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Frank Stuart Dethridge Memorial Address

LIMITATION OF LIABILITY AS A RISK ALLOCATION MECHANISM IN MARITIME LAW

Justice Alan MacKenzie*

The theme which I have chosen for this address is ‘limitation of liability as a risk allocation mechanism in maritime law’. It is currently a topical subject, in New Zealand at least, which I hope will make it of some interest.¹ But that topicality carries with it some dangers for an address such as this. There will be many among you in this audience who are directly involved in limitation issues, on all sides. It would be hazardous for a sitting judge to venture into the reefs and shoals of the specifics. I hope to navigate clearer waters by directing my remarks at a more general level. I will discuss the development of the concept of limitation by examining its history, and the policy considerations which underlie it. I will then describe the limitation of liability regimes in place on a global basis. Finally, I will venture some thoughts on the current relevance of the concept in this modern age.

The basic concept of limitation of liability is simple. Those involved in the ownership of a ship are entitled to limit their liability in respect of claims arising out of their operations, to a total sum which is fixed by the law. The limit is not, as is more usual, set by the practical reality of the financial capacity of the party concerned, or the extent of his insurance cover.

Limitation in this way is not the norm for the law in allocating risk between those responsible for causing damage and those suffering that damage. In most situations, the law serves the function of prescribing the circumstances in which the person causing damage will, or will not, be liable to compensate persons harmed. The application of the law on a claim by claim basis will determine the extent of that liability in financial terms. The law does not, in fields other than maritime law, apply an overarching limit on the total amount to which the wrongdoer may be subjected, when the wrongdoing from a single event or circumstance leads to a multitude of claims.

That is not to say, of course, that the victims of accidents which cause widespread damage to many claimants, in the non-maritime arena, will always, in the end result, be fully compensated for the amount which the law determines as just recompense for the loss. As I have noted, the capacity of the wrongdoer to pay damages, either directly from its own resources or from insurance, sets a de facto limit to the amount which individual claimants will receive. In allocating the total resources available among all such claimants, the law generally operates on a ‘first up, best dressed’ basis. The plaintiff who is quickest off the mark in enforcing his claim will be paid ahead of his more tardy fellow sufferers.²

When the law does intervene to alter that case by case determination of liability, and the satisfaction of it, it generally does so in a way quite the reverse of limitation of liability. The usual mechanism for addressing the issues involved is to provide not that the liability of the wrongdoer be limited, but rather that the wrongdoer must maintain a specified level of resources, by insurance or some other means, to meet the expected liability.

In contrast, in the maritime environment, the extent of liability is fixed by law, and the law prescribes the way the amount available is allocated among claimants. Why then has maritime law developed a concept of limiting

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¹ See for example *Daina Shipping Company v Te Runanga O Ngati Awa* [2013] NZHC 500; 2 NZLR 799.

² For an example of the operation of that principle, see *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd’s Rep 437 (CA).

the total liability of the wrongdoer for the consequences of a maritime disaster? Lord Denning MR addressed that question in *The Bramley Moore*.³

The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more. A small tug has comparatively small value and it should have a correspondingly low measure of liability, even though it is towing a great liner and does great damage. I agree that there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.

Let me examine its origin in history, and its justification in convenience.

The origin of limitation of liability is obscure. The modern formulation of liability, that the liability of a shipowner is limited to an amount calculated by reference to the tonnage of his ship, is entirely a creature of statute.⁴ The modern statutes implement international agreements. There was no such rule, either at common law or in admiralty, in our two countries or in the United Kingdom, from where our common law was initially derived. That great admiralty judge, Dr Lushington, described the historical position as being: 'By the ancient maritime law, the owners of a vessel doing damage were bound to make good the loss to the owners of the other vessel, although it might exceed the value of their own vessel and the freight.'⁵

The view has been expressed that the concept of limitation originated in the notion of *Commande*.⁶ That term describes the type of joint adventure of shipowners or merchants which was common in the Mediterranean in the Middle Ages, in the days before formal legal structures for joint ventures – in the form of joint stock companies and the like – were developed. The liability of the joint adventurers was limited in ways which did not expose each of them to unlimited personal liability for the venture. But the concept of limitation was not incorporated directly into the medieval maritime codes such as the Rolls of Oléron.

The concept seems to have first been established in Continental Europe. Three different systems developed among maritime nations.⁷

Under the first system, the liability of a shipowner was effectively limited to the value of the vessel. This method of limiting liability was first enacted in the Swedish Maritime Code of 1667, and spread to a number of other countries. The method of limiting liability to the actual value of the vessel was quite simple: the shipowner gave notice of abandonment of the vessel and in effect wiped his hands of the disaster. The claimants were left to get what they could, by subjecting the abandoned vessel to judicial sale, and hopefully satisfying their claims from the proceeds.

A second system emerged in Germany, from about the mid-nineteenth century. It was based on the notion that the object which caused the damage, that is to say, the ship, was directly liable to the person harmed. Instead of serving a notice of abandonment, the liability of the shipowner was limited to the value of the ship and freight.

The third system developed in English law, by a series of statutes from the mid-eighteenth to the late nineteenth centuries. Those statutes created a limitation system based on a sum calculated by reference to the tonnage of the ship. The dominance of Britain and its empire, and the diplomatic influence which it exercised, meant that this mode of limitation has prevailed, and is now incorporated in the international conventions on limitation.

The earliest English statute was the *Responsibility of Shipowners' Act 1733*. The immediate trigger for that Act was the decision in *Boucher v Lawson*.⁸ In that case, a shipowner was held liable in full for a cargo of gold bullion stolen by the Master. That decision was greeted with alarm and outrage by the shipowning community. A petition to Parliament by shipowning interests contrasted the unfavourable position of English owners with those on the Continent. That comparative disadvantage was probably at least as important as the perceived

³ [1964] P 200, 220; [1964] 2 WLR 259, 265-6 (CA).

⁴ *Limitation of Liability for Maritime Claims Act 1989* (Cth); *Maritime Transport Act 1994* (NZ) Pt 7.

⁵ *The Volant* (1842) 1 W Rob 383, 387; 166 ER 616, 618 (Admir).

⁶ Kenneth C McGuffie Marsden, *The Law of Collisions at Sea* (Stevens & Sons, 11th ed, 1961) 129-134.

⁷ For a fuller description of the history, see Nigel Meeson and John A Kimbell, *Admiralty Jurisdiction and Practice* (Informa Law, 4th ed, 2011) Ch 8.

