1 INTRODUCTION

The 2008 calendar year was a reasonably quiet one for the Australian scene so far as maritime law matters were concerned even though most of the usual matters saw some developments. The fisheries incursions by illegal foreign fishers in Australia’s northern waters fell from recent highs to more usual levels, and no illegal fishing was detected in the deep Southern Ocean. The whaling issue with the Japanese whaling fleet making its annual voyage to the Southern Ocean remains contentious and the ‘boat people’, mainly refugees from Iraq and/or Afghanistan, still continue to arrive but they are now treated as they should be; on their merits or otherwise. The number of maritime cases in the courts worthy of reporting was not large and there were the usual number of other issues that merit being touched on.

As a result the 2008 ‘Australian Update’ can be categorised more as interesting than dramatic and it begins with fisheries.

2 FISHERIES AND OTHER OFFSHORE ISSUES

2.1 Fisheries

Previous Australian Annual Updates have devoted considerable space to the issues of international fisheries incursions into the Australian EEZ and the attempts by the Australian government agencies and Australian defence forces to curb them. It is pleasing to note that the rate of these incursions is showing signs of decreasing. Some comparison over the past two years may be seen from this table under, in which the of sightings of vessels in the Australian EEZ, which is the same as the Australian Fisheries Zone (AFZ), is much higher but the actual apprehensions are much lower. This would appear to indicate that the unlawful incursions by foreign fishers have dropped markedly.1

<table>
<thead>
<tr>
<th>Sightings inside the AEEZ</th>
<th>Apprehensions</th>
<th>Number of crew apprehended</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>4407</td>
<td>125</td>
</tr>
<tr>
<td>2008</td>
<td>6716</td>
<td>91</td>
</tr>
</tbody>
</table>

As the Australian government has reorganised the offshore surveillance and enforcement powers of its various agencies and defence assets under the one command, known as the Border Protection Command, it may be that an increased efficiency has led to more sightings being recorded.2

Quite a few cases have been processed through the courts in Darwin, the Northern Territory capital city, but none of them have proceeded on appeal. There were no apprehensions in the Southern Ocean or significant court cases in any of the southern cities during 2008, which would appear to indicate that the drive to eliminate the depredations in the Southern Ocean has been attended with some success.

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1 Foreign Fishing Vessels sighted by Coastwatch aircraft within the AEEZ may include multiple sightings of the same vessel or vessels legitimately inside the AFZ.

2 The organisation and activities of the BPC, which is mainly a partnership between Customs and defence, but with all of the other relevant agencies cooperation, may be found on its web site at www.customs.gov.au and follow prompts.
2.2 Whaling Issues

This ‘Update’ has for some years recorded the annual activities of the Japanese whaling fleet in the Southern Ocean harvesting whales each southern summer season and the firm opposition of the Australian government, and that of New Zealand, to this. As expected over December 2008 to March 2009 the Japanese whaling fleet conducted its activities and, as usual, the Sea Shepherd Conservation Society vessel, the Oceanic Viking, harassed them. The Sea Shepherd called it Operation Musashi in this its fifth crusade against the Japanese Whaling Fleet. Sea Shepherd has claimed considerable success in its endeavours, maintaining that because of them the Japanese Whaling Fleet in the 2008-2009 season only achieved a take of 679 Minke whales out of a target of 935 and only one of the endangered Fin whales out of a target of 50 whales. It must be noted that the controversial and at times aggressive tactics at sea of Sea Shepherd’s vessels had led to its having been denied accreditation for observer status to the International Whaling Commission since 1987.

In the 2008-2009 season the Australian government did not send its Fisheries Support vessel, the Oceania Viking to gather evidence for a possible legal challenge to Japan and adopted a more diplomatic stance instead. The Australian government had previously said it was gathering evidence from the Oceanic Viking for an international court case against Japan but these comments have been absent over the earlier part of 2008 year. This may be explicable in light of the fact that the New Zealand government, which has maintained a similar attitude over previous years to that of Australia, revealed that its legal advice was that its case had ‘significant difficulties’ and so one infers the advice was that its prospects of success were not high.

However, the Australian government has pursued its opposition through all diplomatic avenues open to it. At the International Whaling Commission Intersessional meeting in London in March 2008 the Australian Minister for the Environment, Heritage and the Arts, Mr Garrett, directed the Australian delegation to put forward three main proposals for reform of the IWC; namely, development of conservation plans for whaling, improved scientific research beginning with the Southern Ocean and for strict IWC authority over the so-called ‘scientific’ research resulting in killing whales.

At the annual IWC meeting, held in Santiago, Chile, over 23 – 27 June 2008 the Australian Minister’s statements included a high profile and vigorous attack on the Japanese attitude and the conduct of lethal research in the Southern Ocean, including calling on the Japanese government to suspend whaling operations. This meeting of the IWC had a much wider agenda than that on which the Australian delegates concentrated and its 81 members had issues in other oceans apart from the Southern Ocean. However the Chairman’s summary of the Day 3 proceedings did devote considerable space to Japanese special permit whaling, i.e. ‘scientific research’ whaling, and the Japanese JARPN whaling program.

To put the worldwide and the Japanese whaling take in perspective, the annual report of the IWC on member nations catches for 2007 and 2007/2008, in both the northern and the southern oceans, reveals that world-wide Denmark (Greenland), Norway, St Vincent and The Grenadines, South Korea, Russia and the USA take was a total of 405 of all species and all these were for Aboriginal subsistence, whereas only Japan and Iceland had catches under the ‘special permit’ system and they were a total of 912 for Japan and 39 for Iceland.

Unlike earlier years the Japanese Institute of Cetacean Research, an organ of the Japanese government, has published very little recent information. It has however published the opening statement for Japan to the 2009 Annual meeting of the IWC, in which amongst other statements its representative said that the IWC suffers from serious disagreements among different groups and the ‘paucity of constructive, rational and science-based discussions’ can only be described as ‘dysfunctional’. These comments were and are hardly likely to endear Japan to the other IWC delegates.

3 Details can be obtained from the Sea Shepherd Society web site, <www.seashepherd.org > (accessed 28 April 2009).
5 Statement on Safety at Sea made to the IWC Intersessional meeting in March 2008, being Appendix G to the IWC Chair’s Annual Report; see IWC web site <http://www.iwcoffice.org/> (accessed 5 May 2009).
7 The Australian 8 May 2008.
9 Press release and transcript of interview with Mr Garrett dated 26 June 2008; above n6.
10 See IWC web site above n 5 and ‘Chair’s Summary Report for the 60th Annual and Associated Meetings, Santiago, Chile 2008; web site <www.iwcoffice.org/meetings/meetings2008.htm> (accessed 5 May 2009).
11 Report by the IWC of ‘Catches by IWC Member Nations’, Annex K to the Chair’s Annual Report; see IWC web site above n 5.
13 Ibid, Opening Statement, second paragraph.
Later in 2008 the Australian and New Zealand governments conducted talks on the situation in relation to disciplined research into whales and whaling and on 10 September 2008 the Australian minister announced that both countries were joining with Chile in a plan to ‘modernise the IWC and make it into a 21st Century conservation-focused organisation’ which was being considered already by other countries.\(^{14}\) Then in December 2008 the minister announced funding of an additional A$26 million over the next five years for support for research with a focus on scientific research into the Southern Ocean whales.\(^{15}\)

In short it may be said the Rudd government is moving more cautiously in the direction of restricting the Japanese annual whaling catches in what are claimed as Australian waters in the Southern Ocean. The main minister concerned in the matter is better known for his high profile as a pop-singer than as a minister and is obviously on a steep learning curve about the complexities of the international law of the sea and international diplomacy. Nonetheless, it may be expected that over the next year a vigorous program to restrict and finally stop Japanese whaling in the Southern Ocean will be advanced.

