and following :

Orica's State of Mind and the *De Simoni* Principle

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Both offences are offences of strict liability, which means that *mens rea* is not an element of the offence. However, the state of mind of Orica at the time of committing the offence is a relevant consideration when imposing a sentence. This is because a strict liability offence that is committed intentionally, negligently or recklessly will be objectively more serious than one committed accidentally (*Rae* at [42]-[43] and *Gittany* at [123]).

128

In the present case there was no question of Orica having intentionally or recklessly committed the offences with which it had been charged. Rather the issue was whether Orica had committed the offences negligently.

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However, Orica submitted that it would be an error of law to consider its state of mind in the commission of the offences because this would amount to sentencing it for a more serious offence than that with which it has been charged (*R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383 at 389).

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The submission arose in the following way. Orica has pleaded guilty to a "Tier 2" offence against s 120 of the POEOA. The more serious "Tier 1" offence, with which Orica has not been charged, is an offence against s 116 of the Act, which states:

- "116 Leaks, spillages and other escapes
- (1)If a person wilfully or negligently causes any substance to leak, spill or otherwise escape (whether or not from a container) in a manner that harms or is likely to harm the environment:
    - (a)the person, and
    - (b)if the person is not the owner of the substance, the owner,

are each guilty of an offence."

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The rule against punishment for a higher offence than that which the defendant has been charged was set out in *R v De Simoni* ("the *De Simoni* principle") per Gibbs CJ (at 389 and 392):

"However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. Section 582 reflects this principle. The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.

At common law the principle that circumstances of aggravation not alleged in the indictment could not be relied upon for purposes of sentence if those circumstances

could have been made the subject of a distinct charge appears to have been recognized as early as the eighteenth century

…

It is not only in cases in which the offence has been accompanied by circumstances of aggravation that a trial judge may be required, in sentencing, to take an artificially restricted view of the facts. This will be so also in cases where the jury's verdict is inconsistent with the view of the facts that the judge himself has formed, for the judge cannot act on a view of the facts which conflicts with the jury's verdict. However, where the Crown has charged the offender with, or has accepted a plea of guilty to, an offence less serious than the facts warrant, it cannot rely or ask the judge to rely, on the facts that would have rendered the offender liable to a more serious penalty."

132

Accordingly, a sentencing judge cannot take into account a factor which would constitute an element of a more serious offence than the one with which an offender has been charged and of which the offender has been convicted, or to which the offender has pleaded guilty (*Cassidy v R* [2012] NSWCCA 68; (2012) 220 A Crim 420 at [1]).

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An offence is more serious than another offence for the purposes of the *De Simoni* principle if it renders the offender liable to a heavier penalty than the offence for which the offender is being sentenced (*Environment Protection Authority v Snowy Hydro Limited* [2008] NSWLEC 264; (2008) 162 LGERA 273 at [147] citing *R v Booth* (NSW Court of Criminal Appeal, 30 September 1997, unreported), *Environment Protection Authority v Tea Garden Farms Pty Ltd* [2012] NSWLEC 89 at [101] and *Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani* [2012] NSWLEC 115 at [35]-[39]).

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The maximum penalty for an offence against s 116 of the Act in the case of a corporation is $5 million for an offence that is committed wilfully, or $2 million for an offence that is committed negligently (according to s 119), whilst the maximum penalty for an offence against s 120 is $1 million. The offence in s 116 is, therefore, a more serious offence than the offence to which Orica has pleaded guilty and the *De Simoni* principle therefore potentially applies.

135

The *De Simoni* principle has been applied in statutory contexts, including in the sentencing for environmental offences. In *Snowy Hydro*, Biscoe J considered the application of the *De Simoni* principle in the context of s 120 of the Act. His Honour stated that (at [148]-[149]):

- "148The principle has been applied in statutory contexts. For example, it was applied to the Criminal Code (WA) in *De Simoni* and to the Criminal Code (Tas) in Lovegrove v R [1961] Tas SR 206, which was approved in *De Simoni* at 390-391. In determining whether the *De*

Simoni principle applies in a particular statutory context, the task is to interpret the language used and not to construe the statutory provisions on the assumption that they were intended to reproduce the common law. But if the meaning of the statutory provisions is doubtful, resort may be had to the common law for the purpose of aiding their construction: *De Simoni* at 391-392.

- 149The question then is whether the *De Simoni* principle applies in the context of the POEO Act. There is appellate authority that it does. In Hardt v Environment Protection Authority (2007) 156 LGERA 337 at 348-349 [53] (NSWCCA) Giles JA (Grove and Harrison JJ agreeing) held in the context of a strict liability offence under the POEO Act, that:

  Subject to *R v De Simoni* (1981) 147 CLR 383 considerations, it is relevant to sentence for a strict liability offence or an offence with a mental element less than intention to commit the offence to consider with what intention and appreciation of the offence it was committed. Depending on the intention, the offence may be regarded as more serious."

136

His Honour concluded in *Snowy Hydro* that the *De Simoni* principle precluded the Court from considering whether the conduct of the defendant was negligent because of the more serious offence under s 116 of the Act. His Honour reasoned that ([150]-[151]):

- "150Section 241(1) of the POEO Act (set out at [135] above) does not list negligence among the matters that it mandates must be taken into consideration. However, findings adverse to an offender charged under s 120 in relation to matters listed in s 241(1) could lead the court in some circumstances to conclude that the conduct of an offender charged under s 120 was negligent. There is artificiality in the court then stopping short of describing the conduct as negligent, having regard to s 116 and the *De Simoni* principle. Nevertheless, it has come to be accepted that the application of the *De Simoni* principle means that an offender may be sentenced on the fictitious basis that a circumstance of aggravation does not exist when a trial judge would otherwise find that it did exist. In such a case, the price of the principle is an artificially restricted view of the facts. This was recognised in *De Simoni* at 389, 392. However, at a practical level, if matters listed in s 241(1) were to be decided adversely to an offender, in some circumstances the degree of aggravation may not be much greater if the offender's conduct was also described as negligent.
- 151On the basis of the *De Simoni* principle, I do not propose to entertain the question whether the conduct of Snowy Hydro was negligent."

137

Likewise, Craig J in *Tea Garden Farms* reasoned (at [101]-[102]):

- "101The defendant submits that to punish the defendant on the basis that its actions were reckless would contravene the principles enunciated by the High Court in *R v De Simoni* [1991] HCA 31; (1991) 147 CLR 383. A finding of recklessness would be tantamount to finding an element of aggravation that would warrant conviction for a more serious offence, namely an offence against s 116 of the POEO Act. That approach would offend the dictum of Gibbs CJ (Mason and Murphy JJ agreeing) in *De Simoni* at 389.
- 102I accept the submission of the defendant. While the provisions of s 116 of the POEO Act proscribe, in terms, conduct that 'wilfully or negligently causes any substance to leak, spill or otherwise escape', it seems to me that 'recklessly' causing a substance to escape is also conduct that is proscribed by the section. I would regard reckless conduct to involve a lower order of fault than 'wilful' but to involve an equivalent, if not higher order of fault than 'negligent' conduct. As conduct involving fault of the latter kind engages the provisions of s 116, it would make no sense to interpret the section as being inapplicable to conduct that was 'reckless' … "

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A similar finding was made by Sheahan J in *Chief Executive, Office of Environment and Heritage, Department of Premier and Cabinet v Powell* [2012] NSWLEC 129 at [118] (citing *Rae* at [42]-[43]) and *Queanbeyan City Council (No 3)* at [169]-[178]).

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In this case, I accept that the operation of the *De Simoni* principle prevents me from considering whether Orica acted negligently in committing the offence in contravention of s 120 of the Act by reason of the more serious offence of wilfully or negligently causing any substance to leak, spill or otherwise escape contained in s 116 of the Act.

140

However, the parties disagreed as to whether Orica's state of mind could be taken into account in relation to the breach of licence offence under s 64(1) of the POEOA. Orica submitted that its breach of licence condition under s 64(1) caused a polluting substance to "escape" to the environment and because s 116(1) of the POEOA also prohibits the escape of pollutants into the environment and is a more serious offence (maximum penalty $5 million) involving the aggravating circumstance of "wilfully or negligently" causing that escape "in a manner that harms or is likely to harm the environment", the *De Simoni* principle applied.

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The authorities are equivocal on this question. In *Environment Protection Authority v Rethmann Australia Environmental Services Pty Ltd* [2003] NSWLEC 351; (2003) 131 LGERA 422, the Court appeared to apply the *De Simoni* principle to a breach of licence (at [53] per Talbot J).

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The EPA submitted that *Rethmann* was wrongly decided on this point and relied upon several decisions of this Court that have considered, contrary to the approach in *Rethmann*, the state of mind of the offender in relation to a licence condition breach under s 64(1) of the POEOA (*Environment Protection Authority v Transpacific Industries Pty Limited; Environment Protection Authority v Transpacific Refiners Pty Limited* [2010] NSWLEC 85 at [98] and *Environment Protection Authority v Lithgow City Council* [2007] NSWLEC 695 at [35]-[39]).

143

In none of the decisions above was the issue squarely raised by the parties and thus properly considered by the Court. I agree with the submission by Orica that there is nothing in the text or context of either the POEOA or the CSPA that discloses a legislative intention to abrogate the *De Simoni* principle from theoretical application to s 64(1) of the POEOA (indeed s 21A(4) appears to embrace it).

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However, the principle has no practical application with respect to a breach of s 64(1) of the POEOA because there is no "more serious offence" of breaching a licence condition than that with which Orica has been charged and has pleaded guilty to. Accordingly, to take into account whether or not Orica breached a condition of its licence negligently is not to infringe the principle. While the *De Simoni* principle is not narrowly confined to situations where there is another specific offence in aggravated form that is otherwise identical to the offence in question, the offences must nevertheless be of the same general character. Were it otherwise, it would, given the potential breadth of the acts and omissions giving rise to the commission of an offence contrary to ss 115 and 116 of the POEOA, preclude an examination of the state of mind of an offender in most of the strict liability offences created by the POEOA.

145

In my opinion, therefore, the *De Simoni* principle does not apply to a breach of licence offence under s 64(1) of the POEOA because there is no more serious aggravated form of that general character of offence in the POEOA. Therefore it is open to me to consider whether Orica's state of mind in committing this offence was negligent.

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The EPA submitted that Orica had breached the licence condition negligently because of Orica's failure to properly implement its safety management systems and, because having identified several welds of "poor workmanship", Orica did not adequately inspect the other Air Lift welds nor question the impact of stress on the Air Lift welds. It emphasised the joint conclusion of the experts that Orica had failed to maintain its plant and equipment in a proper and efficient condition. Moreover, because Orica had previously been convicted of a breach of licence offence regarding nitric acid discharged from the Plant in 2005 it "should have had full appreciation of the risk". In other words, Orica was well aware of the risks associated with the management and

handling of dangerous chemicals at its KI premises and had been put on notice, as a result of the 2005 incident, of the particular and specific risk of discharge of nitric acid from improper management of its plant and equipment.