⁸ (1733) Cas T Hard 194; 95 ER 125.

injustice to the shipowners. In reviewing the history, Lord Stowell noted that a prompt for the legislation was the limitation regime in Holland, then a major competitor of Britain for maritime dominance.⁹

Parliament acted very quickly to change the law. The preamble to the 1733 Act sets out very clearly, in the language of the day, the policy considerations which underpinned the Act. It bears quoting. It said:

Whereas it is of the greatest consequence and importance to this kingdom to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested in and concerned therein: and whereas it has been held, that in many cases owners of ships or vessels are answerable for goods and merchandise shipped or put aboard the same, although the said goods and merchandise, after the same have been so put on board, should be made away with by the masters or mariners of the said ships or vessels, without knowledge or privity of the owner or owners; by means whereof merchants and others are greatly discouraged from adventuring their fortunes, as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom.

The 1733 Act limited the liability of the shipowner to the value of the ship and freight, for claims arising out of the theft of cargo by Master or crew. That introduced the principle of limitation. Subsequent acts extended the application of the principle to other types of claim, where the claim arose in circumstances where there was no 'fault or privity' on the part of the owner. They also provided for greater certainty in the amount of the limit, by moving from the actual value of the ship to a notional value. The legislation set an amount per ton of the tonnage of the vessel. The various limitation statutes were consolidated in the *Merchant Shipping Act 1894*, in two very well known provisions, ss 503 and 504. In 1900, the right to limit was extended to all cases where, without fault or privity of the person seeking to limit, loss or damage had been caused to property or right of any kind whether on land or water or whether fixed or movable.¹⁰ Both of our countries operated, for a long part of our history, under the 1894 Imperial Act.¹¹

So, by these developments, English law moved in about 170 years from a position where a shipowner had no limit on liability, to a narrow limitation of liability for theft by master or crew based on the actual value of the ship, to a comprehensive limitation for all types of claim except those to which the owner was privy, based on a notional per ton figure.

These developments were all statute law, not judge-made law. As an aside, I mention that the drafting of the statutes has not received universal acclaim from the judiciary which had to apply the statutes. In a judicial *cri de couer* Edmund Davies LJ said:¹²

Were bewilderment the legitimate aim of statutes, the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, would clearly be entitled to a high award. Indeed, the deep gloom which its tortuousities induced in me has been lifted only by the happy discovery that my attempts to construe them have led me to the same conclusion as my brethren.

So much, then, for the history and policy rationale behind the domestic legislation. By their nature, ships travel the high seas. To be effective, any regime for the limitation of a shipowner's liability must be adopted internationally, on a broadly uniform basis. From the early years of the 20th century, there were international efforts to rationalise the three different systems of limitation which were then in operation, as I have described. A leading proponent in those efforts is Comité Maritime Internationale, or CMI, in which both Australia and New Zealand participate, through your association. CMI identified limitation as a subject suitable for regulation by international convention.

CMI's first attempt at achieving uniformity resulted in the 1924 Limitation Convention.¹³ That established the English system as the basic model, and was in effect an international adoption of s 503 of the *Merchant Shipping Act 1894*. That convention received little international acceptance and CMI revisited the subject in the 1950s, leading to the 1957 Limitation Convention.¹⁴ The 1957 Convention also adopted the British system, and increased the limits of liability for property and personal injury claims. The 1957 Convention was more widely adopted than the 1924 convention, but the topic of limitation remained a live one, for both CMI and the

⁹ *The Dundee* (1823) 1 Hagg 109; 166 ER 39 (Admir).

¹⁰ *Merchant Shipping (Liability of Shipowners and Others) Act 1900* (UK) 63 & 64 Vict c 32.

¹¹ In New Zealand, the 1894 Act provisions remained in force until repealed and replaced by the *Shipping and Seamen Act 1952* (NZ).

¹² *The Putbus* [1969] P 136; [1969] 2 All ER 676 at 680.

¹³ *International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels*, 1924, 120 LNTS 123.

¹⁴ *International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships*, 1957, [1981] ATS 2.

International Maritime Organisation (IMO). A further convention was promulgated in 1976.¹⁵ The 1976 Limitation Convention introduced further changes. Importantly, the onus of proof of 'fault or privity' on the part of the owner was reversed. It was now incumbent on the claimant to establish fault, not on the owner to show absence of fault. Also, the calculation of the limitation fund, originally intended to produce a figure roughly equivalent to the commercial value of the vessel, was now influenced by considerations of the availability of insurance.¹⁶ The limits in the 1976 convention were increased by a protocol in 1996.

The outcome of these international developments is that in place of the three quite different modes of prescribing the limit on the liability of the shipowner, there is now one basic model. That is, limitation to a fixed sum based on the tonnage of the vessel, for claims occurring without fault or privity on the part of the owner. There are four significant variations on that theme, in the 1924 convention, the 1957 convention, the 1976 convention and the 1976 convention as amended by the 1996 protocol. Each has some measure of international acceptance.

Modern technology, and the increasing extent to which the seas are exploited by means other than the passage of ships, have led to extension of the concept of limitation to maritime operations beyond the traditional role of the shipowner. A range of conventions, such as the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea* (the 'HNS Convention'),¹⁷ a number of conventions concerning nuclear incidents, and concerning oil pollution address liability for damage in those fields, including the establishment of limitation funds.

As well as the global limitation, the principle of limitation as a risk allocation mechanism in maritime law has been applied to specific types of claim. Again, CMI has played a critical role in these developments. Examples are the rules for limitation of liability for passenger claims contained in the Athens Convention 1974,¹⁸ and the regimes for limiting the liability of shipowners and others for damage to cargo, in the Hague rules,¹⁹ the Hague-Visby rules,²⁰ and the Hamburg Rules.²¹ Those conventions are a separate topic in themselves and I do not venture into that today. I simply note that the policy considerations underlying those specific limitation regimes are very different from those underlying the global limitation of a shipowner's liability. Those conventions were in large part a response to contractual terms which relieved the shipowner from financial responsibility.²² An important part of the impetus behind the passenger and cargo liability regimes was not to limit the liability of the shipowner, but to limit the ability of the shipowner to exclude liability by contract.

I come then to discuss the policy rationale which underlies the limitation of the liability of shipowners and others involved in maritime adventures, in the modern era. Lord Mustill, a previous very distinguished presenter of this address, has on another occasion described six policy justifications which can be advanced as the motives which impelled the development of limitation of shipowner's liability.²³ I describe those briefly, and consider their present relevance. I also discuss other modern policy considerations which are now relevant to the concept of shipowner's limitation.

Lord Mustill's first motive was the concept that the shipowner and the cargo owner were participants in a common adventure for the benefit of both, at the cost of both, and at the risk of both. The limitation of the shipowner's liability assisted the apportionment of those risks between the joint venturers. That motive harks back to the notion of *Commande*, that I mentioned earlier.

The second and related consideration is that high cargo values meant that the value of the cargo might substantially exceed the value of the ship. In the event of the total loss of ship and cargo, the total loss, would, without a limitation of the liability of the shipowner for damage to the cargo, rest disproportionately with the shipowner rather than the other venturer, the owner of the cargo.

¹⁵ *Convention on Limitation of Liability for Maritime Claims*, 1976, 1456 UNTS 221.