### 2.3 Boat People

In 2008 the Federal Government announced significant changes to Australia’s immigration policy, marking a strong shift away from the policies of the previous Howard Government. In September 2001, the previous government had passed a series of legislative instruments aimed at tightening Australia’s migration borders. This was part of the Howard Government’s so-called ‘Pacific Solution’, which arose in response to the infamous Tampa incident that had taken place in August and early September 2001. As part of this hard-line stance, certain areas were excised from Australia’s migration zone, preventing any person who arrived there from applying for a protection visa.\(^{16}\) The excised areas included certain offshore territories, the most likely places refugees, colloquially referred to as ‘boat people’, would arrive. As part of agreements reached with neighbouring countries, illegal entrants to Australia were removed to detention centres in Papua New Guinea and Nauru, places wholly outside Australia. Further adding to the controversy, in 2004 the High Court of Australia in Al-Kateb v Godwin\(^{17}\) upheld the Commonwealth’s constitutional ability to hold a person in immigration detention indefinitely, even in circumstances where there was no real prospect of the person being removed from Australia. In this case the Australian government moved to deport him but no country would take the man so he was in indefinite incarceration, as provided for in the legislation.

Against this background, the Rudd Government was elected in 2007 on a platform that included a commitment to overhaul Australia’s immigration policies. The turn-around began in May 2008, with the announcement of the Federal Budget details. The Budget included numerous measures aimed at improving the integrity of Australia’s migration system. One such measure was to increase Australia’s humanitarian intake. Senator Chris Evans, Minister for Immigration and Citizenship, announced that the Humanitarian Program would be increased to 13,500 in 2008-09, which would include 6,500 offshore refugee places, with a one-off increase of 500 places to assist people affected by the conflict in Iraq. The offshore component of the Humanitarian Program focussed on refugees from Africa, Asia and the Middle East.\(^{18}\) At the same time, the Rudd Government announced its commitment to redevelop the Villawood Immigration Detention Centre in New South Wales which had developed a notorious reputation for harshness to those detained in it.

A further measure announced by the Rudd Government was the abolition of controversial Temporary Protection Visas (TPVs), which had been part of the ‘Pacific Solution’. Previously, unauthorised arrivals were only eligible for TPVs in the first instance and were denied the benefits of permanent residency. The visas expired after three years, after which time the person had to re-apply for asylum. Although holders of TPV could work, they had limited access to social security, health and education benefits.\(^{19}\) Arrivals who come under Australia’s protection obligations can now obtain a Permanent Protection Visa. Existing TPV holders can apply for a permanent Resolution of Status visa\(^{20}\) without the need to reassess protection obligations (subject to meeting health, character and security criteria). Human rights groups welcomed the abolition of the two-tiered visa system for refugees.\(^{21}\)

\(^{14}\) Media release of 10 September 2008 ‘NZ and Australia Working Together on Whale Conservation’ on ministerial web site; above n6.

\(^{15}\) Media release of 5 December 2008 by Minister Garrett; web site above n6.

\(^{16}\) See section 5(1) of the Migration Act 1958 (Cth) (definition of excised offshore place, as set out in Migration Amendment Regulations 2005 (No. 6) Regulation 5.15C). See also section 46A(1).


\(^{19}\) See Migration Regulations 2008 (No. 5) (Cth).

\(^{20}\) Subclass 851.

Then on 29 July 2008, Minister Evans announced a suite of reforms to Australia’s immigration system. These reforms included seven so-called ‘immigration values’ which would ‘guide and drive’ Australia’s new detention policy. The first of these values was that mandatory detention on arrival in order to check on such incoming people would remain an essential element of strong border control. The second was that three groups would be subject to further mandatory detention, namely, all unauthorised arrivals (for the purpose of health, identity and security checks), unlawful non-citizens who pose an unacceptable risk to the community, and unlawful non-citizens who had repeatedly refused to comply with their visa conditions. The third value was that children and, where possible their families, would not be detained in an immigration detention centre. This goes even further than s 5AA of the Migration Act 1958, which provides that minors only be detained as a measure of last resort. Fourth, the Rudd Government announced that indefinite or arbitrary detention was unacceptable and that the length and conditions of detention would be subject to regular review. This appeared to move away from the High Court determination in Al-Kateb v Godwin, discussed above. Similarly, the fifth value was that detention in immigration detention centres should only be used as a last resort and for the shortest practicable time. This attempted to fundamentally overturn the earlier model of long periods of immigration detention. The final two values were that people in detention be treated fairly and reasonably within the law and that conditions of detention should ensure the inherent dignity of the human person.

As part of the changes to migration policy, the Government announced its interest in broadening alternative detention strategies, particularly community-based options. If a person is complying with immigration processes and is not a risk to the community then the person should remain in the community, rather than be confined to a detention centre, until their immigration status is resolved. The Rudd Government also closed the infamous South Australian Baxter and Woomera detention centres, which had been a controversial aspect of the ‘Pacific Solution’.

The detention facility on Christmas Island, in the Indian Ocean, remains the main centre for processing unauthorised boat arrivals. The prescribed offshore territories, introduced by the Howard government, continue to be excised from Australia’s migration zone.

The Rudd Government’s migration policy sparked concern that Australia would face a marked increase in boat arrivals because other countries would perceive Australia’s stance towards refugees as ‘softened’. On 30 September 2008, fourteen people were intercepted on a boat near Ashmore Islands, 320 kilometres off Australia’s north-west coast and transferred to Christmas Island for processing. Three of the group claimed to be juveniles, aged 16 or 17 and, in line with the new government’s stance, they were accommodated in supervised arrangements rather than a detention centre. Two Indonesian nationals were later charged with people smuggling in relation to the incident. In November, the Royal Australian Navy rescued a group of 12 people from their sinking boat in waters 80 nautical miles south-east of Ashmore Island, which is off the Australian north-western coast. On 3 December, another boat, carrying 35 passengers and five crew, was intercepted, also near Ashmore Island. The Federal Government conceded there had been a spike in people smuggling activities but Senator Chris Evans argued this was a result of people smugglers changing their tactics and was not due to the Government’s refugee policy. At the time of writing the ‘boat people’ are still arriving, with many of them having escaped, in harsh and dangerous circumstances, from the countries where our Australian armed forces are involved in trying to suppress the violent regime that was threatening them, i.e. in Afghanistan and Iraq.


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3 OVERVIEW OF MARITIME CASES

3.1 Foreign flagged livestock carrier and invalid notice from AMSA re compliance with Australian Marine Orders Part 43

The matter of Livestock Transport & Trading v Australian Maritime Safety Authority arose out of a notice issued by the Australian Maritime Safety Authority (AMSA) that purported to prevent the vessel Al Messilah from loading livestock in Australia. At the time of being issued the Part 43 notice the Al Messilah was in Fremantle and later scheduled to berth in Portland to load about 72,000 sheep for the purpose of transporting the livestock to the Middle East.

In summary the issue was that AMSA directed the Al Messilah not to load until it had complied with the requirements of MARPOL by installing suitable sewerage provisions for its thousands of sheep, which, as is well known, create a lot of sewage. The ship was foreign flagged and had an international sewage certificate from its flag State so under the MARPOL system non-compliance in sewage provisions of tanks etc. is something to take up with the flag State. The Australian Act only gave AMSA power to direct a foreign flagged ship with this certificate not to enter the port and gives no power to direct it to install tanks etc.