147

But as was stated in *Gordon Plath of the Department of Environment and Climate Change v Fish* [2010] NSWLEC 144; (2010) 179 LGERA 386 at [81], albeit in relation to an offence against s 118 of the National Parks and Wildlife Act 1974 ('the NPWA'), "in the criminal context, negligence means more than a breach of a duty of care". To amount to criminal negligence (at [81]):

" … the degree of carelessness must be such as to show such a disregard for the objects of the statute as to amount to a crime against the state (R v Bateman [1925] All ER Rep 45; (1925) 19 Cr App R 8; see also Andrews v DPP [1937] AC 576 per Lord Atkin at 583; applied in Cittadini v The Queen [2009] NSWCCA 302 at [38]-[40]). For there to be negligence, there must have been an indifference to an obvious risk (R v Taktak (1988) 14 NSWLR 226 at 247, applied in Cittadini)."

148

In my view, the EPA has failed to demonstrate beyond reasonable doubt that Orica breached its licence condition negligently. I have arrived at this conclusion having regard to the fact that prior to the Nitric Acid Air Lift Incident there was a scheduled maintenance program that included the removal and internal inspection and testing of the Air Lift approximately every four years; the Air Lift was removed and hydrostatically tested and inspected by video probe in October 2006. It was removed and all welds were externally visually inspected in 2008. Welds that were identified then as inferior were replaced even though they were still functional. A more limited external inspection of the above ground components of the Air Lift was undertaken in June 2010. Orica commissioned a risk assessment from a specialist contractor, MPT Solutions. That risk assessment did not identify any known or high potential corrosion degradation mechanism for weak acid piping, such as the piping in the Air Lift. That is to say, the risk assessment did not identify that a different corrosion mechanism could occur when weak nitric acid and compressed air were brought together in the presence of mechanical stress. Moreover, although, as the joint experts agreed, it was the change in production process in 2008 that caused the increased stress on the weld due to cavitation, prior to this change, the imperfect weld that was replaced in 2008 had not degraded significantly from 1969 to 2008.

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I therefore do not find that in breaching its licence condition, Orica acted negligently.

- Commonwealth Criminal Code Act 1995 and the Commonwealth Criminal Code

s.3 The Schedule has effect as a law of the Commonwealth. The Schedule may be cited as the Criminal Code.

Chapter 1 -- Codification

Division 1

1.1 Codification

The only offences against laws of the Commonwealth are those offences created by, or under the authority of, this Code or any other Act.

Note: Under subsection 38(1) of the *Acts Interpretation Act 1901* , ***Act*** means an Act passed by the Parliament of the Commonwealth.

Chapter 2 -- General principles of criminal responsibility

Part 2.1 -- Purpose and application

Division 2

2.1 Purpose

The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

2.2 Application

(1) This Chapter applies to all offences against this Code.

(2) Subject to section 2.3, this Chapter applies on and after 15 December 2001 to all other offences.

(3) Section 11.6 applies to all offences.

2.3 Application of provisions relating to intoxication

Subsections 4.2(6) and (7) and Division 8 apply to all offences. For the purpose of interpreting those provisions in connection with an offence, the other provisions of this Chapter may be considered, whether or not those other provisions apply to the offence concerned.

Part 2.2 -- The elements of an offence

Division 3 -- General

3.1 Elements

(1) An offence consists of physical elements and fault elements.

(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

(3) The law that creates the offence may provide different fault elements for different physical elements.

3.2 Establishing guilt in respect of offences

In order for a person to be found guilty of committing an offence the following must be proved:

(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Note 1: See Part 2.6 on proof of criminal responsibility.

Note 2: See Part 2.7 on geographical jurisdiction.

Division 4 -- Physical elements

4.1 Physical elements

(1) A physical element of an offence may be:

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:

"conduct" means an act, an omission to perform an act or a state of affairs.

"engage in conduct" means:

(a) do an act; or

(b) omit to perform an act.

4.2 Voluntariness

(1) Conduct can only be a physical element if it is voluntary.

(2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

(3) The following are examples of conduct that is not voluntary:

(a) a spasm, convulsion or other unwilled bodily movement;

(b) an act performed during sleep or unconsciousness;

(c) an act performed during impaired consciousness depriving the person of the will to act.

(4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.

(5) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.

(6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.

(7) Intoxication is self-induced unless it came about:

(a) involuntarily; or

(b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

4.3 Omissions

An omission to perform an act can only be a physical element if:

(a) the law creating the offence makes it so; or

(b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that there is a duty to perform by a law of the Commonwealth, a State or a Territory, or at common law.

Division 5 -- Fault elements

5.1 Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

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

that the conduct merits criminal punishment for the offence.

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

Division 6 -- Cases where fault elements are not required

6.1 Strict liability

(1) If a law that creates an offence provides that the offence is an offence of strict liability:

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 9.2 is available.

(2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:

(a) there are no fault elements for that physical element; and

(b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.

(3) The existence of strict liability does not make any other defence unavailable.

- Orica at [147]

147

But as was stated in *Gordon Plath of the Department of Environment and Climate Change v Fish* [2010] NSWLEC 144; (2010) 179 LGERA 386 at [81], albeit in relation to an offence against s 118 of the National Parks and Wildlife Act 1974 ('the NPWA'), "in the criminal context, negligence means more than a breach of a duty of care". To amount to criminal negligence (at [81]):

" … the degree of carelessness must be such as to show such a disregard for the objects of the statute as to amount to a crime against the state (R v Bateman [1925] All ER Rep 45; (1925) 19 Cr App R 8; see also Andrews v DPP [1937] AC 576 per Lord Atkin at 583; applied in Cittadini v The Queen [2009] NSWCCA 302 at [38]-[40]). For there to be negligence, there must have been an indifference to an obvious risk (R v Taktak (1988) 14 NSWLR 226 at 247, applied in Cittadini)."

- King v The Queen [2012] HCA 24

Per French CJ, Crennan and Keifel JJ

10.Mr King was charged under s 318 of the Crimes Act which relevantly provided:

- "(1)Any person who by the culpable driving of a motor vehicle causes the death of another person shall be guilty of an indictable offence and shall be liable to level 3 imprisonment (20 years maximum) or a level 3 fine or both.
- (2)For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle —
    - …
    - (b)negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case; or
    - …
    - (d)whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle."

16. As is explained later in these reasons, the requirement that criminal negligence be negligence which "deserves to be punished by the criminal law" has its ancestry in the common law relating to involuntary manslaughter. [8] It was a proposition applied by this Court in *Callaghan v The Queen*, [9] to the provisions of the Criminal Code (WA) relating to involuntary manslaughter involving the negligent driving of a motor vehicle. This Court also held, in that case, that the identical standard of criminal liability applied to the statutory offence of dangerous driving causing death, created by s 291A of the Criminal Code.

22. As was pointed out by this Court in *Wilson v The Queen* [20] there are "two categories of involuntary manslaughter at common law: manslaughter by an unlawful and dangerous act carrying with it an appreciable risk of serious injury and manslaughter by criminal negligence." [21] This case is concerned with the interaction between principles of criminal negligence derived from the common law relating to involuntary manslaughter and the statutory offences of culpable driving causing death and dangerous driving causing death.

23

In his A History of the Criminal Law of England, published in 1883, *Sir James Fitzjames Stephen*, drawing on *Foster's* Discourse on Homicide, summarised the common law of unintended homicide caused by a lawful act: [22]

"Death caused by the unintentional infliction of personal injury is *per infortunium* if the act done was lawful and was done with due caution, or was accompanied by only slight negligence. If it was accompanied by culpable negligence, the act is manslaughter."

24

The term "culpable negligence" embodied a distinction between the kind of negligence necessary to establish civil liability and that necessary to establish criminal liability. It was a distinction which could be discerned in cases dating back to the 17th century. [23] It was left to the jury to determine whether the level of negligence

deserved a criminal sanction. Stephen recognised and applied the distinction in his own writings and in his judicial role. In 1887, in the case of *R v Doherty*, [24] he directed the jury that: [25]

"Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished. As to what act of negligence is culpable, you, gentlemen, have a discretion, and you ought to exercise it as well as you can."

In his *History*, Stephen wrote: [26]

"In order that homicide by omission [to perform a legal duty] may be criminal, the omission must amount to what is sometimes called gross, and sometimes culpable negligence. There must be more, but no one can say how much more, carelessness than is required in order to create a civil liability … It is a matter of degree determined by the view the jury happen to take in each particular case."

25

The distinction was recognised and applied in Australia. In Victoria, from at least the end of the 19th century, a guilty verdict on a charge of involuntary manslaughter required "a somewhat larger degree of negligence than has to be shown in a civil case." [27] In *R v Gunter*, [28] decided in 1921, the Full Court of the Supreme Court of New South Wales held that culpable negligence giving rise to criminal responsibility required "a degree of recklessness beyond anything required to make a man liable for damages in a civil action." [29] The most recent decision cited in that case was *Doherty*. The common law position in Australia and the application of the standard of criminal negligence defined at common law to the construction of statutory manslaughter under the Criminal Codes of Queensland and Western Australia were influenced by decisions of the Court of Appeal and the House of Lords in England.

26

In 1925 in *Bateman* [30] Hewart LCJ referred to epithets, including "culpable", "criminal" and "gross", used to describe the degree of negligence necessary to establish criminal liability. He said: [31]

"whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

In *Andrews v Director of Public Prosecutions* [32] Lord Atkin effectively endorsed that rather instrumental criterion of criminal negligence. [33]

27

Culpable negligence giving rise to criminal liability at common law was not the subject of elaboration beyond the kind of directions approved in *Bateman* and *Andrews*. In *Akerele v The King* [34] the Privy Council referred to the impossibility of

defining culpable negligence and the impossibility of making the distinction between actionable negligence and criminal negligence "except by means of illustrations drawn from actual judicial opinions." [35]

28

The common law of criminal negligence as enunciated in *Bateman*, *Andrews* and *Akerele*, was considered in Australia in connection with the construction of ss 289 and 266 of the Criminal Codes of Queensland and Western Australia respectively. Those sections imposed a legal duty on persons in charge of dangerous things "to use reasonable care and take reasonable precautions" to avoid danger to the life, safety or health of any person. Section 266 of the Criminal Code (WA) was considered by this Court in *Callaghan v The Queen* [36] and s 289 of the Criminal Code (Q) by the Supreme Court of Queensland in *R v Scarth*. [37] They were construed as importing the common law of criminal negligence. The common law distinction between criminal and civil negligence was to be maintained. [38] The Court in *Callaghan* referred to *Doherty* and *Andrews*, the derivation of the Criminal Code (WA) from the English Criminal Code Bill, and Stephen's discussion, in his History, of killing by omission. [39]

29

The common law standard of criminal negligence expounded in *Bateman* and *Andrews* was also accepted in Victoria in its application to involuntary manslaughter. In *Nydam v The Queen* [40] a unanimous Full Court of the Supreme Court, in a decision dealing primarily with the question of mens rea, described the requisite standard of negligence as involving: [41]

"such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment."