¹⁶ Patrick Griggs, 'Limitation of Liability for Maritime Claims: the Search for International Uniformity' [1997] *Lloyd's Maritime and Commercial Law Quarterly* 369.

¹⁷ 1996, 35 ILM 1415.

¹⁸ *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*, 1974, 1463 UNTS 19.

¹⁹ *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, 1924, 120 LNTS 187.

²⁰ *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 1968, 1412 UNTS 127.

²¹ *United Nations Convention on the Carriage of Goods by Sea*, 1978, 1695 UNTS 3.

²² For a brief description of the history, see Sir Bernard Eder (ed), *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 22nd ed, 2011) Ch 20.

²³ Lord Mustill, 'Ships are Different – or are they?' [1993] *Lloyd's Maritime and Commercial Law Quarterly* 490.

The third feature noted by Lord Mustill was that the introduction of the concept of limitation of liability of shipowners was broadly contemporaneous with the development of limited liability through the joint stock company, in other areas of economic activity.

Fourth, the nature of seagoing operations exposed the shipowner to a significant risk of ruin without fault. That created a perceived injustice in the conditions then prevailing. In those earlier times, the shipowner had little practical control over his venture. He could do little more than farewell his vessel from the dockside, entrust his fortune to the integrity and skill of his master and crew and, like Antonio, the Merchant of Venice, seek news on the Rialto and wait for his bottoms to come in. There was a general sentiment that it was unacceptable for the shipowner to be ruined by claims arising from an event for which he was not personally to blame, and about which he could have no knowledge until after, perhaps long after, it had happened.

The fifth motive is the attraction of venture capital. Limitation of liability helped to remove an obstacle to the investment of venture capital, at a time when commercial ventures were mainly conducted by individuals with unlimited personal liability. Limitation would thus encourage the development of a national merchant marine. In those days of Empire, that was a very important policy consideration. It is worthy of note that the broadly contemporaneous development of joint stock companies served a similar economic purpose in other areas of commerce.

The sixth consideration, which Lord Mustill described as a more recently publicised justification, is a general benefit to users. Limitation laws protect not only the carrier, but those using and benefiting from his service. They do so by enabling the shipowner to continue in business, and to prevent an additional impost which would be passed on to cargo owners and ultimately consumers in general by means of freight increases.

Very few of those justifications would be seen as having significant relevance, if the principle of limitation of a shipowner's liability was re-examined, from a policy perspective, today. Lord Mustill was of that view.²⁴

The economic considerations which are said to justify the continued existence of a limitation of shipowners' liability no longer bear any resemblance to those which originally led to its creation, all of which have dropped away, leaving only the comparatively modern proposition that it is in the general interests of society at large that shipowners should be permitted and indeed encouraged to remain in their traditional business; performing it in the traditional way. This proposition might be right, but there are increasing numbers who are thinking about it, who do not regard it as self evident, and who are ready to say so.

Several of the motives to which I have referred arose from the less sophisticated business structures and commercial arrangements of those earlier times. Those motives have become largely irrelevant in the modern age. There are now legal methods of structuring commercial enterprises available to overcome the obstacles. The use of one-ship companies can enable a shipowner to limit his exposure to the capital employed in the operation of each vessel. That may produce an outcome not essentially different from the statutory scheme. As I noted at the outset, the limitation of liability of shipowners is at odds with the way the law fixes liability in other areas. It is however important not to over-emphasise the importance of that. The parallel and broadly contemporaneous development of limited liability corporations may well enable venturers in other activities to achieve a limitation on their exposure from those activities. This means that in the modern age, limitation of the liability of shipowners as it now exists may be less necessary as a means of achieving a balance in the risks involved in that form of economic activity than it once was. But it may for that reason be less out of line with the way risk is allocated in other forms of economic activity than it was when it originated.

The notion that it was unfair to expose a shipowner to unlimited liability for events over which he had no control also needs re-examination today, in the light of modern shipping operations. The shipowner has direct communication with, and the ability to exercise control over, his vessel at every hour of the day and night, anywhere in the world. In that respect he is little different from the operator of any other large commercial enterprise, who does not have the benefit of limitation of liability.

Modern attitudes would also influence views on what is desirable to encourage investment in shipping. Encouragement would not necessarily be seen as justifying a different liability regime for shipowners. The development of a national merchant marine is less important from a policy perspective than it once was. Societal attitudes would not necessarily regard the attraction of venture capital as an unqualified benefit, to be encouraged by limiting the liability of the venture capitalist. Modern attitudes to activities which carry a risk,

²⁴ Lord Mustill, above n 23, 499.

particularly to the environment, are different from those in the past. Society generally, and certain interest groups in society in particular, increasingly advocate for the total costs of activities which carry risks, such as environmental risk, to be allocated to the party whose activities create the risk. Limitation of liability runs counter to that. I do not comment further on this, because it leads me close to the hazardous waters which I eschewed at the beginning of this address. It is however an important consideration, and one not to be underestimated.

Another important difference from the time when limitation was developed is the much larger scale and complexity of maritime operations. The changes have implications for the concept of limitation by reference to the size of the ship. The size of the ship is a convenient, but rather rough and ready, measure for assessing the liability which the shipowner should bear. There is no necessary proportionality between the size of a ship and the potential damage it may cause. It is true that larger ships mean larger limitation funds. But it is also true that the potential damage from a marine disaster has increased significantly. It may be doubted whether there ever was a close relationship between the quantum of the limitation fund calculated by reference to the size of the vessel and the quantum of the potential damage which a vessel of that size could cause. But any proportionality must now be questionable. Modern ships are specialised and purpose built. Their potential to cause harm can differ greatly according to their function, in a way which bears little relationship to their size.

A further significant difference now from then is that there is a much wider range of potential claimants against a shipowner in a maritime casualty. In earlier days, the risk involved in a maritime adventure – the voyage of a ship – was largely confined to the parties directly involved. The parties were the shipowner on one hand, and the owners of the cargo which he carried, or his passengers, on the other. Risk distribution was largely between those participants. The risks are no longer confined to those parties. The increasing complexity of modern commerce means that there will now be a larger number of parties indirectly connected to the venture who will be affected by its success or failure. For example, the cargo carried on a vessel may have been on-sold, possibly several times over, to parties who will have ordered their affairs in the expectation of the safe arrival of that cargo. Also, developments in the law, such as the 20th century extension of liability in negligence for example, mean that the indirect victims of a casualty may now have claims that would not have been seen as significant when the concept of limitation was developed.

Further, and more importantly, there are persons who are not involved in the venture, either directly or indirectly, who have the capacity to suffer significant damage from a maritime casualty. Modern technology, and the increased size and sophistication of ships, creates a potential for damage to these uninvolved parties in a way which was simply not possible and did not require consideration, when the concept of limitation was developed. The most obvious example is the potential for maritime casualty to cause pollution. The fisherman or the tourist operator who depends directly or indirectly on the sea for his income can be affected by a catastrophe which arises from a venture in which he has no interest, direct or indirect.