The detail is whether Australian Marine Order Part 43, and in particular Order 12.2 and section 6.6 of Appendix 4, were consistent with Division 12C of Part IV of the Navigation Act 1912 (Cth). Marine Order Part 43, which makes provision for the carriage of livestock on board ships, is delegated legislation and was made by the Chief Executive Officer of AMSA under a power contained in section 425(1AA) of the Navigation Act. The Applicant to the Federal Court, the owner and operator of the Al Messilah, argued that the notice, in relying on the Order, was invalid as the Order was inconsistent with the Navigation Act.

Australia is a signatory to MARPOL in which Annex IV deals with sewage and contains 12 regulations. Regulation 4 is concerned with conducting surveys to ensure that the structure, systems and fittings of ships comply with the requirements of Annex IV and provides that the responsibility for ensuring that ships are constructed in accordance with the requirements of the Annex lies with the vessel’s flag state. Regulation 9 provides that each ship shall contain a sewage system comprising a treatment plant, a disinfecting system or a holding tank and Regulation 10 prescribes the dimensions of a discharge connection in relation to the ship’s discharge pipeline.

Division 12C of Part IV of the Navigation Act gives effect to Annex IV of MARPOL and distinguishes between Australian vessels and foreign-flagged vessels. Whilst the Court found that AMSA, as the relevant Australian Authority, was empowered under the Act to issue a certificate, known as the International Pollution Prevention Certificate, in respect of an Australian ship constructed in accordance with the relevant regulations of Annex IV of MARPOL, it did not have the same power to enforce compliance with the requirements of Annex IV in respect of foreign-flagged vessels as responsibility for issuance of the International Pollution Prevention Certificate rests with the flag state. Whilst the Court noted that section 267ZQ of the Navigation Act provided AMSA, when it was of the opinion that a foreign ship was not constructed in accordance with Annex IV, with the power to issue certain directions, these directions were nonetheless restricted. The section did not provide AMSA with the power to give directions to change the structure of the vessel.

This was really the end of the matter but there was one further point that needed consideration. Section 425(1AA) of the Navigation Act provides that where a provision of an Order is inconsistent with a provision of the Act, the Act shall prevail, and the Order shall, to the extent of any inconsistency, be of no force or effect.

Order 12 of Part 43 requires that vessels permanently equipped for the carriage of livestock be fitted with systems and equipment that ensure the maintenance of livestock services at a level necessary for the welfare of the livestock. The Order further states that compliance with Appendix 4 will meet this requirement. The Authority contended that Order 12 and Appendix 4 of Marine Orders Part 43 were not inconsistent with the Act and that, in any event, section 257(1) of the Act provided for the making of regulations in relation to the ‘loading, stowing or carriage of cargo in ships or the unloading of cargo from ships’, and that Order 12.2 and section 6.6 of Annexure 4 were orders made by reference to the regulation making powers provided for in s 257(1).

The judge held that no matter what the regulatory source relied upon for making an order under section 425(1AA), the Order must not be inconsistent with a provision of the Act. The end result was an order that the Notice was invalid and Order 12.2 and section 6.6 of Annexure 4 of Marine Orders Part 43 were invalid and of no force and effect to the extent


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that they apply to foreign-flagged vessels. It was never in issue that the Marine Orders were valid against Australian registered ships but then, of course, there are very few of them.

3.2 Admralty - urgent orders to permit a ship under arrest to sail including outside the 12 mile limit

In Tai Shing Maritime Co SA v The Ship 'Samsun Veritas' as surrogate for the ship 'Tai Hawk', the Federal Court of Australia had to consider an urgent application by the arresting Marshall of the Court to move the arrested ship Samsun Veritas from its berth in Port Headland, in north-western Australia, to a proposed anchorage point which included it going outside the Port’s area and beyond the Australian territorial waters. The judge heard the case in the very early hours of the morning because it was urgent to move the ship before 9am that day and it was a good example of the service provided by the judges of the Federal Court in Perth.

The case arose because, on 15 October 2007, Samsun Logix Corporation time chartered the ship Tai Hawk from its owner, Tai Shing Maritime Co SA, and on 1 October 2008 Samsun Logix informed the plaintiff that it intended to redeliver the Tai Hawk before the contractual delivery date under the time charterparty. This was a repudiatory breach of the charterparty and the plaintiff accepted the breach on 15 October 2008 and claimed unpaid hire due and damages.

The Samsun Veritas, as surrogate for the vessel Tai Hawk, was arrested in Australia as surety for the claim and at the time of arrest it was fully laden with some 140,000 tonnes of iron ore and lying alongside in Port Headland. The tidal range in this part of Australia is very large and, being fully laden, together with the prevailing spring tides, brought the vessel’s keel within half of one metre of the bottom in the port. The evidence put to the judge was that there was a real likelihood of the vessel grounding alongside and that, due to the decreasing tidal range, if the vessel did not depart by 9am that morning it would be a minimum of one week before the tides would be such as to allow it safely to do so. Also, there were four other vessels waiting to come alongside and load and this, together with a delay to the Samsun Veritas, meant that the total financial loss could well be about US $86 million. The judge made suitable orders allowing the Samsun Veritas to sail, on conditions he set out at the time, and later gave his reasons in writing.

The reasons showed that the court had considered a number of earlier authorities in coming to its decision. In Sovremenniy Kommercheskiy Flot v 'Socofl Stream', the Court declined to make orders enabling the vessel to sail from Brisbane to Newcastle to facilitate the discharge of the vessel’s cargo. Whilst there was evidence that the vessel would not have grounds for leaving the territorial sea and hence the jurisdiction of the Court, the Marshall opposed the application on the grounds that there was nothing that could prevent the vessel changing course for international waters if the master so decided. In differentiating the current application, the Court noted that the consignee had not been heard from, the owners of the vessel had not appeared and the Marshall supported the application provided that arrangements both in a physical and financial sense could be made. Whilst the court was conscious of the fact that in moving the Samsun Veritas from its current berth would involve the vessel going outside the Court’s jurisdiction, there were very significant public interest considerations in favour of it.

The Court then considered the matter of Den Norske Bank (Luxembourg) S.A v The Ship 'Martha II'. Despite being under arrest in Melbourne at the instance of a mortgagee, and against opposition from the mortgagee, orders were issued permitting the vessel to proceed from Melbourne to Botany Bay, near Sydney. At Botany Bay the original orders were varied which precluded the vessel from loading new cargo, but permitting the vessel to proceed from Botany Bay out and around for the few miles to Port Jackson (Sydney) to berth or anchor, all in the custody of the Marshall. In distinguishing the Martha II from an earlier decision of the court in Malaysia Shipyard and Engineering Sdn Bhd v Iron Shortland, concerning the ship Iron Shortland, where orders permitting the arrested vessel to sail between Port Headland in Western Australia and Port Kembla in New South Wales were approved, the court observed, amongst other factors, that a significant public interest consideration, namely, the potential shortage of iron at the Port Kembla steel works, were taken into account.

Whilst noting that the decision in the Martha II supported a view that an arrested ship should not be permitted out of the Court’s jurisdiction, the Court nonetheless noted the very urgent and paramount public interest considerations. In giving precedence to these considerations, but cognizant of the fact that the Samsun Veritas would whilst en route to Dampier port temporarily be outside the Court's jurisdiction, i.e. outside the territorial sea, the Court made orders permitting the vessel to sail. Conditions included that the plaintiff be permitted to place a representative to remain on board and for the Marshall to do the same in order to retain safe custody, control and preservation of the ship.