The criterion of "a high risk that death or grievous bodily harm would follow" was adopted by the plurality in *Wilson v The Queen*. [42]

30

Statutory developments in the Australian States and Territories throughout the 20th century created new offences relating to reckless, dangerous and negligent driving simpliciter and culpable, reckless or dangerous driving causing death. [43] Section 10 of the Motor Car Act 1909 (Vic), modelled on s 1 of the Motor Car Act 1903 (UK) created, inter alia, the offence of driving "recklessly or negligently or at a speed or in a manner which is dangerous to the public". That offence, absent the reference to negligent driving, was continued by s 318 (1) of the Crimes Act as originally enacted. Although not involving any element of death or injury to any person it was available as an alternative verdict in trials for manslaughter which continued in Victoria as a common law offence punishable by statute. [44] The kind of direction that should be given in a manslaughter trial in relation to an alternative verdict of dangerous driving was set out by Lord Atkin in *Andrews*: [45]

"the judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in *Bateman's*

case and then explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving."

(citation omitted)

Taken in context, that passage does not embody or rest upon the premise that negligence is an element of driving "at a speed or in a manner which is dangerous to the public". *Andrews* was ultimately concerned about the appropriate direction to be given in a case of manslaughter involving criminal negligence.

31

In *R v Coventry* [46] this Court considered the offence, created by s 14 of the Criminal Law Consolidation Act 1935 (SA), of driving a motor vehicle "in a culpably negligent manner, or recklessly, or at a speed, or in a manner, which is dangerous to the public; and … by such negligence, recklessness, or other conduct" causing the death of a person. [47] The plurality held that driving "at a speed or in a manner which is dangerous to the public" established an objective standard "impersonal and universal, fixed in relation to the safety of other users of the highway." [48] Starke J said "all that is essential is proof that the acts of the driver constitute danger, real or potential, to the public." [49] The test for dangerous driving was thus established as an objective test. That objective test was reflected in this Court's decisions in *McBride v The Queen* [50] and *Jiminez v The Queen*, [51] relating to culpable driving causing death under s 52A of the Crimes Act 1900 (NSW). That offence was analogous, although not identical, to the offence of dangerous driving causing death created by s 319 of the Crimes Act.

32

Section 52A of the Crimes Act 1900 (NSW) was enacted in 1951. [52] It created the offence of culpable driving committed when the death of any person was occasioned through impact with a motor vehicle being driven by a person "at a speed or in a manner which is dangerous to the public". [53] The quoted criterion of liability was, in relevant respects, similar to that used in s 319(1) of the Crimes Act. In *McBride*, Barwick CJ said of the criterion in s 52A: [54]

"This imports a quality in the speed or manner of driving which either intrinsically in all circumstances, or because of the particular circumstances surrounding the driving, is in a real sense potentially dangerous to a human being or human beings who as a member or as members of the public may be upon or in the vicinity of the roadway on which the driving is taking place."

The Chief Justice's observation was expressly approved by the plurality in *Jiminez v The Queen*, [55] which was concerned with s 52A of the Crimes Act 1900 (NSW).

33

In Barwick CJ's discussion, in *McBride*, of the term "speed or in a manner dangerous to the public" the Chief Justice also said: [56]

"This concept is in *sharp contrast to the concept of negligence*. The concept with which the section deals requires some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others. This does not involve a mere breach of duty however grave, to a particular person, having significance only if damage is caused thereby."

(emphasis added)

34

In its decision in *R v Buttsworth* [57] in 1983 the Court of Criminal Appeal of New South Wales treated the offence under s 52A as "a species of negligent driving of less gravity than negligent driving appropriate to manslaughter." [58] *Buttsworth* was referred to in a footnote by the plurality in *Jiminez*, but to support the proposition that the level of risk engendered by dangerous driving must be greater than that ordinarily associated with the driving of a motor vehicle. [59] *Jiminez* does not support the proposition that negligence is an element of driving at a speed or in a manner that is dangerous to the public. Consistently with that view, the Court of Criminal Appeal of New South Wales in *LKP* [60] held that momentary inattention can, depending upon the circumstances of the case, constitute driving in a manner dangerous to the public for the purposes of s 52A. The Court of Criminal Appeal held that *Coventry*, *McBride* and *Jiminez* all stand together. *Buttsworth* was not referred to in that decision. Nor was it referred to by the Court of Criminal Appeal in its decision in *Saunders* [61] in 2002. In that case an appeal against a conviction for dangerous driving causing death was allowed on the basis that the trial judge did not elucidate to the jury "the concept of dangerous driving as distinct from negligent driving". [62] In *Gillett v The Queen* [63] McClellan CJ at CL, with whom Sully and Hislop JJ agreed, in a case involving an accused who drove while suffering from the medical condition of epilepsy, said: [64]

- "The relevant question is whether the manner of driving, the condition of the vehicle, or the condition of the driver as a matter of objective fact made the driving a danger to the public."
- That is not a question which assumes that some species of criminal negligence less than that necessary to make out manslaughter is an element of driving in a manner or at a speed which is dangerous to the public.

35. In Victoria, the offence of culpable driving causing death under s 318(2) of the Crimes Act was created in 1967 by the Crimes (Driving Offences) Act 1967. [65] The degree of negligence to be proven for the purposes of s 318(2)(b) was held by the Full Court of the Supreme Court of Victoria in *R v Shields* [66] to be "the same degree as that required to support a charge of manslaughter". [67]

- 36
- In 2002 in *R v De'Zilwa* [68] Charles JA referred to decisions of the Supreme Court of Victoria over a period of more than 30 years setting out the directions

which should be given to a jury when s 318 (2)(b) was relied upon by the prosecution. His Honour, with whom Ormiston JA and O'Bryan AJA agreed, applied essentially the same test of criminal negligence as was set out in *Nydam* [69] in 1977. The only relevant difference was that in *De'Zilwa* Charles JA referred to "a high risk" of "death or serious injury" [70] rather than "death or serious bodily harm". *De'Zilwa* was applied by the Court of Appeal in *R v Mitchell*. [71] Callaway JA, with whom Buchanan and Vincent JJA agreed, said: [72]

- "The gross negligence required by s 318(2)(b) of the Crimes Act 1958 (culpable driving) … imports a community standard."
- Although negligence was made out in that case, the Court of Appeal, applying the common law criterion of criminal negligence, held that the evidence could not have satisfied the jury beyond reasonable doubt that there was: [73]
- "such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances, and which involved such a high risk that death or serious injury would follow, that the driving … merited criminal punishment."
- 37
- The offence of dangerous driving causing death or serious injury was introduced into the Crimes Act in 2004 with the insertion of a new s 319. [74] In the Second Reading Speech for the Crimes (Dangerous Driving) Bill the Attorney-General said: [75]
- "To establish this offence the prosecution will not be required to prove criminal negligence, which is required to prove culpable driving causing death. Rather, to establish the new offence, the prosecution will have to prove that the accused drove at a speed or in a manner dangerous to the public having regard to all the circumstances of the case, and by doing so, caused the death of or serious injury to another person."

Bell J [in dissent as to the outcome of the appeal]

79

In *De Montero*, in his report to the Court of Appeal, the trial judge drew attention to the absence of guidance as to the directions to be given in a case in which dangerous driving was left as an alternative verdict on a presentment charging culpable driving. [118] The guideline that the Court of Appeal formulated in *De Montero* was designed to address this deficiency. It is set out in the reasons of French CJ, Crennan and Kiefel JJ. [119] In contention are the requirements that the manner of driving "merit criminal punishment" and create "a considerable risk of serious injury or death to members of the public".

80

The direction that the accused's conduct must merit criminal punishment derives from *Bateman*, [120] in which a medical practitioner appealed to the English Court of Criminal Appeal against his conviction for the negligent manslaughter of a patient. The direction proposed in *Bateman* was designed to impress upon the jury the distinction between liability in tort and the higher degree of negligence required to support liability for manslaughter. [121]

81

Driving that is culpably negligent within the meaning of s 318(2)(b), or dangerous within the meaning of s 319(1), is in each case conduct that warrants punishment under the criminal law. Both sections create serious criminal offences for which substantial terms of imprisonment may be imposed. To direct the jury that, to convict an accused of culpable driving causing death, the driving must have been such as to warrant criminal punishment, and not to give a like direction with respect to dangerous driving, may suggest that the latter offence encompasses conduct that does not warrant such punishment. It was with a view to avoiding this misconception that the Court of Appeal in *De Montero* said that a "meriting criminal punishment" direction should be given with respect to dangerous driving.

82

The logic of a direction on the trial of a criminal offence that the accused's conduct must "merit criminal punishment" has been questioned. [122] The elements of manslaughter by criminal negligence stated by the Full Court in *Nydam v The Queen* [123] include that the accused's conduct must warrant punishment under the criminal law. This appeal does not provide the occasion to consider the continued usefulness of the direction in the case of negligent manslaughter. However, I agree with French CJ, Crennan and Kiefel JJ that there is no warrant for transposing the direction to the trial of a count of dangerous driving causing death.

an objective test of liability. Neither requires proof that the accused possessed a subjective awareness of, and indifference to, the risk created by his or her driving. The mens rea for each is no more than the intention to do the acts involved in driving the motor vehicle. In neither case is it incumbent on the prosecution to prove a subjective "intention to drive badly." [138]

95

In *R v Buttsworth*, [146] the New South Wales Court of Criminal Appeal considered the relationship between negligent manslaughter and driving in a manner dangerous to the public in the context of a challenge to the adequacy of the directions respecting the distinction between the offences. The jury had been directed that the distinction was essentially one of degree. O'Brien CJ of Cr D, who gave the leading judgment, undertook a comprehensive review of the history of negligent manslaughter and of the statutory driving offences before concluding that the directions were consistent with authority. [147]

96

A footnote in the plurality reasons in *Jiminez* refers with apparent approval to the following passage in O'Brien CJ of Cr D's judgment: [148]

"It is, of course, true to say that it is not sufficient or appropriate simply to describe driving in a manner dangerous to the public as a degree of negligent driving. A direction to that effect would fail because it does not set out the specifics of the degree of fault appropriate to the offence of culpable driving. But to describe the driving as being of that degree of negligence which amounts to a manner of driving which is dangerous to the public, as those terms are explained in McBride's case and those which precede it, is, I think, correct, both logically and according to authority."

97

O'Brien CJ of Cr D's account of the distinction between criminal liability for both negligent manslaughter and dangerous driving, and civil liability, is pertinent: [149]

"What has always been made clear is that these offences are to penalize the offending quality of the driving according to the degree of its departure from the standard reasonably to be expected; and whether or not they also involved an element of harm to be caused or associated with the driving they are not concerned with the concept of an action on the case which looks to the compensation of an individual who sustains injury by reason of the existence of a legal duty to him which recognizes only one standard for the measurement of its breach."