Risk allocation among those wider classes of potential claimants raises a set of issues not relevant in the simpler days of old.

A very important consideration today is the potential of ships to cause pollution. Maritime law addresses in a number of ways the environmental risks arising from pollution. I have already mentioned the pollution conventions. A further recognition of the need for the law to address potential harm from pollution are the developments in the law of salvage. The traditional ‘no cure, no pay’ basis for compensating those who undertake salvage when a ship has been damaged at sea has given way to a recognition that it is not only the property of the shipowner and cargo owner which is at stake in a salvage operation. Salvors must also be concerned with the potential environmental effects, and must be compensated for the measures which they take to address those effects, whether or not they are ultimately successful in saving any property of the shipowner or the cargo owners. A limitation of liability regime which requires those who suffer damage from adverse environmental effects to stand in line with other claimants might now be seen as running contrary to the modern trend. But, again, I am sailing near dangerous waters, and I say no more on this topic.

When I reflect on the matters I have mentioned, it seems to me that it is unlikely that, if we were starting with a clean slate, we would now adopt a risk allocation mechanism in the maritime field like that which we have. However, I think that there are two main considerations which make fundamental change unlikely.

The first is the power of incumbency. The present liability regime has been in place for many years. The industry worldwide has organised its affairs, and its insurance arrangements, in ways which would make fundamental change difficult, and likely to occur only if the present arrangements were seen to be entirely inappropriate.

I think that the present regime is not likely to be seen as entirely inappropriate, largely because of the second consideration. That second consideration is the need for international congruity in maritime matters. An internationally uniform risk allocation mechanism has distinct advantages over the different regimes which would be likely to arise if liability was left, as in other areas of economic activity, to the domestic law.

I mention those as some of the considerations which may well influence the future of limitation of liability as a risk allocation mechanism in maritime law. They are complex, and they do all not point in a clear direction as to how they should influence the policy of the law. I do not have a crystal ball, and I do not intend to venture any view about how the law may develop, either domestically or internationally, in this regard. I have attempted only to point out issues, not to provide answers. You in this audience, with your involvement in these issues as participants or as advisers, will help to determine the future shape of our law in this important area.

AUSTRALIAN COASTAL SHIPPING: NAVIGATING REGULATORY REFORM

Jennifer Porter*

1 Background

On 18 June 2012, the Federal Labour Government passed the *Stronger Shipping for a Stronger Economy* legislative package, with the aim of revitalising Australia's ailing shipping industry.¹ The legislative package overhauled the regulation of coastal shipping in Australia, changing vessel registration arrangements,² introducing a licensing regime to regulate vessels engaged in domestic shipping trade and strengthening cabotage provisions.³ It also introduced a raft of tax incentives,⁴ designed to 'encourage and sustain growth and productivity in our shipping industry'.⁵ This regime came atop 2010 amendments to the *Fair Work Regulations 2009* (Cth) which extended the application of the *Fair Work Act 2009* (Cth) to foreign flagged vessels operating in Australian waters and engaged in coastal trading.

In April 2014, the Australian Government released an Options Paper: *Approaches to regulating coastal shipping in Australia* ('Options Paper'), and sought stakeholder input regarding the impact of the current regulatory regime on the shipping industry. The Options Paper records Government's 'unambiguous aim' to 'reduce the regulatory burden in the shipping industry to provide Australia with access to efficient and competitive shipping services'.⁶

This paper will analyse the legal, economic and practical implications of the 2012 regulatory changes and undertake a review of the industry's response to the Options Paper. This will inform an analysis of the key issues affecting the coastal shipping industry, and facilitate the identification of matters to be considered and resolved in any future legislative reform.

2 Implications of the 2012 Legislative Package

The *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) ('*Coastal Trading Act*') established a three tier licensing system which replaced the permit system prescribed by the *Navigation Act 1912* (Cth). Under the *Coastal Trading Act*, vessels on the Australian General Register may obtain a General Licence which affords the holder unrestricted access to the coastal trade for a period of five years.⁷

A Temporary Licence can be granted to a vessel registered on the Australian International Shipping Register, or a foreign flagged vessel, to undertake nominated coastal trading voyages over a 12 month period.⁸ An application for a Temporary Licence must include a minimum of five voyages and specify loading dates, cargo or passenger details, unloading dates and vessel details.⁹ Vessels with a General Licence are afforded the right to lodge a notice in response to applications for Temporary Licences by foreign flagged vessels, where the General Licence holder could undertake the voyage contemplated in the application.¹⁰ Following a period of consultation, the Minister can determine whether or not to grant the Temporary Licence. Once granted, a Temporary Licence can be varied, and is required to be varied, if dates or cargo details change prior to the voyage outside accepted tolerance limits.¹¹

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¹ Anthony Albanese MP, 'A Strong and Prosperous Maritime Future' (Media Release, June 18 2012) <<http://anthonyalbanese.com.au/a-strong-and-prosperous-maritime-future>>.

² *Shipping Registration Amendment (Australian International Shipping Register) Act 2012* (Cth).

³ *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) Pt 4.

⁴ *Shipping Reform (Tax Incentives) Act 2012* (Cth); *Tax Laws Amendment (Shipping Reform) Act 2012* (Cth).

⁵ Albanese, above n 1.

⁶ Australian Government Department of Infrastructure and Transport, 'Approaches to regulating coastal shipping in Australia' (Options Paper, Department of Infrastructure and Transport, 8 April 2014)

<https://www.infrastructure.gov.au/maritime/business/coastal_trading/review/index.aspx>.

⁷ *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) ss 13, 16.

⁸ *Ibid* ss 28, 40.

⁹ *Ibid* s 28.

¹⁰ *Ibid* s 31.

¹¹ *Ibid* ss 43-49.

The *Coastal Trading Act* also provides for the granting of Emergency Licences which allow access to coastal trade for a period of no longer than 30 days, in certain limited circumstances.¹²

The *Stronger Shipping for a Stronger Economy* legislative package also altered the vessel registration arrangements in Australia, renaming the existing register the Australian General Register, and establishing an Australian International Shipping Register ('AISR'). Australian-owned or operated vessels which are engaged predominantly in international trade, can register on the AISR, and take advantage of less stringent labour requirements, and associated lower costs, when engaged on international voyages.¹³ To date, no vessels have registered on the AISR.¹⁴

The 2012 legislative package also introduced tax reforms designed to encourage Australian-based shipping operations and investment in the Australian fleet and workforce.¹⁵

2.1 Effect on Shipping and Industry

Whilst the new regulatory regime has been in place for a relatively short period of time, there has been no evidence of "revitalisation" of the Australian shipping industry, and industry reports suggest the reform has not achieved its stated aims.