31 [2008] FCA 1546. 
32 [1999] FCA 42. 

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3.3 Practice and procedure - application to bring a cross-claim under Pt VIA of the Trade Practices Act 1974 (Cth) and Part IVAA of the Wrongs Act 1958 (Vic) - application of s 79 Judiciary Act 1903 (Cth)

In the matter of BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd and Braemar Seascope Pty (No 2)\textsuperscript{35} BHPB Freight Pty Ltd (BHPB), as owners, agreed to charter the cargo vessel Global Hawk to charterers New Century International Leasing Co Ltd (‘NCI’). The vessel was subsequently delivered to Nera Shipping Co Ltd (‘Nera’), a shelf company, which then failed to pay the hire charges. The case was only about pleadings and at issue was whether a pleading for a cross-claim to apportion liability should be allowed.

The charterparty had been negotiated between shipbrokers Braemer Seascope Pty Ltd (‘Seascope’), acting for BHPB, and Cosco Oceania Chartering Pty Ltd (‘Cosco’). In this action it is alleged by BHPB that Cosco falsely represented that it was acting on behalf of NCI, that the entity to whom the vessel would be chartered was NCI, that it was authorised to enter into the proposed charterparty on behalf of NCI, and that without BHPB’s knowledge the vessel was delivered to Nera. BHPB sought damages against Cosco under section 82 of the Trade Practices Act or compensation under section 87 for an alleged contravention of section 52 (misleading and deceptive conduct). Alternatively, BHPB sought damages for negligent misstatement and breach of warranty of authority. In relation to Seascope, BHPB claimed damages for negligence and breach of its retainer as BHPB’s shipbroker. An application was brought by Cosco to bring a cross-claim seeking apportionment of liability and this whole matter turned on whether the judge would allow this change to the case.

In defence of BHPB’s claim, Cosco denied liability and pleaded that if it were found to be liable to BHPB then its liability is limited to the proportion for its own responsibility for that loss and not for the whole of it. Cosco sought to rely on section 87CD of the Commonwealth Trade Practices Act and section 24AI of the Victorian State Wrongs Act, being provisions that allowed a court to make findings about proportionate liability. The other defendant, Seascope, also denied liability and, in the alternative, also sought to rely on proportionate liability as part of its defence.

In his reasons Finkelstein J noted that proportionate liability had been introduced into state and federal legislation following an inquiry into the law of joint and several liability as a result to the growing number of actions against professionals, particularly auditors, who were being singled out for negligence actions, not because of their culpability (which might be small), but because they were insured and had the capacity to pay large damages awards. The inquiry subsequently recommended that joint and several liability for negligence which causes property damage or economic loss be replaced by liability which is proportionate to each defendant’s degree of fault and both the Commonwealth and the State of Victoria made these legislative amendments. They were not, however, in identical terms.

In the Commonwealth Trade Practices Act the relevant provisions are contained in Pt VIA, comprising sections 87CB to 87CI. The proportionate liability provisions in the Victorian Wrongs Act are found in Pt IVAA. Although the Victorian provisions follow the same structure as the Commonwealth legislation there are important differences. First, Pt IVAA applies to ‘a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care’. This covers a far wider range of torts than the provisions in the Trade Practices Act, which in this case were confined to claims for misleading and deceptive conduct.\textsuperscript{36} There is also an important procedural difference. For a defendant to take advantage of the proportionate liability provisions in the Victorian State Wrongs Act, the concurrent wrongdoer must also be a defendant. The word ‘defendant’ is defined to include any party in the proceeding save for the plaintiff. The Trade Practices Act has no such requirement. To the contrary, section 87CD(4) provides that proportionate liability is available ‘whether or not all concurrent wrongdoers are parties to the proceeding’.

The proportionate liability regime in the Wrongs Act may apply to an action in the Federal Court by reason of section 79 of the Judiciary Act so long as commonwealth law does not ‘otherwise provide’.\textsuperscript{37} The Court then reasoned that, on the assumption that the provisions are procedural in nature, they would not apply to a claim for relief under section 87 of the Trade Practices Act for a contravention of section 52 because, by necessary implication, Part VIA has ‘otherwise provided’. Separately from section 79, the proportionate liability regime in the Wrongs Act would apply to BHPB’s common law claim for negligent misstatement to ensure resolution of the whole matter.

\textsuperscript{35} [2008] FCA 1656.
\textsuperscript{36} Damages under section 82 based on a contravention of section 52.
\textsuperscript{37} See Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd (2007) 164 FCR 450.

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In deciding the matter the court found that the only claim BHPB was capable of bringing against Cosco that is an apportionable claim under the *Trade Practices Act* was the claim for damages for a contravention of section 52. The action for damages for negligent misstatement is an apportionable claim by reason of the application of the *Wrongs Act*.

However, for reasons that the judge set out in considerable detail, neither the claim for relief under section 87 nor the claim for breach of warranty of authority was found to be an apportionable claim.

The court then reasoned that when dealing with BHPB's claim it would be necessary to determine proportionate liability between Cosco and Seascope in relation to the claim under section 82, it would not follow that Cosco could raise that issue against Seascope in its own claim. With few exceptions a plaintiff is only permitted to bring an action in a court of law to enforce some right against or to restrain the commission of some wrong by, the defendant.

Cosco’s contention that it is only proportionately liable in accordance with Pt VIA for the damages claimed by BHPB necessarily raises a dispute between BHPB and Cosco. Privity determines that it will not, however, affect the rights or obligations of Seascope. The court then observed that even if Cosco was able to shift some of the blame to Seascope, it would confer no right in Cosco against Seascope that could be enforced in a court.

It is not appropriate to set out the rest of this detailed reasoning but in the end the Court granted Cosco leave to bring a claim against Seascope for contribution, such claim to be limited to the damages that BHPB may recover from Cosco on its breach of warranty of authority claim and its claim for compensation under section 87 of the *Trade Practices Act*, and that Cosco's application otherwise be dismissed. The end result is that the pleadings left BHBP entitled to sue Cosco for its damages and Cosco to sue Seascope if it should lose against BHPB. It would not, however, allow Cosco to bring Seascope directly into the action between it and BHBP. This rather lengthy case illustrates the importance of parties having their pleadings in order and ensuring they sue the right party in the right format.

### 3.4 Admiralty – whether a straight bill of lading is a document of title – whether a straight bill of lading is a ‘sea carriage document’ under Schedule 1A of the Carriage of Goods by Sea Act 1991 (Cth). No delivery of cargo without an original Bill of Lading

In *Beluga Shipping GmbH & Co. KS ‘Beluga Fantastic’ v Headway Shipping Limited and Sulzon Energy Ltd and Anor* 38 the Federal Court was asked in an urgent interlocutory hearing to vary previously issued orders of the Court to release valuable cargo, namely wind turbine generating equipment, in the possession of the Sheriff as the Court’s officer and this be done without presentation of an original bill of lading. The parties considered the matter to be urgent but the original bill of lading was in India and there would be a delay of some five to six days before it could be presented in Australia. In support of the application the defendants offered to the plaintiff and to the Court a copy of the bill certified as a true and correct one and documents to indemnify and hold harmless the plaintiff and its servants and agents, and the Court’s Sheriff, in respect of any losses that they may sustain by reason of delivering the cargo without production of any of the originals.