98

The analysis in *Buttsworth* draws on Lord Atkin's account of the distinction between driving in a manner dangerous and negligent manslaughter in *Andrews v Director of Public Prosecutions*. [150] The South Australian Supreme Court has analysed the relationship between driving in a manner dangerous and the concept of negligence in the same way. The decisions are summarised in *De Montero*. [151]

99

Nothing in the decisions of the New South Wales Court of Criminal Appeal in *LKP* [152] or *Gillett* [153] departs from the analysis in *Buttsworth*. In *Saunders*, [154] Simpson J, who gave the leading judgment, extracted a lengthy passage from the judgment of Spigelman CJ in *Hopton*. [155] The Chief Justice said, of those cases in which inattentiveness is the feature of the manner of driving particularised, that the jury would not be properly instructed if left to speculate as to "the level of negligence" which may be appropriate. More recently, in *R v Borkowski*, Howie J, in giving the leading judgment of the New South Wales Court of Criminal Appeal, observed: [156]

"As the law presently stands, there is a rational, logical and cohesive hierarchy of offences concerned with the infliction of death or serious injury by the use of a motor vehicle. The offences range from negligent driving causing grievous bodily harm … through the driving offences in the Crimes Act [1900 (NSW)] to manslaughter by gross criminal negligence. All of these offences involve varying degrees of negligence, however the actual conduct may be described, ranging from a lack of care and proceeding through dangerousness to culpable negligence: *R v Buttsworth* … . This structure is acknowledged by s 52AA(4) that provides that on a trial for an offence of manslaughter … a jury can return a verdict of guilty of an offence under s 52A."

100

In my opinion, this is an accurate statement of the relationship between the hierarchy of offences in Victoria ranging from dangerous driving causing death to culpable driving causing death (and negligent manslaughter).

102

The experience in Victoria has been that juries frequently seek assistance with the scope of the gross degree of departure from the standard of care needed to establish guilt of negligent culpable driving. [157] The provision of the statutory alternative verdict of dangerous driving causing death is a recent development. Judges will frequently be required to leave the alternative verdict on a presentment charging negligent culpable driving. In such a case, it is necessary to give directions which meaningfully convey to the jury the distinction between the two offences. I agree with the substance of the observation in *Buttsworth* that an exposition of the law which does not convey that dangerous driving involves a degree of negligence that is less than that required to establish guilt of the more serious offence of culpable driving is unlikely to make practical sense to a jury. The directions need not involve a disquisition on proof of negligence in a civil action. However, they should make clear, consistently with *McBride*, [158] that criminal liability does not attach for every failure to adhere to the standard of care.

- Nydam v R [1977] VR 430 , Full Court of Victorian Supreme Court Manslaughter by negligence.

  Judicial Commission of NSW bench book directions

[5-1000] Manslaughter by criminal negligence

In cases of manslaughter by criminal negligence, juries should be directed in accordance with *Nydam v R* [1977] VR 430 at 445 which the High Court approved in *The Queen v Lavender* (2005) 222 CLR 67 at [17], [60], [72], [136] and *Burns v The Queen* (2012) 246 CLR 334, per French CJ at [19]. In brief, the offence was described in *Nydam v R* as follows:

"In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment."

Before the offence can be committed the accused must owe a legal duty of care to the deceased, such a duty having been recognised by the common law: *Burns v The Queen* at [97], [107]; *Lane v R* [2013] NSWCCA 317 at [59]–[62]. As to where

such a duty commonly exists, see *R v Taktak* (1988) 14 NSWLR 226 and *Burns v The Queen* at [97]. The question of whether a given set of facts gives rise to a duty of care is a question for the judge. It is a question for the jury whether the facts exist: *Burns v The Queen* per French CJ at [20]. It is essential that the act or omission that amounts to a breach of duty is the act or omission that causes death: *Justins v R* (2010) 79 NSWLR 544 at [97]; *Lane v R* at [61].

The common law defence of honest and reasonable mistake of fact does not apply to the offence: *The Queen v Lavender* at [57]–[60].

The test for criminal negligence is objective: *The Queen v Lavender* at [60]; *Patel v The Queen* (2012) 247 CLR 531 at [88]. The court in *R v Sam (No 17)* [2009] NSWSC 803 at [14], [21], [31] articulated the personal attributes of the accused that may be assigned to the reasonable person. The standard to be applied in some cases must take account of special knowledge on the part of a person, as relevant to how a person with that knowledge would act: *Patel v The Queen* at [90].

As to manslaughter by gross criminal negligence generally, see: *Criminal Practice and Procedure NSW* at [8-s 18.50]; *Criminal Law (NSW)* at [2.2130]ff.

[5-1010] Suggested direction — manslaughter by criminal negligence

Note: The suggested direction below assumes that the death of the victim is not a fact in dispute and that the accused's act/omission caused or accelerated that death. The direction assumes that the facts, which the Crown alleges gives rise to the existence of a duty of care, are in issue. There may be cases where there is no such issue, for example, where the offence involves a parent and child, and, therefore, it is unnecessary to direct the jury on the existence of a duty of care generally.

[*The accused*] is charged with the offence of manslaughter. Manslaughter is the unlawful killing of another human being. Although it is an offence of homicide, it is a less serious offence than murder because the Crown does not allege that the accused acted with the intention of killing the deceased. It is not the Crown case that [*the accused*] intended any harm at all to be inflicted upon [*the deceased*] let alone that [*he/she*] should die.

The offence of manslaughter can be committed in a number of ways but here the Crown alleges that the killing of [*the deceased*] was caused by a deliberate [*act/omission*] of [*the accused*] that was so seriously negligent on the part of [*the accused*] and created such a high risk of serious injury or death to another person that it amounted to a criminal offence.

In order to prove manslaughter on this basis the Crown must prove a number of facts beyond reasonable doubt. Unless you find each of these facts proved to that standard [*the accused*] must be acquitted.

The Crown must prove each of the following beyond reasonable doubt:

1. the death of [*the deceased*]; and
2. [*the accused*] owed a legal duty of care to [*the deceased*]; and
3. [*the accused*] [*committed an act/omitted to do an act*]; and

4.
the [*act/omission*] caused (that is, was a substantial cause of) or accelerated, the death of [*the deceased*]; and

5.
[*the accused's*] [*act/omission*] was negligent in that [*he/she*] breached the duty of care which [*the accused*] owed to [*the deceased*]; and

6.
[*the accused's*] [*act/omission*] amounted to criminal negligence and merited criminal punishment for the offence of manslaughter because:
(a)
it fell so far short of the standard of care which a reasonable person would have exercised in the circumstances; and
(b)
involved such a high risk that death or really serious bodily harm would follow as a result of the [*act/omission*].

1. The death of [*the deceased*]

The Crown must prove beyond reasonable doubt the death of [*the deceased*]. That is not an issue in this case and you can proceed on the basis that this has been proved beyond reasonable doubt.

2. [*The accused*] owed a legal duty of care to [*the deceased*]

The Crown must prove that [*the accused*] owed a legal duty of care to [*the deceased*]. Every person owes a duty to conduct himself or herself in a manner that he or she will not cause injury to another person in circumstances where a reasonable person in his or her position would have foreseen a risk of injury from such conduct to that other person. The law recognises that one person owes a legal duty of care to another in certain situations.

[*It is suggested that any examples given to the jury concerning a legal duty of care should be relevant to the kind of case that is before the court, that is, negligence based on an omission to act (see Burns v The Queen (2012) 246 CLR 334 at [97], [107]) as opposed to negligence arising from an act of the accused such as driving. The following may be used as examples depending on the facts of the case. In the majority of cases no exposition upon legal duties of care will be necessary but the following may be added if it is thought a particular case warrants it.*

Generally speaking one citizen owes no duty of care to another citizen. Therefore, by way of example, a member of the community is under no legal duty to save a stranger from drowning, even if there were no risk to the safety of the potential life-saver. Similarly, the law does not impose a duty of care on suppliers of prohibited drugs to take reasonable steps to preserve the life of their customers.

There are other circumstances where the law does recognise one person owes a legal duty of care to another. For example, when you drive a motor vehicle on a public street then you owe a duty of care to other road users, whether they are drivers or pedestrians. When you breach that duty of care you may be driving negligently because your standard of driving has fallen short of what is expected of a reasonable, prudent driver in the particular situation in which you were driving. This is simply an

example of how a duty of care arises and the consequences of breaching that duty of care.]

A duty of care owed by one person to another can normally arise in at least four situations: first, because of an obligation imposed by law, such as the driving of a motor vehicle; secondly, because of a certain relationship between the two persons, for example the relationship of a parent and child, or a doctor and patient; thirdly, where a person has assumed a duty of care over another by a contractual relationship, for example in an employment relationship; and, fourthly, where, by the person's voluntary conduct, he or she has assumed a duty of care for another person.

The Crown here asserts that [*the accused*] owed a legal duty of care to [*the deceased*] because [*set out the Crown's allegation of the way in which the duty of care has arisen*]. I direct you that, if you find beyond reasonable doubt on the evidence before you that the facts are as the Crown alleges them to be, then according to the law [*the accused*] owed a duty of care to [*the deceased*].

[*If there is an issue as to whether the facts giving rise to a duty of care exist then set out the arguments of the parties.*]

3. [*The accused*] [*committed an act/omitted to do an act*]

[See ingredient 4 below.]

4. The [*act/omission*] caused (that is, was a substantial cause of) or accelerated, the death of [*the deceased*]

I now turn to ingredients three and four. The Crown must prove beyond reasonable doubt that [*the accused*] [*committed an act/omitted to do an act*] and that this [*act/omission*] caused (that is, was a substantial cause of) or accelerated the death of [*the deceased*]. In this case neither ingredients three and four are in issue. Therefore, you can proceed on the basis that the Crown has proved these ingredients beyond reasonable doubt.

5. [*The accused's*] [*act/omission*] was negligent in that [*he/she*] breached the duty of care which [*the accused*] owed to [*the deceased*]

The Crown must prove beyond reasonable doubt that [*the accused*] breached the duty of care owed by [*him/her*] to [*the deceased*]. The Crown alleges that [*he/she*] [*state Crown allegation that [the accused] acted or omitted to act in such a way as to constitute a breach of that duty of care*].

It is for you, as the jury, to determine the standard of care required to be exercised by a reasonable person, that is an ordinary member of the community, in the situation in which [*the accused*] was placed. If [*the accused*] failed to do what a reasonable person would have done [*or did what a reasonable person would not have done*] in the situation in which [*the accused*] found [*himself/herself*] then you would find that [*the accused*] breached the duty of care owed to [*the deceased*]. Unless you are satisfied beyond reasonable doubt that there was a breach of duty of care, then [*the accused*] cannot be guilty of manslaughter.

In deciding whether there was a breach of duty of care, you have to consider what a reasonable person would have done in the situation in which [*the accused*] was

placed. A reasonable person is one who has some, but not all of the personal attributes of [*the accused*]. A reasonable person is a person of generally the same age as [*the accused*]; with [*his/her*] experience and [*training*] and with [*his/her*] knowledge of the facts. The reasonable person is a person of normal courage and resolve. So you have to put this reasonable person into [*the accused's*] shoes at the time of the incident and attribute to that person [*the accused's*] knowledge of the circumstances at the time [*the accused*] committed the act or acts, or failed to take a relevant course of action.
If [*the accused*] failed to act as a reasonable person would have done in that situation, then [*the accused*] has breached the duty of care that [*he/she*] owed [*the deceased*]. It does not matter whether [*the accused*] knew that [*he/she*] was breaching [*his/her*] duty of care, or whether [*the accused*] believed that [*he/she*] was acting in an appropriate way in the circumstances which [*he/she*] faced. You are not concerned with [*the accused's*] personal beliefs about the correctness or appropriateness of [*his/her*] conduct. You are concerned with what a reasonable person in [*the accused's*] position would have thought was appropriate and necessary.
[*If applicable:*
In deciding that issue [*the accused*] has invited you to take account of ... [*insert particular fact or circumstance which [the accused] knew, or thought [he/she] knew which contributed to [his/her] opinion that [he/she] was acting in an appropriate way (see The Queen v Lavender (2005) 222 CLR 67 at [59]–[60])*.]