Shipowner association, Shipping Australia Limited, reports that the Australian blue water shipping industry has continued to contract. It is aware that a number of international shipping companies have withdrawn from offering coastal shipping services due to increased cost and administrative burdens, resulting in reduced competition and increased cost to shippers.¹⁶ This is consistent with the Australian Competition and Consumer Commission's ('ACCC') observations that the number of Australian vessels registered to carry coastal trade has fallen from 22 in 2010-11 to 16 as at December 2013.¹⁷ The ACCC notes that restrictions on foreign lines operating is leading to higher costs for Australian businesses and particularly as foreign vessels are being discouraged from carrying coastal trade incidental to an international service.¹⁸

A report published by the Institute of Public Affairs found that as 'a result of the 2012 changes alone, the net present value of the coastal shipping industry's net economic benefit to the Australian economy is between \$76 million and \$150 million less than it would be in the absence of these changes'.¹⁹

The 2012 amendments are by no means the sole cause of the decline in Australian shipping, which has been on a downward trend for some time. The extension of the *Fair Work Act* to foreign flagged vessels is seen as a major contributing factor in the reduction in coastal trade.²⁰

As a result of the recent regulatory change, shippers, including manufacturers and primary producers, are experiencing increased shipping costs. Industry groups are reporting that their members are experiencing significant freight increases, which in trade-exposed industries threatens Australian industry survival in a global marketplace. The Minerals Council of Australia reports that members have experienced increased tonnage rates of up to 63%, and freight rates have increased by over \$3 000 per day along the east coast of Australia.²¹ The Australian Aluminium Council reports that members have experienced an increase in shipping costs of as much

¹² Ibid ss 64-74.

¹³ Australian Government Department of Infrastructure and Transport, above n 6.

¹⁴ Australian Maritime Safety Authority, *List of Registered Ships* (2014) <<http://www.amsa.gov.au/vessels/shipping-registration/list-of-registered-ships/index.aspx>>.

¹⁵ Australian Government Department of Infrastructure and Transport, above n 6.

¹⁶ Shipping Australia Limited, Submission No 63 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

¹⁷ Australian Competition and Consumer Commission, Submission No 23 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, (2014) <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

¹⁸ Ibid.

¹⁹ Chris Berg, Aaron Lane, *Coastal Shipping Reform: Industry Saviour or Regulatory Nightmare?* (2013) Institute of Public Affairs <http://www.ipa.org.au/portal/uploads/Coastal_Shipping_Report-Institute_of_Public_Affairs-Dec_13.pdf>..

²⁰ Shipping Australia Limited, above n 16; National Farmers' Federation, Submission No 34 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

²¹ Minerals Council of Australia, Submission No 50 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

as 100%. In respect of some bulk commodity producers, products can be shipped between ports in Australia for prices comparable to shipment from Australia to Asia.²²

The Business Council of Australia submits that the 'cabotage restrictions, are locking in uncompetitive shipping rates and imposing excessively high regulatory costs on businesses'.²³

A further indication of the failure of the 2012 regulatory regime to achieve its aims is the zero rate of uptake on registration on the AISR.

The continued decline in coastal shipping trade means that end users are resorting to transporting products interstate by road and rail, with associated environmental and infrastructure costs. Or, alternatively, substituting Australian inputs for overseas imports.

2.2 Legal Uncertainty Regarding Objects of the Coastal Trading Act

The application of the *Coastal Trading Act*, and in particular the interpretation of the matters which the Minister can take into account when deciding whether to grant a Temporary Licence, has caused confusion and uncertainty for stakeholders. This confusion stems from the inherent inconsistencies between the objects of the *Coastal Trading Act*. Section 3(1) provides that the object of the Coastal Trading Act is to provide a regulatory framework for coastal trading in Australia that:

- (a) promotes a viable shipping industry that contributes to the broader Australian economy; and
- (b) facilitates the long term growth of the Australian shipping industry; and
- (c) enhances the efficiency and reliability of Australian shipping as part of the national transport system; and
- (d) maximises the use of vessels registered in the Australian General Shipping Register in coastal trading; and
- (e) promotes competition in coastal trading; and
- (f) ensures efficient movement of passengers and cargo between Australian ports.

The Full Court of the Federal Court of Australia had opportunity to consider the competing nature of the objects of the *Coastal Trading Act* in *CSL Australia v Minister for Infrastructure and Transport*.²⁴ This case concerned the validity of a decision to vary a temporary licence, and the matters which the decision-maker could take into account in making the decision.

The matters which the Minister may have regard to in deciding whether to grant a temporary licence include in s 34(2)(f) of the Coastal Trading Act, 'the object of this Act'. Allsop CJ determined that it was clear from a review the Parliamentary debate that the *Coastal Trading Act* was concerned to 'revitalise an important industry by the introduction of features that were seen as likely to stimulate an Australian shipping industry: an appropriate regulatory framework, labour market reforms, a new international shipping register and taxation reform and incentives'.²⁵

In regard to the competing objectives set out in s 3(1) of the *Coastal Trading Act*, Allsop CJ noted that the 'multifactorial aims of the regulatory framework may, to a degree, have some tension among them' and was of the view that the framework was 'one in which a significant degree of latitude is given to the government of the day to administer any coastal trading regime'.²⁶ The uncertainty in this case arose as to whether commercial considerations are within the bounds of the matters which the decision-maker ought to have regard in reaching a decision whether or not to grant a Temporary Licence. This manifests in practice where shippers can be forced to use a General Licence vessel in circumstances where a Temporary Licence vessel is offering better commercial terms for the same voyage.

²² Ibid.

²³ Business Council of Australia, Submission No 59 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

²⁴ [2014] FCAFC 10 (26 February 2014).

²⁵ Ibid [28].

²⁶ Ibid [31]-[32].

2.3 Balancing Competing Economic Considerations

The competing nature of the objects of the *Coastal Trading Act* highlights a broader policy issue; the conflict between encouraging an Australian coastal shipping fleet in circumstances where foreign registered vessels can provide lower cost services to Australian commodity producers.

In analysing coastal shipping regulatory reform, one must ask whether encouraging expansion of the Australian domestic shipping fleet is the right approach, or should government aim to lower shipping costs by encouraging foreign flagged vessels to operate in Australia? The latter approach would support the broader manufacturing, mining and agricultural industries that use shipping for transport, and help to stem the flow of manufacturers taking their operations offshore, when faced with rising Australian operational costs.

The Business Council of Australia notes that the current regime contains two inconsistent objectives.²⁷ On the one hand, the regime aims to enhance efficiency and competition while also maximising the use of Australian vessels, whilst, on the other hand higher-cost Australian ships are given preferential rights over lower-cost foreign vessels.

It has been said that the 'measure of economic success should not be the market share of Australian flagged vessels within the coastal shipping industry'.²⁸ Rather, the focus should be on increasing the competitiveness and efficiency of coastal shipping so that Australian products can compete in global markets. A strong manufacturing and mining industry would, in turn, require and foster a strong shipping industry.