In submissions, the Sulzon companies, as the shippers and named consignees, argued that there was no practical possibility that the Sheriff would be at any commercial risk were he to deliver against a certified copy of the bill of lading without production of the original. This was, it was contended, because the bills were straight bills of lading claused ‘freight prepaid’. Further, it was submitted, the proffered indemnities and proposed amendments to the present orders would be sufficient to protect the Sheriff from the likelihood of a claim for wrongful delivery of the cargo. The Sulzon companies argued that because they were the true owners and their related entity was the named consignee of the cargo, the subject of the bills, they were entitled to receive the bills in India, where they were presently located. As such, it was said that there was no practical risk that an innocent intervening party could acquire some interest in or title to the bills, or similarly acquire one or more of the original bills so as to be able to present them to the Sheriff after he had relinquished possession of the goods.

In refusing the application the Rares J based his decision on two grounds. First, no undertaking was proffered to the Sheriff. More fundamentally, however, the copies of the bills of lading provided:

> In witness whereof the Master or Agent of the said Vessel has signed the number of Bills of Lading indicated below all of this tenor and date, any one of which being accomplished the others shall be void.

Also important was that there were three originals of the bill of lading each copy being stamped ‘copy non-negotiable’.

In light of this the Court was not satisfied that it was appropriate to require the Sheriff, as an officer of the Court, to

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38 [2008] FCA 1791.

(2009) 23 A&NZ Mar LJ
deliver goods or to act on some other basis than that provided in the bills of lading. That is, the bills required the production of an original bill to obtain delivery of the cargo and any assurances the parties may wish to proffer in asking the Sheriff to deliver without production of an original would be little protection against a claim by any person who later produced an original bill and sought delivery of the cargo.

In making this decision the Court noted the centuries of mercantile practice and development of the law merchant that affords protection to a carrier who delivers cargo on production of the bill of lading. The Court cited the decision in *The Raphaela S*39 where it was noted that the House of Lords held that a straight bill of lading required delivery of the cargo by the master in the same way as a negotiable bill. In the same decision, the Court noted that the House of Lords held that a straight bill was ‘a bill of lading or any similar document of title’ because it was a document of title within the meaning and for the purposes of Art I(b) of the Hague-Visby Rules.

The Court then held that the same result must follow in the present circumstances. In this the Court noted that the amended Hague Rules in Schedule 1A of the Australian *Carriage of Goods by Sea Act* apply by force of Articles 10(2) and (3) to the cargo in question unless any of the original Hague Rules, (referred to in the Act as the ‘Brussels Convention’), the Hague-Visby Rules, the SDR protocol or the Hamburg Rules apply. On the evidence before the Court, there was nothing to displace the application of the amended Hague Rules. The Court then held that the bills of lading were documents within the meaning of a ‘sea carriage document’ in the amended Hague Rules. That definition includes both ‘a bill of lading that, by law, is not negotiable’ (Art I(1)(g)(iii)) and a ‘non-negotiable document ... that either contains or evidences a contract of carriage of goods by sea’.40 In short the Court gave great weight to the fact that under Australian law this bill of lading was definitely a document of title and was concerned that a third party may rely on it to acquire an interest in the title to the cargo.

In arriving at its decision the Court also considered the decision of the Supreme People's Court of the People's Republic of China in *American President Lines v Guangzhou Feida Electrical Apparatus Factory of Wanbao Group* in 2002.41 In this decision the Chinese court had held that the straight bill of lading in issue was not a document of title because it incorporated contractually the provisions of the *Carriage of Goods by Sea Act 1936* and the *Federal Bills of Lading Act* of the United States of America. As the *Federal Bills of Lading Act* had been incorporated into the parties' contract, and the Act expressly permitted a carrier to deliver goods to a consignee named in a non-negotiable bill without production of an original bill of lading, the court found that delivery by the carrier was authorised without production of an original bill.

Whilst expressing great respect for the decision of the highest court of a great maritime nation, the Court held that the *American President Lines* decision should be distinguished from the present case. First, in this case there was no suggestion that the bills of lading permitted the carrier to deliver the cargo except on production of an original bill. Secondly, the judgment by the Chinese Court was before the decision in *The Raphaela S*, a decision which the Court clearly preferred. In any event, the Australian Court noted that the provisions of the Australian *Carriage of Goods by Sea Act* were binding in the circumstances and provided that a straight bill is a sea carriage document for the purposes of the amended Hague Rules.

On a final note the Court again mentioned the commercial possibility that an original bill of lading had passed, or may pass, into the hands of a third party who was not before the Court. In this the Court opined that the Sheriff should not be put at risk, nor should the Court itself be put at risk, of committing a conversion of the goods by agreeing to vary orders made on the appropriate and conventional basis that original bills of lading be produced for the discharge of cargo from the Sheriff's custody. The Court, accordingly, refused the application.

3.5 *Carriage of goods - whether bill of lading port to port bill or land/sea bill - section 8 of the Sea-Carriage Documents Act 1998 (Vic)*

In the matter of *M&U Imports Pty Ltd v Gava International Freight S.p.A.*,42 M&U Imports (‘M&U’), an Australian importer, entered into an agreement with an Italian exporter, Parlux SpA (‘Parlux’) to purchase electrical hairdryers and some ancillary parts (the ‘goods’). The terms of sale were identified as ‘FOB Italian Port’. After being loaded into a container and despatched by road from the Parlux factory at Trezzano in Italy, the goods were in turn transhipped in Milan and freighted by rail to the port of La Spezia where they were then loaded on the vessel *MSC Bruxelles* bound for

40 Article 1(1)(g)(iv).
41 4th Civil Division, unreported, 25 June 2002.
Melbourne. On arrival in Melbourne the container was trucked to M&U and on opening M&U discovered that only 333 cartons out of the full load of 573 cartons of goods were in the container.

M&U sued Parlux for the value of the missing goods, as first defendant, and sued Gava International Freight SpA ("GIF"), for failing to deliver the goods in accordance with the bill of lading issued by GIF as second defendant. In short M&U sued the two defendants in the alternative but it only sought recovery of its loss against one of them.

At first instance the trial judge heard a great deal of evidence, as to which see shortly, and found for M&U against Parlux as being in breach of its agreement to deliver 573 cartons and the judge dismissed the M&U action against GIF on the bill of lading. Both Parlux and M&A launched appeals, to the Victorian Court of Appeal.

The trial judge had heard evidence about what happened in Italy at Parlux when the container was stuffed and sealed, the state of the container when loaded onboard in La Spezia, its state and how it was trucked from the port in Melbourne to M&U premises and its state when opened. On this evidence the trial judge found that the theft had most likely happened on the land leg in Italy because, so he found, the theft was likely explained because the Parlux employees did not seal the container lock properly and some party or parties opened it on the Italian land leg, stole the cartons, and then properly resealed it. This explained, so the judge found, why the inspections at loading in La Spezia showed a correctly sealed container, as did the inspections on discharge in Melbourne port and on opening at M&U premises.

The judge then turned to the true meaning and effect of the contracts to decide on which party liability for the theft should fall. The trial judge had little trouble deciding that the contract between M&U and Parlux to deliver 573 cartons of goods had been breached and that Parlux was prima facie liable. A more difficult issue was about the bill of lading, which was between M&U and GIF and whether it had been breached.

In dismissing the claim against GIF the trial judge found that GIF had been acting in two distinct capacities in its dealings with the goods. GIF was in fact a freight forwarder and in its capacity with respect to the land transport in Italy, GIF was acting as a contractor with Parlux. On the bill of lading GIF was the carrier and in this capacity it was contracted with M&U. The trial judge found against the contention advanced by M&U that the bill of lading covered the Italian land sector of the carriage.