6. [*The accused's*] [*act/omission*] amounted to criminal negligence and merited criminal punishment for the offence of manslaughter

The Crown must prove beyond reasonable doubt that [*the accused's*] [*act/omission*] amounted to criminal negligence and merited criminal punishment for the offence of manslaughter.
A mere breach of duty is not enough to amount to the offence of manslaughter. A breach of duty is often called carelessness or negligence. A breach of the duty of care may make a person liable to pay compensation to another person for damages in a civil action. However, that liability is not sufficient for the offence of manslaughter. [*The accused's*] conduct must be so gravely in error and carry with it such a high risk of serious injury that it deserves to be punished as a serious criminal offence.
The breach of duty must have a certain quality before [*the accused*] can be guilty of this offence. [*The accused's*] conduct must, first, fall so short of what was required and, secondly, must give rise to such a high risk of serious injury or death, that the conduct deserves criminal punishment. Often negligence giving rise to manslaughter is described as gross or even wicked. It is negligence of such a serious kind that it far exceeds simple carelessness or negligence that occurs frequently in our society.
If [*the accused's*] breach of duty meets this level of seriousness and carries with it a high risk of serious injury or death, it does not matter that [*the accused*] never intended, or appreciated that [*his/her*] actions might harm [*the deceased*].

- NSW Sugar Milling Co-Operative Ltd v EPA

NSW CCA 13.4.1982 [CL add citation]

Environmental Offences and Penalties Act 1989 (NSW) s6(1)
'If a person, without lawful authority, wilfully or negligently causes any substance to leak …' [ie relevantly identical to POEO Act s116(1)]

Hunt CJ at CL [page one of the judgment] :
… In considering whether a defendant has acted negligently, the issue is decided upon an objective basis. What must be considered is whether the risk of such harm was foreseeable to the reasonable person in the position of the defendant, not whether the defendant subjectively foresaw the risk himself : Wyong Shire Council v Shirt (1980) 146 CLR 40 at 44, 47-48. That of course was a civil case but the criminal law has also adopted an objective test : Nydam [1977] VR 430 at 445 ; Buttsworth [1983] NSWLR 658 at 675.

I agree with both Enderby J and Allen J that the evidence discloses that, objectively, a reasonable person in the position of the defendant would have foreseen the likelihood of harm to the environment and that negligence was established in accordance with the criminal standard discussed in Andrews v DPP [1937] AC 576 at 583.

Allen J [final page of the judgment] :
… I would add, on the issue of negligence, that it is to be borne in mind that the appellant, the body convicted, was not Mr Watts but the co-operative. The question is whether that body fell so far short of the standard of care of an objectively reasonable person in the position in which it found itself that it was negligent to the criminal degree.

- EPA v Ampol Ltd
  81 LGERA 433, NSW CCA

Stated Case — Form — No findings of fact — Inappropriate questions — Abstract and out of factual context — Meaning of 'negligence' in statute creating environmental offences — Whether degrees of negligence constitute distinct and separate legal criteria — Charge alleging offence of contributing to the conditions giving rise to the commission of an offence — Conditions and not the offence as such constitute the gravamen of the charge — Criminal Appeal Act 1912 (NSW), s 5A(1A) — Environmental Offences and Penalties Act 1989 (NSW), s 6

Criminal Law — Statutory offences — 'Negligently' — Meaning — Environmental Offences and Penalties Act 1989 (NSW), s 6

Words and Phrases — "Statutory offences" — "'Negligently'" — "Meaning" — "Environmental Offences and Penalties Act 1989 (NSW), s 6"

Section 5A(1A) of the Criminal Appeal Act 1912 (NSW) empowers a judge of the Land and Environment Court at any time before completion of summary prosecution proceedings before that judge to submit by way of stated case any question of law arising at or in reference to the proceedings to the Court of Criminal Appeal for determination.

Section 6(1) of the Environmental Offences and Penalties Act 1989 (NSW) provides, inter alia, that if a person, without lawful authority, wilfully or negligently causes any substance to leak, spill or otherwise escape in a manner which harms or is likely to harm the environment the person is guilty of an offence. Subsection (2) provides, inter alia, that if the owner of the land on which the substance was located at the time of the leak, spill or other escape wilfully or negligently, in a material respect, caused

or contributed to the conditions which gave rise to the commission of the offence under subs (1), the person is guilty of an offence.

The Environment Protection Authority claimed that Ampol Ltd (the Company), "being the owner of land at Mort Street, Lithgow on which diesel was located" did "negligently, in a material respect, contribute to the conditions which gave rise to the commission of an offence under s 6(1) of the Environmental Offences and Penalties Act 1989". The offence referred to was "the offence by Brir Pty Ltd that (it) did without lawful authority negligently cause a substance, namely, diesel, to escape in a manner which was likely to harm the environment". The proceedings were heard between 15 and 25 February 1993 in the Land and Environment Court before Pearlman J. The parties informed her Honour of the allegations made by them and of the essential nature of the case and the defence. Two matters at least emerged as in dispute, (1) degree of negligence to be established to prove the relevant offence, and (2) whether the prosecution was required to prove that the company "contributed to each of the elements of the s 6(1) offence alleged against Brir Pty Ltd". At the conclusion of the final addresses her Honour reserved her decision. She made no findings of fact but was requested by the Environment Protection Authority to "submit questions of law to the Court for determination". A document was prepared at the Court and concluded as follows:

- "13.The questions of law which I have been requested to submit for determination are:
    - (1)Whether in order to prove its case the Authority must establish that Ampol's negligence:
        - (a)Was a high degree of negligence entailing recklessness or wantonness?
        - (b)Amounted to a failure to respond to a foreseeable risk in a manner to be expected of a reasonable person in Ampol's position?
        - (c)Satisfied another, and if so what, test of negligence?
    - (2)
        - (a)Whether the Authority must establish that Ampol negligently contributed to any element of the offence alleged against Brir under s 6(1) of the Act?
        - (b)If so, to which particular element or elements of that alleged offence must the Authority establish negligent contribution?"

The document did not in terms submit the questions for determination. When the hearing before the Court of Criminal Appeal commenced doubt was expressed as to whether the issues were properly submitted to that Court or were in an appropriate form. After discussion counsel requested the Court to substitute for the issues referred to in 13(1) above a question in the following form:

- "(1)Is the standard of negligence required to be established in the present case (beyond reasonable doubt) under s 6(2) of the Environmental Offences and Penalties Act 1989:
    - (1)negligence entailing recklessness or wantonness;
    - (2)negligence based on failure to respond to a foreseeable risk in a manner to be expected of a reasonable person in Ampol's position;
    - (3)negligence going beyond a mere matter of compensation between subjects, showing such a disregard for harm or likely harm to the environment as to amount to a crime and conduct deserving of punishment;
    - (4)any other or additional standard."

Held: (1) Questions in the abstract and out of their factual context should not be submitted for determination by the Court of Criminal Appeal under s 5A(1A) of the Criminal Appeal Act 1912.

(2) The proper course in cases such as the present is for the trial judge first to determine the facts: in the present case, to decide what it was that the company did or omitted which was said to constitute negligent contribution to the offence. The judge should then determine whether those facts, in the context of the case, satisfied the statutory test of negligent contribution to the offence. If questions are

to be submitted for consideration by the Court of Criminal Appeal, ordinarily the questions should raise for determination whether error of law would be involved in holding that such acts or omissions constituted negligent contribution to the offence.

(3) The questions, both as formulated by the judge and as modified before the Court of Criminal Appeal, were based upon a failure fully to understand the significance of "negligence" in criminal offences.

(4) There are no degrees of negligence forming distinct and separate legal criteria for the purposes of the word "negligence" in statutes creating criminal offences, the term simply indicates that the default in question must be of a sufficiently high order or seriousness to warrant the sanction of the criminal law.

R v Buttsworth [1983] 1 NSWLR 658; ; *Andrews v Director of Public Prosecutions* [1937] AC 576 , and *R v D* [1984] 3 NSWLR 29, *referred to*.

(5) In respect of the question whether the prosecutor must establish that the company "negligently contributed to any element of the offence alleged against" Brir Pty Ltd the answer to a question so framed must be in the negative because the offence charged against it went to "the conditions which give rise to" that offence by Brir Pty Ltd and not to that offence as such.

Stated Case

This was a stated case by a judge of the Land and Environment Court under s 5A(1A) of the Criminal Appeal Act 1912. The facts giving rise to it are referred to in the judgment.

K Mason (*Solicitor-General for New South Wales*) and *H G Murrell*, for the appellant.

M G Craig QC, for the respondent.

Judgment

Judgment reserved

24 December, 1993

Mahoney JA.

The difficulty in the present proceeding lies with the questions, not with the answers. It is no new insight that, if the correct question be asked, the answer will be apparent: at least, ordinarily it will be. In my opinion, the questions which this Court is asked to answer are the wrong questions.

The questions have been asked in the following circumstances. The Environment Protection Authority claims that Ampol Ltd (the Company), "being the owner of land at Mort Street Lithgow on which diesel was located" did "negligently, in a material respect, contribute to the conditions which gave rise to the commission of an offence under s 6(1) of the Environmental Offences and Penalties Act 1989". The offence referred to is "the offence by Brir Pty Ltd that (it) did without lawful authority negligently cause a substance, namely, diesel, to escape in a manner which was likely to harm the environment". The offence with which the company is charged derives from s 6(2) of the 1989 Act which proscribes "wilfully or negligently," in a material respect, causing or contributing to the conditions which gave rise to the commission of the offence under sub-s (1) … . The Company is charged with "negligently" doing so.

The proceedings were heard between 15 and 25 February 1993 in the Land and Environment Court by Talbot J. The parties informed his Honour of the allegations made by them and of the essential nature of the case and the defence. In this regard, two matters at least emerged as in dispute: the degree of negligence to be established to prove the relevant offence; and whether the prosecution was required to prove that the Company "contributed to each of the elements of the s 6(1) offence alleged against Brir Pty Ltd".

At the conclusion of the final addresses, his Honour reserved his decision. He made no findings of fact. But he was requested by the Environment Protection Authority to "submit questions of law to the court for determination". The document prepared by his Honour concluded as follows:

- "13.The questions of law which I have been requested to submit for determination are:
    - (1)Whether in order to prove its case the Authority must establish that Ampol's negligence:
        - (a)Was a high degree of negligence entailing recklessness or wantonness?

        - (b)Amounted to a failure to respond to a foreseeable risk in a manner to be expected of a reasonable person in Ampol's position?
        - (c)Satisfied another, and if so what, test of negligence?
    - (2)
        - (a)Whether the Authority must establish that Ampol negligently contributed to any element of the offence alleged against Brir under s 6(1) of the Act?
        - (b)If so, to which particular element or elements of that alleged offence must the Authority establish negligent contribution?"