The proponents of encouraging an Australian domestic shipping fleet through cabotage recognise the political and national defence objective and importance of maintaining a fleet of Australian flagged vessels, a well-trained seafaring workforce, and fostering development of onshore maritime skills. However, there is an evident conflict between these policy objectives and the economic outcomes of the policy, in circumstances where Australian flagged vessels incur higher operating (especially labour) costs compared to their foreign flagged counterparts and are passing these costs on to end users.²⁹

The nature of cabotage regulation was considered in the recent Report of the Commission of Audit, which characterised cabotage regulation as 'effectively industry assistance' which increased costs and reduced competition, and recommended the cabotage policy be abolished.³⁰ If industry support is to be provided by government, it should be done so through separate and considered policy.³¹

Cabotage regulation can be supported on the basis that the protection of the Australian shipping industry is necessary to preserve maritime skills and encourage training and investment in the Australian maritime industry. The Maritime Union of Australia ('MUA') submits that the availability of Australian flagged ships is an essential part of the nation's economic independence, its defence and border security and that without a domestic trading fleet there will be major implications for the supply of the nation's maritime skills.³² However, if the current cabotage regime is having the unintended impact of reducing the coastal fleet, and reducing the amount of tonnage shipped, then it is unlikely to have any benefits to maritime skills and training.

A further consideration is whether Australia can instead take advantage of the global shipping industry to maintain its maritime workforce. It is arguable that Australia could still maintain port and maritime skills through operating in the international marketplace, particularly if this is carried out in conjunction with the training offered by the Royal Australian Navy.³³

²⁷ Business Council of Australia, above n 23.

²⁸ Berg and Lane, above n 19.

²⁹ Port of Townsville Ltd, Submission No 47 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

³⁰ National Commission of Audit, *Towards Responsible Government, The Report of the National Commission of Audit Phase Two* (2014) <http://www.ncoa.gov.au/report/index.html?utm_source=Liberal+Party+E-news&utm_campaign=f9646c25f4-Commission+of+Audit&utm_medium=email&utm_term=0_51af948dc8-f9646c25f4-57654429>.

³¹ Business Council of Australia, above n 23.

³² Maritime Union of Australia, Submission No 72 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

³³ Shipping Australia Limited, above n 16.

3 Options Paper

The Options Paper proposed three broad policy options for consideration and comment.³⁴ Option 1 was to remove all regulation of access to coastal trading. This would involve repealing the *Coastal Trading Act* and related legislation. Without regulation, all vessels, regardless of flag, operating in the Australian coastal trade would be required to comply with all Australian laws, including the *Fair Work Act*, customs legislation, and occupational health and safety regulations. Foreign vessels would be considered 'imported' under the *Customs Act 1901* (Cth) ('*Customs Act*'), effectively making it impossible for foreign vessels to operate in the coastal trade.

Option 2 was to remove all regulation of access to Coastal Trading and enact legislation to deal with the effects of other Australian laws. This option proposed to deal with issues which would arise through repeal of the *Coastal Trading Act* such as importation, immigration and workplace relations with further legislation.

Option 3 was to continue to regulate coastal trade, but to make amendments to remove those aspects of the regime which place unnecessary burdens on industry participants. Proposed amendments under Option 3 included:

- (a) extending the geographical reach of the Coastal Trading Act to, for example, voyages between the mainland and places outside the coastal waters of a State or Territory, such as offshore installations, or floating production, storage and offloading ('FPSO') facilities;
- (b) changing the five voyage minimum for Temporary Licences;
- (c) amending the onerous requirements for applications to vary Temporary Licences; and
- (d) amending the tolerance provisions for Temporary Licence voyages.

4 Industry Response

Responses to the Options Paper were received from a broad cross-section of participants in the coastal shipping industry. This section will provide a high-level, industry-based review of the submissions received, highlighting key areas for consideration.

International shipping lines are, unsurprisingly, in unanimous agreement that Australian coastal shipping regulations ought to be less restrictive towards the presence of foreign-flagged vessels. They seek a reduction in the administrative burden imposed by the regulations, and, in particular, removal of the application of the *Fair Work Act* to foreign vessels on the coastal trade.³⁵

The oil and gas industry has a keen interest in the regulation of Australian coastal shipping, with public submissions from the peak body, the Australian Institute of Petroleum Ltd ('Institute'), and Caltex, alongside in-confidence submissions from Woodside, Shell Australia and BP Australia.³⁶ Within the oil and gas industry, there is a preference for Option 3 in order to minimise the restrictions, costs and regulatory burdens the *Coastal Trading Act* imposes on the industry (particularly on Australian oil refineries).

Of particular concern to the oil and gas industry are the customs consequences of vessels returning from offshore oil and gas facilities ('FPSO facilities') to Australian ports: such vessels are considered 'offshore industry vessels' which are not covered by the *Coastal Trading Act*. These vessels are therefore not exempt from the *Customs Act* and are considered imported for the purposes of the *Customs Act*.³⁷

³⁴ Australian Government Department of Infrastructure and Transport, above n 6.

³⁵ Nicolai Noes, Maersk Line Australia, Submission No 2 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; Teekay Corporation, Submission No 12 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; CSL Australia, Submission No 22 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

³⁶ Though n.b., these companies are each a member of the Australian Institute of Petroleum Ltd and the Institute's submission notes that it is on behalf of the following 'core member' companies: BP Australia Pty Ltd; Caltex Australia Limited; Mobil Oil (Australia) Pty Ltd; and the Shell Company of Australia Ltd.

³⁷ Caltex Australia, Submission No 33 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

Although the Australian oil and gas industry has a declining need for coastal shipping (due to ongoing restructure and rationalisation of the refining industry and petroleum distribution), the oil and gas industry does take an interest in coastal shipping generally. This is a result of concerns over the competitiveness of Australian oil refineries, as the customs confusion and coastal shipping costs and delays associated with Temporary Licences results in less flexibility for oil shippers. The practical result is that foreign crude oil is being imported to Australian refineries and Australian crude oil is being exported rather than sold locally, lessening the choice for Australian refineries and thereby harming their competitiveness.