Because of the Italian land leg, the judge’s analysis required his Honour to consider whether this bill was a multi-modal bill or a port-to-port one, which is a topic of not inconsiderable interest in light of the recently agreed UNCITAL multimodal international convention. He noted that, whilst the form is that of a bill that could be a multimodal transport bill, the manner in which it had been completed and its terms were strongly suggestive of a port to port bill. That is, there was nothing that unequivocally pointed to a land/sea bill and that the goods were received by GIF under the bill when they were loaded on the vessel at La Spezia.

It may be convenient to mention to readers that the Australian law in this case was established by the Victorian State Act, the Sea-Carriage Documents Act 1998 (Vict.), and that under section 8 it is capable of applying to such a document not only in relation to any carriage by sea under it but also in relation to any carriage by land under it. Being a Victorian State Act is why the action was in the Victorian State courts.

There were two appeals to the Court of Appeal against the decisions of the trial judge. Parlux appealed against being liable to M&U and, to cover its position in case Parlux succeeded, M&U appealed against the decision dismissing its claim against GIF.

In dismissing both Parlux’s appeal against M&U and M&U’s appeal against GIF, the leading judgment was given by Cavanough AJA, with whom Buchanan and Redlich JJA agreed.

Parlux’s main grounds of appeal were that the findings of fact by the trial judge were not justified on the evidence and the judge’s reasons were insufficient. These are difficult grounds on which to succeed in any appeal. Parlux argued that its employees were long standing, highly experienced and careful and not likely to have incorrectly closed the seal on the container and, further, there was no actual evidence of where the thefts occurred. Suffice to state here that the careful judgment of Cavanough AJA reviewed the judge’s findings and reasons in detail and found that the findings were open on the evidence and the reasons were quite sufficient. Hence the Palux appeal was dismissed.

For maritime lawyers the more interesting part of the appeal relates to whether the bill of lading should be interpreted as a port-to-port one or a multi-modal one. The leading judgment noted, among other things, that the main heading of the

44 Lest there be any confusion it is noted that AJA stands for an Acting Justice of Appeal and JJA is the plural for Justices of Appeal.
document, expressed in capital letters, was simply ‘BILL OF LADING’. In smaller printed capitals below the heading the somewhat equivocal expression ‘CARRIER/MULTIMODAL TRANSPORT OPERATOR’ appeared. It also noted that it was not until towards the bottom of the page that any express reference is found to the document itself being anything other than a conventional bill of lading and that on the back, in quite small print, there was a heading ‘Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING’ and its provision was stated as ‘Applicable only when document used as combined transport B/L. Place of acceptance/delivery always to be an address’.

The judge held that the most important part of the bill was the front and that the pre-printed terms on the front did nothing to indicate that the bill was multimodal, save for the above matters, and the provision of spaces for specifying a ‘Place of receipt’ and a ‘Place of delivery’. There was no provision for the specification of any details in relation to the mode of land transport. M&U made 18 different points in its submissions and it is not necessary to deal with them all. Suffice to note that Cavanough AJA held that he was ‘not persuaded … that the bill of lading should be read as extending to the Italian land leg of the carriage’. 45

It is worthwhile however to note a few more points about the analysis of this bill of lading. His Honour held that the fact that the spaces on the front of the bill for ‘Place of receipt’ and ‘Place of delivery’ were not filled in should not be deemed particularly significant and contrasted the present bill with those considered in the 1993 New South Wales case of The Antwerpen 46and the further NSW case of The Resolution Bay. 47

In The Antwerpen and The Resolution Bay the bills of lading contained a definition clause which provided:

‘Combined transport’ arises when the place of acceptance and/or place of delivery are indicated on the face hereof in the relevant spaces and ‘Port to port shipment' arises when the carriage called for by this bill of lading is not combined transport.

In The Antwerpen, the name ‘Felixstowe’ had been entered into the box for Place of Acceptance. ‘Felixstowe’ had also been entered as the Port of Loading (Ocean Vessel). The box for Place of Delivery had been left blank. The name ‘Sydney’ had been entered into the Port of Discharge box.

In The Resolution Bay, the letters CFS (understood to be an abbreviation for Container Freight Station) had been typed into the Place of Acceptance and Place of Delivery boxes. Here the court applied The Antwerpen and held that the inclusions were meaningless, with the result that the bill was a port-to-port bill. By way of explanation, the court stated:

This case emphasises that if carriers wish to ensure that a bill of lading takes effect as a combined transport bill they must insert a meaningful address in the ‘Place of Acceptance' and/or ‘Place of Delivery' boxes on the face of the bill.

Cavanough AJA noted that the decisions in The Resolution Bay and The Antwerpen were distinguished by the 2003 English Court of Appeal in East West Corporation v DKBS 1912 and Another 48, partly on the basis of the express requirement in the bills for the insertion of an ‘address’. The English Court of Appeal held that the insertion in the Place of Receipt and Place of Delivery boxes of place names corresponding with the names of the ports of loading and discharge had the effect that the bills were to be regarded as combined transport bills. In the present case nothing at all has been inserted in the ‘Place of receipt’ and ‘Place of discharge’ boxes which Cavanough AJA held to be a very strong indication that the parties did not intend that the bill should apply to any transport other than sea transport.

This then was the end of the M&U and Parlux case and it is also the end of the cases for this Australian 2008 ‘Update’ that are of sufficient compass to note here.

4 LEGISLATIVE DEVELOPMENTS

The Commonwealth and all seven of the State and Territory parliaments continued to pour out legislation during 2008 at their usual very high rate. Of those acts a selection of the Commonwealth ones are noted here. Only Commonwealth ones are noted as they are off Australia-wide relevance and only a selection is noted as the space and the patience of the readers, and the authors, have some limitations. For readers interested in searching for other legislation or for looking further into the legislation mentioned here the Commonwealth and State and Territory web sites have full details. 49

45 Para 45.
47 Unreported, 6 December 1994, BC 9403463, Carruthers J, NSW Supreme Court.
49 The Commonwealth web site is www.comlaw.gov.au/.

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4.1 Offshore Petroleum Acts

The Commonwealth government had determined, as part of its environmental drive, to enact legislation to enable captured CO₂ gases, mainly from onshore coal fired electricity stations, to be injected into the sea bed in areas where undersea oil and gas fields lie. This is new technology world-wide and not yet perfected but the government resolved to put the legislation in place. It chose to do this by massive amendments to the very large and newly-proclaimed Offshore Petroleum Act 2006, renamed as the Offshore Petroleum and Greenhouse Gas Storage Act 2006, which amended Act came into force towards the end of 2008. Unhelpfully, the government was unable to provide a copy of this now more massive and now much amended Act for some six months after it came into effect.

The core of the changes was in the Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008 which amended the Offshore Petroleum Act 2006 (Cth) by providing for a system of offshore titles that will allow the transportation by pipeline and injection and storage of greenhouse gas substances in deep geological formations under the seabed. As set out, the object of this Act is ‘to provide an effective regulatory framework for: (a) petroleum exploration and recovery; and (b) the injection and storage of greenhouse gas substances; in offshore areas.’ The amended Act sets up a system for regulating the following activities in offshore areas:

(a) exploration for petroleum;
(b) recovery of petroleum;
(c) construction and operation of infrastructure facilities relating to petroleum or greenhouse gas substances;
(d) construction and operation of pipelines for conveying petroleum or greenhouse gas substances;
(e) exploration for potential greenhouse gas storage formations;
(f) injection and storage of greenhouse gas substances.

This new Act was addressed in the 2007 Australian Maritime Update (page 355) but at that time the Act had not yet been passed and was still a Bill.