His Honour did not in terms submit the questions for determination.

1. The submission of questions of law to the court of criminal appeal:

The Land and Environment Court was exercising its summary jurisdiction. Section 5A(1A) of the Criminal Appeal Act 1912 (NSW) provides that at any time before the completion of proceedings before it, "the judge hearing the proceedings may, or if requested by the Crown shall, submit any question of law arising at or in reference to the proceedings to the Court of Criminal Appeal for determination". The submission is dealt with as if it were an appeal under s 5AA(1) and s 5AB of that Act. Presumably the legislature intended that, in dealing with the "question of law" submitted to it, the Court of Criminal Appeal should adopt and adapt the procedure for the hearing of an appeal against a conviction provided for by s 5AA. That appeal is "by way of rehearing on the evidence" given in the court below and on any evidence in addition or in substitution for it.

When the hearing of the proceeding commenced before this Court, doubt was expressed as to whether the issues were properly submitted to the court or in an appropriate form. After discussion, counsel requested the court to substitute for the issues referred to in 13(1) above a question in the following form:

- "(1)Is the standard of negligence required to be established in the present case (beyond reasonable doubt) under s 6(2) of the Environmental Offences and Penalties Act 1989:
    - (1)negligence entailing recklessness or wantonness;
    - (2)negligence based on failure to respond to a foreseeable risk in a manner to be expected of a reasonable person in Ampol's position;
    - (3)negligence going beyond a mere matter of compensation between subjects, showing such a disregard for harm or likely harm to the environment as to amount to a crime and conduct deserving of punishment;
    - (4)any other or additional standard."

I doubt that the procedure provided by s 5A(1A) was intended to authorise the Land and Environment Court to submit a series of questions concluding with a question such as: "any other or additional standard". Nor, in my opinion, was it intended that — special cases apart — questions be submitted in the abstract and out of their factual context. The present case illustrates the difficulties involved in such questions. Standards of care are not measured in quantum packages. What is to be determined in each case is whether the acts or omissions in question are, for the purposes of the legislation, below the standards required by the circumstances of the case.

The proper course in such cases as this is ordinarily for the trial judge first to determine the facts: in this case, to decide what it was that the company did or omitted which is said to constitute negligent contribution to the offence. He should then determine whether those facts, in the context of the case, satisfy the statutory test of negligent contribution to the offence. If questions are to be submitted for consideration by this Court, ordinarily the questions should raise for determination whether error of law would be involved in holding that such acts or omissions constituted negligent contribution to the offence.

I am not convinced that the questions now before the Court are capable of answer in their terms. But the Court has been pressed by the parties to determine the issues raised by them. I shall indicate generally my views in relation to them.

2. The questions relating to negligence:

The questions, both as formulated for the judge and as now suggested, are in my opinion based upon a failure fully to understand the significance of "negligence" in criminal offences. This is not the case in which to deal definitively with what is there involved. It is sufficient to say: that the instant questions are based upon an understanding of the significance of negligence which is not appropriate; and that the form of the questions makes it impracticable to answer them according to their terms.

The questions assume that, in relation to criminal offences, "negligence" has several distinct meanings each of them separate, and each representing a quantum increase in the extent of the default involved. Counsel have referred the Court to a number of decisions of high authority in which judges have discussed the nature of the mental element (described as mens rea or the like) involved in particular crimes and the significance for this purpose of terms such as "negligence". The cases have examined the question whether a mental element is involved at all and if it is what is the nature of it: see, eg, *He Kaw Teh v The Queen* (1985) 157 CLR 523; ; *Andrews v Director of Public Prosecutions* [1937] AC 576 (manslaughter); *R v Buttsworth* [1983] 1 NSWLR 658 (culpable driving); *R v D* [1984] 3 NSWLR 29 (negligent act causing grievous bodily harm); see also *Environment Protection Authority v N* (1992) 26 NSWLR 352 at 358-359; ; 76 LGRA 114 at 120; ; *NSW Sugar Milling Co-operative Ltd v Environmental Protection Authority* (1992) 75 LGRA 320 . The suggestion has been that, in different contexts, "negligence" may mean different things and that the choice in the present proceeding is between different meanings of this kind. I do not think that these decisions establish, or require the Court to accept, such a view of the term.

Such was not the effect of the traditional criminal law. It has been said that the traditional criminal law did not impose liability for negligence, as such, that is, that negligent conduct — as distinct from purposive conduct — did not constitute a crime: see the survey of the history of the criminal law in this regard by O'Brien CJ of Cr D in *R v Buttsworth* (at 667-674). I do not mean by this that "negligence" and similar terms were not used in cases concerned with the traditional criminal law. But such terms were used not to indicate that negligent conduct as such was a crime but for other purposes. This use of "negligence" may be illustrated by the much cited case of *Andrews v Director of Public Prosecutions* . The crime there in question was manslaughter. Death had been caused by the acts or omissions of the accused. Conduct which is sufficient to constitute manslaughter may be intentional, that is, directed to causing harm or death, or unintentional. It was in relation to the latter that "negligence" was used. As Lord Atkin pointed out, it has been necessary for the courts to indicate the kind of unintentional conduct which is sufficient to constitute manslaughter. As the history of the criminal law, as discussed in these cases, indicated, the law progressed from the punishment of conduct causing death as such to the punishment only of such conduct where it involved default of some kind. "Negligence" was one of the terms used to describe the default which was sufficient for the conduct to be held to be manslaughter.

But the courts made clear that it was not every default or lack of care which would, if it caused death, constitute manslaughter. It was necessary that the default be of a greater rather than a lesser degree of blameworthiness. To illustrate this, words such as "reckless" and "wanton" were used to describe the default in question. "Reckless" was that chosen by Lord Atkin in *Andrews v Director of Public Prosecutions* . But considered in terms of principle, the use of "negligence" and these other terms indicated merely that the default in question must be of a high order, that is, that to constitute manslaughter it would necessarily be of a higher rather than a lower order of blameworthiness or unacceptability. These matters are only of peripheral relevance in a case such as the present.

The legislature has, however, created crimes in which negligence is, by the terms of the legislation, a component of the crime: see, eg, *R v D* (1984) 3 NSWLR 29, where the negligence of the act causing grievous bodily harm is an essential part of the crime; Crimes Act 1900 (NSW), s 54. In other cases, the legislature may create a statutory offence to which concepts such as negligence and the like may be relevant but, in the sense to which I have referred, negligence is not as such a constituent of the offence. Thus, in *Buttsworth ,* the offence was culpable driving: in determining what was "culpable" it was relevant to consider, inter alia, whether the act impugned was intentional, inadvertent, arose by reason of default of some kind, or otherwise fell within the statutory description.

In the present case, "negligence" is an element of the offence. It is therefore necessary to determine what is meant by the term. In some cases, terms of this kind may be used merely to indicate that the other elements of the offence, for example, contributing to conditions of the relevant kind, need not have been done with intent and that something less is sufficient. However, ordinarily, the term involves, inter alia, two things: that there was a duty not to do the act impugned and that that act was done. In the present case, the legislation intended that acts not be done which would contribute to the relevant conditions. But, of course, the legislative intention went further: the legislation required that in doing what was impugned, the accused fell below the standard of conduct required of it.

The tedious drawing out of these obvious steps in the legislative purpose may, I think, be excused as necessary to focus upon what is here in question, namely, what default is sufficient for the purposes of the statute.

In my opinion, whether the contribution to the relevant conditions was made negligently within the statute must be assessed having regard to the contribution and the conditions in question and the circumstances of the case. An act or omission may constitute negligent contribution to the condition if

the conditions be of one kind but not if they be of another. An act or omission may or may not constitute negligence for this purpose depending upon the seriousness of the principal offence, viz, the escape of a substance in a manner likely to harm the environment. What may be negligence if the escape would flood the countryside may not be negligence if that against which the precaution is to be taken is the escape of water into a field.

However, these things having been taken into account, is there some additional consideration such that (to take the example suggested in argument) what was done or omitted involves a "gross" departure from an appropriate standard of care. I do not think that there is. The matter may be tested, in part, by an example. Assume that the precautionary act or omission which allegedly should have occurred be of great moment or considerable cost (the erection of a large wall or the constant employment, twenty-four hours each day, of a number of workmen), that the damage apt to be caused to the environment by the omission of it be small, and that there be uncertainty whether the precaution would prevent the damage. The omission of the precautionary act or omission would, on those assumptions, ordinarily be negligent under the civil law: *Wyong Shire Council v Shirt* (1980) 146 CLR 40 . It would be negligent under the criminal law only if the court, on an assessment of all the facts, concluded that failure to take the relevant precaution warrants criminal punishment. I do not think that the matter can be formalised beyond that.

For these reasons, I am of opinion that the assumptions on which the relevant questions were formulated are incorrect and the questions cannot be answered according to their terms.

There are, in addition, difficulties arising from the precise verbiage of the questions submitted. To take but one example, "recklessness or wantonness", as an expression of the highest standard of negligence, proposes a test of an indeterminate category. It does not take account of whether, for example, it comprehends a gross departure from the required standard, not because of recklessness or wantonness, but because of some other factor, for example, lack of knowledge. However, it is not necessary to pursue this matter further.

What then was intended by the present provision? In my opinion, it is necessary for the Court to identify the acts or omissions which constitute the "contribution" to the conditions giving rise to the commission of the offence. It is necessary to show beyond reasonable doubt that they resulted from the act or omission of the company. And it must appear that, intentional acts aside, that which constituted the contribution was something which, having regard to the purpose and intention of the legislation, the company ought not to have done. If these things are established and the matter be of a moment sufficient to attract criminal sanction, the evidence would, in my opinion, allow the conclusion that the offence had been committed.

3. Contribution to the conditions which give rise to the commission of the offence:

The question asks whether the authority must establish that the company "negligently contributed to any element of the offence alleged against" Brir Pty Ltd. The answer to a question so framed must be in the negative. That with which the company is charged is that it negligently in a material respect did "contribute to the conditions which give rise to the commission of an offence … ". The offence charged goes to "the conditions which give rise to" the offence by Brir Pty Ltd not to the offence as such. A contribution to "the conditions" will be sufficient provided it is a contribution "in a material respect". What will be the conditions which in fact give rise to the commission of the offence will of course depend upon and vary with the circumstances.

For these reasons:

- 1.Question 1 cannot be answered according to its terms.
- 2.(a) No.

The proceeding should be returned to the trial court to be disposed of. Each party should bear its own costs of the proceedings before this Court.

Badgery-Parker J.

I agree with Mahoney, JA that the question should be answered as his Honour has proposed, for the reason that his Honour has expressed. I wish to add a few words in order to emphasise one point. It is entirely inappropriate for this Court to be asked to answer broad questions of law which are not anchored in the facts of a particular case. Where a question arises as to whether or not particular conduct may properly be held to constitute an offence and it is desired that a case or question be stated for the determination of this Court, the trial judge should first make specific findings of fact and then, by the application of the law as he or she holds it to be should determine whether the offence charged is or is not thereby made out. Only then is it appropriate to refer a question to this Court, for its determination as to whether as a matter of law the factual findings support a conclusion of guilt.