Another concern, which the oil and gas industry shares with other industry participants, is that the requirements on Temporary Licence holders to nominate voyages in advance, to allow General Licence holders to contest voyages, are redundant in circumstances where there are no General Licence oil tankers in Australia who could contest the voyages.³⁸ Caltex and the Institute each submit that the five voyage requirement should be repealed and the cumbersome provisions around variations to Temporary Licence applications should be amended. Caltex also suggests that the *Fair Work Act* should not apply to foreign-flagged vessels where there is no General Licence equivalent.³⁹

Primary producers submit that the key objective of coastal shipping policy should be to ensure the availability of competitive and reliable sea freight to meet the needs of rising consumer demand and logistical challenges specific to agricultural products.⁴⁰ Industry specific requirements include the nature of perishable agricultural goods and refined sugar and molasses which require specialised ships that are not currently on the General Register. Moreover, the National Farmers' Federation suggests that the application of the *Fair Work Regulations* to foreign-flagged Temporary Licence vessels is problematic, stifling competition and driving up costs.⁴¹

The Business Council of Australia argues for removal of cabotage restrictions that give Australian General Licence vessels the right to contest loads and seeks an open, competitive market, submitting that 'removing cabotage restrictions will reduce shipping costs and support investment and employment growth in manufacturing sectors'.⁴²

Overwhelmingly, shippers, be they manufacturers or shippers of raw materials or containerised goods, favour removal of cabotage restrictions as they are bearing the costs of increased freight rates. The Australian Peak Shippers Association submits that the legislation has had an adverse affect on the movement of containerised goods around the Australian coast, and its shippers are facing increased freight costs.⁴³ Bell Bay Aluminium submit that unless they can access internationally competitively priced shipping, then business will become uncompetitive and unsustainable.⁴⁴ This sentiment is echoed by the Australian Aluminium Council and the Cement Industry Federation.⁴⁵

Shippers question the practicality of the five voyage minimum requirement for Temporary Licences. The Minerals Council of Australia supports Option 2, and notes that it is extremely difficult for bulk shippers to provide accurate information about planned voyages a year in advance.⁴⁶ The Australian Aluminium Council submits that it is critical for a regime to provide shippers with the ability to contract for single voyages, and vary loading and discharge ports, and dates, to respond to operational changes.⁴⁷ Further, they require the ability to refuse bids from General Licence holders where the service offered is uncompetitive, unsafe or unsuitable.⁴⁸

Shipping Australia Limited ('SAL'), the peak ship-owner association, represents 37 member lines, who, with one exception, formed a general consensus position. SAL submit that the *Coastal Trading Act* and its interaction with the *Fair Work Act* are impeding international shipping lines from participating in coastal trade, and the

³⁸ Australian Institute of Petroleum, Submission No 66 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

³⁹ Caltex Australia, above n 37.

⁴⁰ National Farmers' Federation, above n 20.

⁴¹ Ibid.

⁴² Business Council of Australia, above n 23.

⁴³ Australian Peak Shippers Association Inc, Submission No 3 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁴⁴ Bell Bay Aluminium, Submission No 21 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁴⁵ Australian Aluminium Council Ltd, Submission No 59 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁴⁶ Minerals Council of Australia, above n 21.

⁴⁷ Australian Aluminium Council Ltd, above n 45.

⁴⁸ Ibid.

Australian shipping industry continues to contract. SAL supports Option 2 to increase competition, reduce regulatory burden and reduce costs to shippers and customers.⁴⁹

In contrast, the Maritime Union of Australia strongly supports Option 3 submitting that it is 'in the national interest to retain and grow the coastal shipping industry', and argues that 'the existence of a coastal shipping fleet improves competition and dampens freight rates, and that if General Register ships were to be removed, current low freight rates cannot be guaranteed'.⁵⁰

In addition to the above industry participants, who each engage in the shipping of cargo around the Australian coast, numerous submissions were received from passenger cruise ships and tourism entities. Small expedition cruises (up to 5 000 tonnes) are not exempt from the application of the *Coastal Trading Act*. A divide can be seen in the submissions. On the one hand, small Australian expedition cruise operators say foreign flagged vessels are undercutting their profits by utilising lower cost labour structures. These entities support maintaining the current system, with additional restrictions placed on foreign flagged vessels.⁵¹ In contrast, submissions received from Tourism Commissions and foreign cruise ship operators, support broadening the exemption so that foreign flagged expedition cruise ships can operate more freely in Australian waters.⁵² The overarching message of the passenger cruise industry submissions is that the nature of the industry is so different from the bulk cargo shipping trade, that separate consideration must be given to their regulation.

5 Analysis of Key Issues

5.1 Fair Work Act

From 1 January 2010, the application of the *Fair Work Act* was extended to cover all crews on certain vessels operating in Australian waters, with Part B of the *Seagoing Industry Award 2010* applying to foreign vessels. Under the current regime, the *Fair Work Act* applies to crews on ships operating under a Temporary Licence which have made at least two other voyages under a Temporary Licence in the prior 12 months.⁵³

Shipping Australia Limited members report that the extension of the application of the *Fair Work Act* has been 'the single most damaging factor to participation and competition in coastal trade'.⁵⁴ The extension of the *Fair Work Act* to vessels operating in the domestic coastal trade has increased the cost of coastal shipping. In conjunction with the *Coastal Trading Act*, the legislative package privileges Australian vessels with higher crew remuneration rates which in turn increases the cost of shipping for Australian businesses and consumers.⁵⁵

The MUA provides an example of one of very few submissions in support of the continued (and increased) application of the *Fair Work Act* to foreign flagged vessels, suggesting that a 'construction weakness' combined with 'weak compliance and enforcement' has resulted in the *Fair Work Act* not applying to 'most ships carrying [Temporary Licence] cargos'.⁵⁶

A number of factors militate against the extended application of the *Fair Work Act* to foreign vessels. Firstly, foreign seafarers do not spend their wages in the Australian economy or pay tax in Australia, so the increased shipping costs are not being returned to our economy. Secondly, foreign seafarers are subject to varied home

⁴⁹ Shipping Australia Limited, above n 16.

⁵⁰ Maritime Union of Australia, Submission No 72 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁵¹ North Star Cruises Australia Pty Ltd, Submission No 5 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; Coral Princess Cruises, Submission No 10 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; Australian Expedition Cruise Shipping Association, Submission No 11 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁵² South Australian Tourism Commission, Submission No 9 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; Tourism and Transport Forum Australia, Submission No 62 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; Cruise Lines International Association, Submission No 67 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁵³ *Fair Work Regulations 2009* (Cth).

⁵⁴ Shipping Australia Limited, above n 16.

⁵⁵ Port of Townsville Ltd, above n 29.

⁵⁶ Maritime Union of Australia, above n 50.

country taxation regimes including some where income is taxed at lower rates than in Australia. As a result these seafarers could effectively receive higher wages than their Australian counterparts.

The industry responses to the Options Paper overwhelmingly favoured the need to exempt foreign flagged vessels employing foreign crews from the operation of the *Fair Work Act*. It is submitted that reform should remove the application of Part B of the *Seagoing Industry Award 2010* in order to reduce cost of foreign vessels trading on the coast. This would level the playing field between continuously trading foreign vessels, and vessels undertaking less than two coastal voyages. However, it would widen the gap between the costs of operation of foreign flagged and Australian flagged vessels.

5.2 Temporary Licences

The regime for applying for and varying Temporary Licences has been fraught with problems arising from the increased administrative burden and cost, and the inherent lack of flexibility.