Along with this new amended Act during 2008 went, of course, a number of other Acts amending various aspects. One of them was the Offshore Petroleum Amendment (Miscellaneous Measures) Act 2008 that, aside from technical aspects not of immediate interest, corrects the definition of ‘coastal waters’. The need to define and then re-define ‘coastal waters’ arises from the Australian Offshore Constitutional Settlement 1979, in which the Commonwealth agreed with the States that, for most purposes, the States could have jurisdiction out to three nautical miles, which was then the width of the Australian territorial sea. Subsequently the width was extended to 12 miles, but the States still have this three mile jurisdiction and it has given rise to great complexity in the application of Australia’s offshore laws.

Other amending offshore petroleum acts are the Offshore Petroleum Amendment (Datum) Act 2008 which requires that, for the all-important survey accuracy of offshore sections and blocks, the data be based on the Australian Geodetic Datum, which is linked to the international one. The Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Act 2008, the Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Act 2008 and the Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Act 2008 all relate to revenue aspects of the legislation. This legislation is, for want of a better word ‘experimental’, and it will need to be attended with many legislative changes to the acts and the regulations as events develop.

4.2 Protection of the Sea

The Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 gave legislative effect to the IMO Bunkers Convention, the International Convention on Civil Liability for Bunker Oil Pollution Damage, which has come into effect internationally at last. There has long been a sound and effective system internationally for compensation for oil spills from tankers, except in the USA where it is in place from other legislation unique to the USA. There had been no such provision, however, for oil spills from non-tankers and this was addressed in this Bunkers Convention and for Australia in this Bunkers Convention Act. There needed, as usual, to be amendments to the related Acts and this was done by the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) (Consequential Amendments) Act 2008 which amended the Admiralty Act 1988, the Protection of the Sea (Civil Liability Act) 1981 (which gives effect to the Civil Liability Convention relating to oil spills from tankers) and the Protection of the Sea (Powers of Intervention) Act 1981 (which gives effect to the Intervention Convention).

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50 Explanatory Memorandum to the Bill, para 1.
51 Section 2A.
52 Section 3.

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The various ‘Protection of the Sea’ Commonwealth Acts deal with the many international conventions and from time to time they need amendment to keep up with the changes to the conventions. In the Protection of the Sea Legislation Amendment Act 2008 the Parliament amended the various Australian acts that related to the Fund Convention by giving effect to the 1993 Protocol to it. This 1993 Protocol sets out the third tier of insurance from oil spills from oil tankers, which is optional for countries to take, and Australia has opted to take it. Australia has, of course, long been a member of the Fund Convention. This 2008 amending Act also makes amendments to legislation to put in force changes to MARPOL sets in train legislative changes relating to levies on shipping.

4.3 Customs and Transport Security

After the Australian Colonies federated into the Commonwealth of Australia in 1901 one of the first Acts passed by the newly-elected Commonwealth parliament was the Customs Act 1901, in order to create some revenue for the newly-created federal government. Since then this Act has been much amended and in 2008 it was further amended by the Customs Amendment (Strengthening Border Controls) Act 2008 which dealt with provisions relating to forfeiture of goods, surrender of goods, detention of goods, and the right in certain circumstances to compensation for loss of goods. Schedule 2 of the amending Act relates to search powers on certain ships and aircraft most of which is applicable to the offshore situation in that it made clear that the searches of vessels, aircraft and persons now had express legislative backing. The Commonwealth officers had been doing this for years anyway, but this amendment made it expressly clear that this was permissible.

Another legislative change relating to border security was the Transport Security Amendment (2008 Measures No.1) Act 2008, which made provision for an aircraft, vessel or offshore oil or gas facility to have more than one Maritime Security Plan. Under the main act, the Maritime Transport and Offshore Facilities Security Act 2003 the legislation provided for only one such plan, but this amendment provided for more than one.53

4.4 Great Barrier Reef

The Great Barrier Reef is, as has been mentioned in earlier ‘Updates’, the subject of its own Act passed by the Commonwealth Parliament54. The legislation is amended frequently and 2008 was no exception with the passage of the Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008. This amending Act was lengthy and comprehensive amounting to some 150 pages of legislation. The topics covered by it included changes to the Great Barrier Reef Marine Park Authority, which Authority is the body established by the GBRMP Act to give effect to and manage the legislation, to change the zones and set out the details of the activities that are permitted or not permitted in the various zones, to set out increased regime concerning environmental impact assessments relating to proposed activities and, of course, to increase the enforcement and penal provisions. Apart from the amendments to the GBRMP Act itself, these amendments also made significant changes to the Environment Protection and Biodiversity Conservation Act 1999.

5 OTHER ISSUES

5.1 Discovery of HMAS Sydney

During World War II (1939-1945) the Royal Australian Navy cruiser, HMAS Sydney (II), sank after a battle with the German raider HSK Kormoran in the Indian Ocean in November 1941. It was a major disaster and has evoked much Australian sentiment in recent years as not one of the 645 of the crew lived to tell the tale and no one knew where the wreck was located.

However, the wreck of Sydney II was found on 16 March 2008, located approximately 112 nautical miles off Steep Point in Western Australia, lying in 2,560 metres of water. This followed the discovery of the wreck of the Kormoran on 12 March and the search team worked from there in the direction that the Kormoran survivors said was the bearing of the cruiser when last seen.55
The Sydney’s entire crew of 645 went down with the ship and although the Kormoran also sank, 317 of its 397 crew were rescued. The loss of the Sydney and its crew remains Australia’s worst naval disaster. The location of both vessels had remained a mystery for over 66 years.

The circumstances surrounding the loss of the Sydney had been kept secret at the time as there was a war on and the Federal Government of the day had maintained the strictest secrecy about the loss for 12 days. The delay in making an official announcement strengthened public suspicion that information about the disaster was being withheld. The eyewitness accounts of the German survivors as to what had occurred and the location of the battle were also viewed sceptically. In 1997, the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade launched an inquiry into the circumstances surrounding the loss of the vessel. The report was tabled in Parliament in June 2000.

Following the discovery of the wrecks in 2008, an official inquiry, headed by Terence Cole QC, was announced. The findings of the inquiry were not yet known at the time of publication but it can hardly come up with any new information. It was essentially established in order to meet the high emotions and the public perception of further cover up long after hostilities had ended and there was any valid reason for it.

On 19 November 2008 the Rudd Government announced that these two vessels would be protected under the Historic Shipwrecks Act 1976 (Cth). This ensures the wrecks will be permanently protected by prohibiting damage or disturbance to or removal of the vessels and their relics. It also requires a person to obtain a Commonwealth permit to enter the sites, ensuring the wrecks will be permanently protected.

Through the Australian Heritage Council, the Rudd Government has begun an assessment for the National Heritage Listing of both sites, and as both ships are war graves, and they both lie in very deep water, it is unlikely that there will be any attempt to interfere with them. The finding of the Sydney, and the Kormoran, has been of some comfort to the descendants in both Australia and Germany of those lost in them.

There are three other historic wrecks with naval connections that are the subject of search and other activity. The Australian submarine AE1 was mysteriously lost with all hands in World War I (1914-1918) in waters off Papua New Guinea when it and the new Australian fleet were searching for the German battle fleet in September 1914. The AE1 was last seen on the surface about 50 kms from the anchorage near Rabaul as it commenced its homeward journey. It never arrived and, despite three days of searching by the fleet then and many searches since, no trace of it or its crew had remained a mystery for over 66 years.

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The Australian submarine AE1 was last seen on the surface about 50 kms from the anchorage near Rabaul as it commenced its homeward journey. It never arrived and, despite three days of searching by the fleet then and many searches since, no trace of it or its crew had ever been found. Searches for this lost submarine, the first loss of the newly established Royal Australian Navy, continue.