Finlay J.

I have had the advantage of reading the draft judgment of Mahoney JA. I agree with the answers and orders proposed by his Honour and with the reasons in his Honour's judgment.

- Australian Petroleum Pty Limited (previously known as Ampol Ltd) v EPA

  Application for Special Leave to Appeal to the High Court
  [1996] HCA Trans 112

MR GYLES: If your Honours please, the kernel of the issue for appeal if there were one is to be found at page 42 of the book in the judgment of the Court of Criminal Appeal, line 24, where their Honours say:

The risks and possibility of offence were foreseeable as that concept is properly applied. There were practicable means of obviating them namely bunding, increasing the separator tank capacity, installing alarm or shut-off valves. Such were within the scope of pollution control works for which AMPOL retained responsibility. It did not do so. It therefore contributed to the circumstances giving rise to the offence. Its failure to take these steps to obviate the foreseeable risk and consequent offence were omissions which a reasonably prudent owner would not make. Such negligence was neither trivial nor inconsiderable and merited penal sanction.

That, your Honours, would be read in conjunction with what was said by their Honours at page 39 line 30 to 40 line 5 and 40 line 35 to the end of that page.

As your Honours will appreciate, it is our submission that what the Court of Criminal Appeal did not do was to ask themselves the question, in reviewing what happened below, "Can it be said that the failure to take the precautions was something which, in effect, all reasonable people confronted with that situation would take?", because absent such a finding, where we are dealing with criminal negligence by omission, you cannot satisfy the test of beyond reasonable doubt.

In other words, your Honours, what is set out by the Court of Criminal Appeal in that passage which reproduces what they had earlier said is to in fact apply a civil standard: foreseeable risk, practicable precautions, therefore breach of standard. Now, if your Honours please, we submit that, in the criminal context - assume foreseeability, assume practicable precautions, the next question is can it be said that all persons, all reasonable persons in the position of the defendant, would have taken those precautions. Once there is any area of judgment involved it, in our respectful submission, eliminates the possibility of there being guilt beyond reasonable doubt.

TOOHEY J: But introducing foreseeability may operate unduly to your advantage, would it not?

MR GYLES: Your Honour, I would submit not in the circumstances of this case, because the judge below did not find foreseeability. She said, in effect, you have a duty. So it does not work adversely to us in this case, your Honour.

TOOHEY J: No, I was not suggesting it did.

MR GYLES: And it does not work in our favour, either, because there was no finding of foreseeability.

TOOHEY J: Why should foreseeability play a part in this?

MR GYLES: Your Honour, I am not submitting that it should.

TOOHEY J: The question is rhetorical.

MR GYLES: Yes. The question, your Honour, is breach of standard; that is the question under the statute.

BRENNAN CJ: What is the proposition? Is it that before there can be a conviction, the negligence must be so gross as to amount to a crime against the State and conduct deserving of punishment?

MR GYLES: No, your Honour. That is not the formulation or the proposition which I contend. It is that before you can say that an omission leads to guilt beyond reasonable doubt, you must be able to find that all persons confronted with the standard would have supplied the omitted precautions.

BRENNAN CJ: All reasonable persons?

MR GYLES: All reasonable persons in the position of the accused, let me concede.

BRENNAN CJ: How do you then deal with the finding at page 42, line 39, "which a reasonably prudent owner would not make"?

MR GYLES: "A reasonably prudent owner", and that is the point, your Honour. The court below did not address the question, "Can we say that all persons in that position would have done that same thing?" The answer, of course, would be almost rhetorical, because what the applicant did was to comply with the known standards.

BRENNAN CJ: But do you say that if that had read "which all reasonably prudent owners would not make", that would have answered the question.

MR GYLES: Indeed, your Honour, indeed.

BRENNAN CJ: But it is because it is "a reasonably prudent owner" that it fails to live up to the necessary standard.

MR GYLES: Yes, your Honour. But if the correct test had been posed, attending to the facts, the court would have been confronted with a situation where the evidence was - in the court below, it was said, "Well we will accept for the purposes of argument that all reasonable precautions were taken and you complied within industry practice". That, however, is not to the point. Now we respectfully submit that if the right question had been asked, the answer would have been given. Of course, given this body of material, there was a choice, or a question of judgment, and that is not a criminal standard of proof.

Now, your Honours, the matter may have been complicated by the stated case decision in this very matter where in 81 LGERA 433, their Honours sent back the stated case. However,
Mr Justice Mahoney did analyse to some extent the question of negligence in a criminal setting, starting at 437. And at 439, point 5, said this:

The omission of the precautionary act or omission would on those assumptions ordinarily be negligent under the civil law -

referring to *Shirt's Case.*

It would be negligent under the criminal law only if the court, on an assessment of all the facts, concluded that failure to take the relevant precaution warrants criminal punishment. I do not think that the matter can be formalised beyond that.

BRENNAN CJ: That is the test which I put to you, which you abjured.

MR GYLES: Yes, your Honour, but it is, for this reason. What his Honour Justice Mahoney says is, what I would submit, an additional element. It assumes - and this is what may have misled the court below - that there has already been a finding, relevantly, that the criminal standard has been breached. But it may be that there is something which is so obvious that all persons would have done it but is so minor as not to warrant criminal sanction. In other words, his Honour is there drawing an extra element, which we would embrace, but what his Honour is saying is not, we respectfully submit, to the contrary of our submission.

Your Honours, since we prepared our outline of argument, it has come to our attention that an article has been published - if I may hand it to your Honours - dealing generally with protecting the environment through criminal sanctions, with particular reference to this Act, and at pages 19 and 20 the authors deal with the question of negligence. We have taken the liberty, because of the time constraints, your Honours, of highlighting two paragraphs - and for my learned friend's benefit, it is the second last paragraph in the right-hand column of page 19, and the right-hand column on page 20. I do not, of course, wish to mask the rest of it from your Honours, but this article makes rather neatly the point that we have sought to make in our outline of submissions. What had gone before left a considerable element of doubt about the question of negligence in a setting such as this, criminal negligence, and the authors say it has been complicated "by the decision of the Court of Criminal Appeal in *EPA v Ampol*. That, your Honours is the decision of Mr Justice Mahoney to which your Honours have just been taken and your Honours will see, in the lefthand column of page 20, that is analysed.

DAWSON J: The problem with that, Mr Gyles, is that, really, the offence is not being negligent. It is merely descriptive of the offence which is, of course, causing or contributing to the conditions.

MR GYLES: Quite, but doing so negligently.

DAWSON J: It is difficult to see that the word "negligently" there means anything more than carelessly; that is, carelessly as opposed to wilfully.

MR GYLES: Yes, your Honour, but - - -

DAWSON J: And all those cases which deal with negligence, as it were, as a crime in itself, really do not bear on the subject.

MR GYLES: Your Honour, that, with respect, may or may not be so but that is not my point. My point is that the statute does require proof of the element of negligence. Whether it be called "carelessness" as opposed to "wilfulness" which is, I think, what your Honour is putting to me, I accept that.

DAWSON J: What I am putting to you is there are not standards of carelessness in that context; either it is careless or not. Careless is what is opposed to wilfulness.

MR GYLES: Yes, your Honour, I am accepting that for the moment subject to the qualification that Mr Justice Mahoney adds in this decision. What I do put to your Honours is that if there be a criminal standard to be satisfied of negligence, call it "carelessness" - I am not arguing for different standards of carelessness - I am simply saying a court must find as a fact that all persons, reasonable persons, confronted with that situation would have supplied the omissions. It is not a question of whether they would have done something else. It is a question whether they would have supplied the omissions with which we were charged and convicted.

DAWSON J: That is setting a standard of negligence.

MR GYLES: No, it is simply applying the criminal standard, your Honour, that is, proof beyond reasonable doubt.

DAWSON J: That is where you have a crime of negligence and you have to determine what the content of it is. But the crime here is contributing to a situation.

MR GYLES: Yes, your Honour, negligently.

DAWSON J: Negligently as opposed to wilfully. You do not really have any particular standard there.

MR GYLES: If your Honour's proposition were correct, it would mean that one could take out of the statute "negligently".

DAWSON J: No, no.

MR GYLES: With respect, it would be simply saying "contributing to by whatever means". That would be a crime of strict liability which this is not. "Negligently" requires there to be a normative judgment by the tribunal hearing the case.

BRENNAN CJ: That is quite right, and once one has the facts proved beyond reasonable doubt, there is nothing left but a normative judgment to be made in order to determine yea or nay the issue of negligence. Now, in this case there is no doubt about the facts.

MR GYLES: No.

BRENNAN CJ: The question is how does one evaluate those facts? And in the evaluation, the court has said that a reasonably prudent owner would not have made this omission. Now, where is the error to be found in applying that standard?

MR GYLES: Because, your Honour, the court that found that did not address the question as to whether or not, in effect, everybody confronted with that situation, acting reasonably, knowing what they did know, would have supplied those omissions.

BRENNAN CJ: I do not understand that distinction that you are making having regard to the language which was used. If you mean that everybody would not have taken those steps and that some other persons are, after all, in some broad and general sense prudent or reasonable, that may be so but that is not the test of negligence.

MR GYLES: No, your Honour, I am not suggesting that is a test of negligence. What I am suggesting is that if it is suggested that a particular precaution is necessary - we are dealing with omissions - that before you can convict somebody of a criminal offence of not supplying that precaution, the court must conclude that that standard was not met beyond reasonable doubt. It is not simply a case of the facts being proved beyond reasonable doubt, as your Honour, with respect, would know, it is a question of whether or not the standard has been breached beyond reasonable doubt, bearing in mind the facts which have been proved.

BRENNAN CJ: Once you have the facts proved, the rest is surely a question of law.

MR GYLES: It is a question of law, your Honour, but nonetheless, the standard - - -

BRENNAN CJ: Then the question of law is whether or not, on those facts, one can say that it amounts to something that is negligent.

MR GYLES: Yes, your Honour. Your Honour, may I endeavour to put it this way: there is a distinction between civil and criminal negligence in this setting. It does not lie only in the degree of negligence. Before you get to the degree of negligence to make it culpable, you must find that there is a sufficient - the difference in standard of proof must have some impact and the only impact it has - - -

BRENNAN CJ: The standard of proof, are you saying?

MR GYLES: Yes, beyond reasonable doubt as against the civil onus. There is a difference, your Honours. That is the point. Now, where is that difference recognised in this judgment? It is not? The court below referred to *Shirt's Case* and *Vozza v Tooth & Co*, your Honours.

BRENNAN CJ: But you do not have a standard of proof of the question at law.

MR GYLES: Your Honour, with respect, there is a standard of - criminal negligence or the proof of criminal negligence is proof beyond reasonable doubt of negligence, is it not, with respect? If that proposition be right, it follows that this court below did not attend to that question.

BRENNAN CJ: That, perhaps, highlights the difficulty because when you put it that way negligence is a mixed question of fact and law. The onus of proof relates to the facts. The evaluation then is one which is to be made upon the facts as proved. In the classical situation, in all the negligence trials, of course, it is a matter for the jury to determine, having regard to the facts whether or not the negligence amounts to the criminal standard.