The AE2, the sister submarine to the AE1, was also lost in World War I, in this case in the Allied Gallipoli campaign for the fleet to try to fight its way through the Dardanelles and into the Sea of Marmora. The AE2 did succeed in getting through the Dardanelles on the day of the landings on 25 April 1914, ANZAC Day to the Australian and New Zealanders, but it was sunk 5 days later. The AE2 wreck was found in 1998 and talks continue between interested parties and governments in Australian and Turkey as to how best to record its achievements, along with those of the Sultan Hissar, the Turkish gun boat that so damaged the AE2 that the crew abandoned and scuttled her.

The third wreck of particular national interest is the Australian hospital ship Centaur. At the time of the ships loss it was steaming north in the seas some 40 kms off the east Australian coast, offshore from Brisbane, fully lit, not zig-zagging, unarmed and fully marked as a hospital ship when a Japanese submarine, in a cowardly attack, torpedoed it with subsequent heavy loss of life of medical staff and others. This occurred in 1943 and some 268 people were lost and only about 68 managed to survive. The sinking is marked annually by suitable ceremonies. The Centaur lies in fairly deep water but the team that found HMS Sydney (II) is currently searching for it and success is considered very likely. If found the descendants of those lost will be comforted by the finding.

59 The Courier Mail, 16 May 2009.
60 The Courier Mail, 13 May 2009.

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5.2 Native Title Claims in the Torres Strait

Readers will be aware from earlier Updates that the Torres Strait area, which lies between the northern tip of Australia and the southern part of Papua New Guinea (PNG) is not without its legal issues. One issue relates the complex Native Title claims made in this area by the Torres Strait Islanders, the indigenous people who live on the many islands there and who have, of course, a unique culture of their own which is quite different to that of the Aboriginal people on the Australian mainland. One aspect of this culture is their special relationship with the sea and with the southern PNG peoples.

There are presently 34 Indigenous Land Use Agreements (ILUAs) that have been registered in relation to land and waters in the Torres Strait region. Twenty five of these are Area Agreements and the remaining nine are Body Corporate Agreements. The vast majority of these ILUAs were entered into by native title claimants to facilitate the making of consent determinations of native title.61

The Torres Strait Regional Authority anticipates that by the end of 2010 all native title claims over land in the Torres Strait will be finalised although it is uncertain when the Regional Sea Claim will be finalised although it is hoped that the Federal Court will make a determination by the end of 2010.62

Into this matrix was thrown the claims of the PNG residents who had traditionally fished and traded in the Straits area that is now part of Australia, which is most of it. When PNG was granted independence in 1975 a Torres Strait Treaty63 between the two countries erected a complex system of zoning and sovereignty in the Torres Strait area supervised by a number of authorities. When the Federal Court of Australia started hearing native title claims from the TS peoples some of the PNG peoples felt their rights may become reduced. As a result they applied to be joined in the actions but, of course, this had its difficulties as they were not Australian residents or citizens and as foreigners they were claiming to be heard in litigation and settlement negotiations relating strictly to Australian resident and citizen rights.

One particular case, Gamogab v Akiba and Others,64 epitomised this issue as the primary judge refused permission for the PNG applicants to be joined in the action as he held, in the exercise of his discretion, that it was more a political matter relating to international matters and, of course, the Australian domestic courts had long held that international diplomatic matters were not justiciable. On appeal one judge upheld the decision but the other two held otherwise, upholding the appeal and sending the matter back to the primary judge to deal further with it. This appeal was in 2007 and provides an illustration of the type of important and complex offshore laws litigation that comes into the public eye from time to time.65

5.3 Australian Coal Ports Now in Over Capacity

During the economic boom times Australian ports could not cope with the demand for bulk exports and a huge wastage of demurrage was a regular feature off the ports with some 30 ships anchored offshore awaiting a berth to load. In some ports the number was even greater. As a result there was huge pressure to increase the export capacity of these ports and during 2007 and 2008 this got under way. Millions of dollars are now being raised and invested in increasing export capacity and work has commenced in some of these ports.

However, the world economic downturn has resulted in a major fall in export tonnages and, as is well known, an increasing number of the world’s bulk cargo ships are being laid up. One ramification is that the major investment in the Australian bulk ports has been characterised by a lack of demand for the existing loading capacities, let alone the future expanded ones.66 It is not as though the blame can be laid at any one door as the world boom was not foreseen by many and nor was the world financial meltdown. Further, the lead time is very long to raise the large sums of capital, put in place the contracts and allow for and supervise the necessary construction. It is likely that when the extra capacity has been constructed in the bulk ports it will be utilised in due course as there has been a steady increase in demand for Australian bulk exports over many years and, aside from the usual economic up-and-down cycles, the long term uptrend is likely to continue.

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62 ibid.
65 See for instance The Australian, 15 October 2008, reporting that Judge Finn of the Federal Court was hearing evidence on these matters on one of the Torres Strait islands in October 2008.

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5.4 Australian Coastal Shipping

The lack of any policy by any Australian political party on maritime matters, and in particular on support for the Australian shipping industry in relation to coastal shipping, has been a talking point for the Australian shipping industry for many years. During the Howard government years report after report lay inactive on the government shelves about the need to do something. For the most part the number and size of Australian ships registered steadily declined as those with shipping capital made a point of registering their ships in other countries. As a result the number of Australian seafarers has steadily declined and in recent years one consequence of this decline has been the difficulty harbour authorities have had in finding experienced harbour masters and pilots.

This became an election issue and the Labour Party, which was elected in the Rudd Government at the end of 2007, promised support. Some of this promise was forthcoming in that this government commissioned a report on coastal shipping and in October 2008 a bipartisan Parliamentary committee report entitled Rebuilding Australia’s Coastal Shipping Industry was released by the Commonwealth Minister for Infrastructure, Regional Development and Local Government, Mr Anthony Albanese. The Report was long and complex and, after thinking of little else over the Christmas holidays, on 16 February 2009 Mr Albanese announced a Shipping Policy Advisory Group to consider and make recommendations based on the recommendations of the Report.

The Group is comprised of a selection of industry and government appointees and in his statement the Minister made the right noises in announcing that the government is ‘determined that shipping will once again fulfil its potential as a critical element to our national transport system’. As the Maritime Union of Australia has quite a lot to gain from an increase in Australian crews, as has the national interest as a whole, it is hoped that the MUA’s considerable influence with the present government will result in some suitable action being taken. This remains to be seen.

6 CONCLUSION

As mentioned in the Introduction, the Australian scene has not been dramatic during 2008 but it may be seen that as the country is an island there are always offshore issues of interest. The one issue of particular interest and the one that excites much publicity is that of Japanese whaling. The Sea Shepherd annual foray to harass the Japanese whaling fleet is done with very strong links to the media so this issue is not likely to abate while these annual whaling fleets come into the Southern Ocean. Australian is not alone in this as New Zealand also has a strong public resentment to them.

One issue that has not been given much attention in this Australian ‘Update’ series is the amount of offshore oil and gas activity, mainly being conducted off the north-west of the country, where there is a considerable amount of oil and gas exploration and development. There is also considerable activity in the ports of that region where they export a large amount of iron ore. This remote and sparsely inhabited part of Australia is rich in minerals onshore and rich in petroleum offshore. Perhaps next year the spotlight of this ‘Update’ will focus on some of the detail from these two activities.

68 Australian Maritime Digest, 1 March 2009, No.177, p.11.
69 Ibid.