MR GYLES: Your Honour, properly instructed. Now, may I give your Honour an illustration of what would be a proper instruction? The House of Lords recently looked at the question of medical negligence in *Adomako's Case* [1995] 1 AC 171, at page 188. The summing up - and, with respect, it is

useful to think how a jury would be summed up to because that really isolates the point - in the middle of the page starting at D there is a particular part of the summing up. The last sentence of it was this, at E:

You should only convict a doctor of causing a death by negligence if you think he did something which no reasonably skilled doctor should have done.

Now, your Honours, that is precisely what was not found in this case by this court below. Their Lordships go on:

The criticism was particularly of the latter part of this quotation in that it was open to the meaning that if the defendant did
what no reasonably skilled doctor should have done it was open to the jury to convict him of causing death by negligence. Strictly speaking this passage is concerned with the statement of a necessary condition for a conviction by preventing a conviction unless that condition is satisfied. It is incorrect to treat it as stating a sufficient condition for conviction.

And, your Honours, we respectfully submit that that principle applies here and that the formulation and the reasoning of the Court of Criminal Appeal is directly in the teeth of it.

BRENNAN CJ: But that principle is related to the line of cases of *Andrews*, *Akerele.* It has got nothing to do with the problem you are advancing, has it?

MR GYLES: Your Honour, I respectfully submit where one has, as an element of the offence, negligence and proof of it and it is a question of omission, then it applies, your Honour. There is no reason in principle why it should not and, your Honour, we submit it is timely for this Court to take on board this problem.

BRENNAN CJ: We need not trouble you, Mr Solicitor.

ICAC AND LOCAL GOVERNMENT

- The events involving the recent sentencing of the former General Manager of Burwood Council will be discussed along with two of the relevant recommendations made by the ICAC to the Division of Local Government in relation to the employment of General Managers and the role of the Mayor when dealing with complaints against a General Manager.

- The ICAC website includes the following information in relation to ICAC prosecution outcomes :

Investigation into alleged corrupt conduct involving Burwood Council's General Manager and others (Operation Magnus).

On 16 May 2014, Mr Romano (the former General Manager of Burwood Council) pleaded guilty to 3 counts of misconduct in public office, 3 counts of giving false or misleading evidence pursuant to s87(1) of the ICAC Act and 1 count of fraudulent misappropriation pursuant to s124 of the Crimes Act…
On 7 November 2014, his Honour Justice Arnott SC sentenced Mr Romano to imprisonment for an aggregate term of 2 years and 6 months with a non-parole period of 20 months.
The Commission has been notified that Mr Romano has lodged a notice of intention to appeal.

- The ICAC website contains the following information in a fact sheet :

Alleged corrupt conduct of Burwood Council's General Manager and others

ICAC FINDINGS

The ICAC has made 17 corrupt conduct findings against former Burwood Council General Manager, Pasquale (Pat) Romano. The corrupt conduct in which Mr Romano engaged included:

· using his position at the Council to engage IPP Consulting Pty Ltd for personal purposes to conduct surveillance on a work colleague of his wife, and knowingly causing the invoices for the work, which amounted to over $35,000, to be paid by the Council

· using IPP Consulting to conduct surveillance on candidates for the 2008 council elections, although he knew this fell outside the proper performance of his functions as the General Manager, and knowingly causing the $15,485 invoice for this work to be paid by the Council

· failing to manage appropriately his conflict of interest in the recruitment to Council of his friend, Albert Becerra, and in the payment of $41,400 to Mr Becerra above his contracted remuneration
· procuring work on units in which he had a personal interest from Council officers during Council time
· taking adverse managerial action against four Council whistleblowers.

ICAC RECOMMENDATIONS
The ICAC recommends that the advice of the Director of Public Prosecutions (DPP) should be obtained with regard to the prosecution of Mr Romano for several offences including:
· four of giving false or misleading documents to the Council with intent to defraud the Council, contrary to section 249C of the *Crimes Act 1900*
· four common law offences of misconduct in public office
· an offence of obtaining financial advantage by false or misleading statements, contrary to section 178BB of the Crimes Act
· two offences of causing detrimental action to be taken against a person who made protected disclosures, contrary to the *Protected Disclosures Act 1994 (*now named the *Public Interest Disclosures Act 1994*)
· three offences of causing or procuring disadvantage to persons for or on account of those persons assisting the ICAC, contrary to section 93 of the *Independent Commission Against Corruption Act 1988*
· two offences of providing false or misleading evidence to the Commission.

CORRUPTION PREVENTION
The Commission has made 31 corruption prevention recommendations including that:
· the NSW Division of Local Government be authorised through legislative amendment to require NSW councils to adopt policy and practice considered to be of state-wide significance by the Division's Chief Executive
· the NSW Minister for Local Government seeks legislative amendment to the *Local Government Act 1993* to establish internal audit for local authorities as a statutory function
· Burwood Council policies should be amended to prohibit the General Manager from having any involvement or giving directions to staff in relation to any formal complaints where he/she is the subject of the complaint.

BACKGROUND
· The Commission's investigation arose as a result of information provided by Burwood Council officers. It involved a wide range of allegations spanning many years about Mr Romano and other Council officers. Many of the allegations arose from complaints about Mr Romano made by Council staff to the Mayor of Burwood, the Commission and the *Sydney Morning Herald*

- The ICAC website contains the following information set out as a media release :

The Independent Commission Against Corruption (ICAC) has made 17 corrupt conduct findings against the former General Manager of Burwood Council, Pasquale (Pat) Romano, and recommends that the advice of the Director of Public Prosecutions

(DPP) should be obtained with regard to the prosecution of Mr Romano for several offences.

In its report on the *Investigation into alleged corrupt conduct involving Burwood Council's General Manager and others*, released today, the Commission makes 31 corruption prevention recommendations, noting that Mr Romano was able to undertake the corrupt conduct detailed in the report "by taking advantage of weaknesses in the controls applied to his position". Some of the recommendations are made to Burwood Council, while others are made to the NSW Government to help improve systems in local government across the state.

The ICAC found that Mr Romano engaged in corrupt conduct through a variety of actions including using his position at the Council to engage IPP Consulting Pty Ltd for personal purposes to conduct surveillance on a work colleague of his wife, and knowingly causing the invoices for the work, which amounted to over $35,000, to be paid by the Council. Mr Romano also used the company to conduct surveillance on candidates for the 2008 council elections, although he knew this fell outside the proper performance of his functions as the General Manager, and knowingly caused the $15,485 invoice for this work to be paid by the Council.

Other corrupt conduct findings include failing to manage appropriately his conflict of interest in the recruitment to Council of his friend, Albert Becerra, and in the payment of $41,400 to Mr Becerra above his contracted remuneration. Mr Romano also acted corruptly by procuring work on units in which he had a personal interest from Council officers during Council time, selling his Council car without first purchasing it and misleading the Council about the sale price of the car, and taking adverse managerial action against four Council whistleblowers.

The ICAC recommends obtaining the DPP's advice with respect to the prosecution of Mr Romano for offences including four of giving false or misleading documents to the Council with intent to defraud the Council, four common law offences of misconduct in public office, an offence of obtaining financial advantage by false or misleading statements, two offences of causing detrimental action to be taken against a person who made protected disclosures, three offences of causing or procuring disadvantage to persons for or on account of those persons assisting the ICAC, and two offences of providing false or misleading evidence to the Commission.

As Mr Romano's contract as General Manager has been terminated, the issue of taking disciplinary action against him does not arise.

The Commission's corruption prevention recommendations include that the NSW Division of Local Government be authorised through legislative amendment to require NSW councils to adopt policy and practice considered to be of state-wide significance by the Division's Chief Executive. The ICAC also recommends that the NSW Minister for Local Government seeks legislative amendment to the Local Government Act 1993 to establish internal audit for local authorities as a statutory function.

Other recommendations include that Burwood Council policies should be amended to prohibit the General Manager from having any involvement or giving directions to staff in relation to any formal complaints where he/she is the subject of the complaint.

The Council should also develop a policy for the payment of appropriate out-of-pocket expenses incurred by the General Manager and other employees, and should include protocols in the policy that explicitly prohibit the General Manager or any other Council employee from approving expenses where there is an actual or perceived personal benefit derived from the expenditure.

- The ICAC website includes the following material in relation to Recommendations made by the ICAC and the implementation, or otherwise, of such Recommendations :

Plan for Implementation of Recommendations
Investigation into alleged corrupt conduct involving Burwood Council's General Manager and othe and others

Recommendation 26.

That the Chief Executive of the NSW Division of Local Government amends the Standard contract for the employment of general managers to include specific provision for a council to suspend the general manager from duty on a reasonable apprehension that he/she has engaged in corrupt conduct or serious misconduct.

Summary of response

Action proposed
The principle behind this recommendation is supported in part. However, given the recent history of arbitrary terminations of general managers' contracts , it is considered that implementation of this recommendation in its proposed form may result in the potential for misuse. The Division considers that adequate provision for the suspension of general managers is made under the Local Government Act 1993 and the current standard contract for general managers.
In particular Section 440D of the Local Government Act 1993 provides that the Minister for Local Government may suspend the general manager of a council from duty if:
The Independent Commission Against Corruption recommends that consideration be given to their suspension with the institution of disciplinary or other proceedings for serious corrupt conduct; or If criminal proceedings for serious corrupt conduct are instituted against them ; or If the general manager makes an admission of serious corrupt conduct.

The standard contract for general managers currently allows councils to grant special leave to general managers. It is contemplated this would be used in a case where a general manager was required to step aside while matters were under investigation.

Recommendation 27

That Part 3 of the Model Code of Conduct for Local Councils in NSW be amended to improve the guidance provided to mayors in managing complaints against a general manager. In particular, guidance should be provided about the consideration of the suspension of the general manager in appropriate cases. A duty should also be placed on the mayor to monitor decisions and actions of the general manager and other

council officers for possible detrimental action against staff or contractors who have provided information about alleged misconduct.

Summary of response
Action proposed
This recommendation was completed through the review of the Model Code of Conduct.
In particular, separate Procedures for the Administration of the Model Code of Conduct have been prescribed which give clearer guidance on the management of complaints made to mayors about the general manager (refer clauses 5.21-5.25 of the Procedures).
The mayor's role in managing complaints about the general manager is now limited. Unless complaints are resolved or referred to an external agency at the outset, the complaint must be referred to an independent conduct reviewer for preliminary assessment and, where serious, for investigation.
The Division has also issued a guide to code of conduct processes for mayors to assist them to manage complaints about the general manager.
There is also now an explicit provision in the Model Code prohibiting detrimental action in reprisal for complaints made under the Code of Conduct (refer clauses 8.4-8.6 Model Code).
Breaches of these provisions by councillors or the general manager are to be referred by councils to the Division for action.
The Guidelines for the Appointment and Oversight of General Managers issued by the Division in July 2011also provide guidance in relation to the consideration of the suspension of the general manager.
ICAC's letter of 1 June 2012 (your ref Z10/0071) indicated the Commission has accepted the amendments to the Code as an alternative to the implementation to recommendation 27,given that the changes largely achieve the intended outcome behind the recommendation.