The 'nature of the shipping industry is such that few voyages ever proceed absolutely as planned in terms of cargo volume and timeframe for loading and discharge'.⁵⁷ It is imperative that any licence system be flexible enough to deal with inevitable changes to schedules and cargo. The requirement to forecast, with precision, five voyages in advance, is simply incompatible with the nature of the shipping industry. In many cases, it is impractical for bulk shippers to provide accurate information about planned voyages a year in advance.⁵⁸ Shippers need flexibility around cargo sizes and loading dates and require the ability to take account of practical realities of shipping, including weather delay and port queues.

In a number of sectors, including container, pure car carrier and oil tanker, there are no General Licence vessels registered.⁵⁹ If there are no General Licence options for a particular cargo, then Temporary Licence applications will inevitably be uncontested. In such a case, the regulatory and administrative burden on applicants serves no practical purpose. Consideration ought to be given to removing this requirement for classes of vessels or cargos for which there is no registered General Licence alternative.

A final point to be made about the Temporary Licence application, is that shippers want the ability to refuse a bid from a General Licence holder where the terms offered are uncompetitive or unsuitable to their needs. Under the current regime, shippers can be forced to accept a General Licence vessel where the cost is substantially higher than that offered by the Temporary Licence applicant. The satisfaction of this valid request by shippers will need to be finely balanced with the underpinning policy of cabotage. A potential mechanism to bridge this gap is submitted by the MUA, which suggests that the ACCC could take responsibility for monitoring anti-competitive behaviour by General Licence holders.⁶⁰

5.3 Unintended Customs Consequences

The oil and gas industry are experiencing significant difficulty with the application of the *Coastal Trading Act* to FPSO facilities and the unintended importation of such vessels under the *Customs Act*.

Pursuant to s 112 of the *Coastal Trading Act*, a vessel is not imported into Australia for the purposes of the *Customs Act* only because it is used to carry passengers or cargo under a Temporary Licence or an Emergency Licence.

An offshore industry vessel is defined to mean a vessel that is used wholly or primarily in, or in any operations or activities associated with or incidental to, exploring or exploiting the mineral and other non-living resources of the seabed and its subsoil;⁶¹ this definition includes vessels moving cargo from a FPSO facility to an Australian port.

Pursuant to s 10 of the *Coastal Trading Act*, that Act does not apply to offshore industry vessels, meaning that such vessels cannot apply for a Temporary Licence, and are therefore not exempt from the importation provisions of the *Customs Act*.

⁵⁷ Australian Shipowners Association, Submission No 58 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁵⁸ Minerals Council of Australia, above n 50.

⁵⁹ Shipping Australia Limited, above n 16; Caltex Australia, above n 37.

⁶⁰ Maritime Union of Australia, above n 50.

⁶¹ *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) s 6.

In order to reverse this unintended importation consequence, it is suggested that the definition of 'offshore industry vessel' be amended to exclude such vessels. In this way, foreign-flagged vessels carrying crude oil or condensate to an Australian port can apply for Temporary Licences, and would not be subject to unintended importation under the *Customs Act*.⁶²

5.4 Australian International Shipping Register

To date, no vessel has registered on the Australian International Shipping Register. This clearly suggests that the policy is not having the intended effect, and that shipowners see no advantage to the AISR over using foreign flagged vessels operating under Temporary Licences.

The AISR was intended to provide a lower operating cost option for vessels to register in Australia. The *Fair Work Act* does not apply to AISR vessels while engaged in international trade, but in order to undertake a domestic voyage, the vessel must apply for a Temporary Licence and becomes subject to Part B of the *Seagoing Industry Award 2010*.

A number of factors can be said to be contributing to the lack of uptake on registration on the AISR. Firstly, the tax incentives which apply to the AISR are insufficient to lure vessels away from more generous international tax regimes. Secondly, there is no provision in the legislation for AISR vessels to be given priority over foreign flagged Temporary Licence vessels. An application for a Temporary Licence by an AISR vessel remains subject to challenge by a General Licence holder.

Thirdly, the strict eligibility requirements for registration, which require a vessel to be engaged 'predominantly' in international trading, may be inadvertently narrowing the field of potential registrants. Consideration could be given to relaxing or amending this requirement, if the AISR is to continue.

5.5 Application to Passenger Ships

Cruise ships are exempt from the coastal trading regime under s 11 of the *Coastal Trading Act*, where they are over 5 000 tonnes and capable of carrying at least 100 passengers. The exemption was granted because there are no Australian-flagged vessels of this size or capability.⁶³ The Tourism and Transport Forum reports that this exemption has 'facilitated the growth of this segment of the market'.⁶⁴

However, high end smaller vessels, referred to as expedition cruise ships, are not exempt from the application of the *Coastal Trading Act*. Foreign flagged vessels wishing to engage in coastal tours must apply for a Temporary Licence, and comply with Australian workplace relations laws when operating in Australian waters. This has been said to have deterred international expedition cruise ships from entering the Australian market.⁶⁵

An uneven playing field has effectively developed between the large cruise ships which are exempt, and the expedition cruise ships which must apply for a Temporary Licence and face higher wage costs operating in Australia.

There are a number of practical differences between cruise operators and cargo vessels which militate against a uniform application of regulation to the two industries. In both cases, the five voyage minimum may be impractical but for differing reasons. For cruise ships, the nomination of voyages in advance is nonsensical where voyages are planned and then marketed for sale. The requirement to nominate in advance serves no practical purpose. This can be contrasted to cargo vessels which nominate voyages in response to shipper requirements, which are apt to change due to operational requirements, making the inevitable variations cumbersome and costly.

The impact of the application of the *Fair Work Act* is amplified in the cruise ship industry, where labour costs are a significant expense, given the high ratio of crew to passengers required to operate a cruise ship.

⁶² This amendment is supported by: Caltex Australia, above n 37; Australian Shipowners Association, above n 57; and Australian Institute of Petroleum, above n 38.

⁶³ Australian Government Department of Infrastructure and Transport, above n 6.

⁶⁴ Tourism and Transport Forum Australia, above n 61.

⁶⁵ Cruise Lines International Association, above n 52.

The Tourism and Transport Forum recommends that the exemption be extended to include all cruise ships over 500 tonnes.⁶⁶ This would be consistent with the International Maritime Organisation definition of cruise ship, and would allay many of the concerns of international cruise liners wishing to operate in Australia. However, this is likely to be vigorously contested by Australian companies operating along the coast, who view foreign competition as having an unfair advantage. Foreign vessels, whilst currently required to pay Australian wages whilst operating in Australia, have the opportunity to spread those costs over a year with a resulting lower cost base.⁶⁷

This analysis suggests that the passenger cruise industry is of a significantly different nature to bulk cargo shipping, and subject to differing pressures and incentives, such that consideration ought to be given to separating regulation for these two contrasting industries.

6 Way Forward for Coastal Shipping Regulation

The current regulatory regime has significantly increased administrative burdens for shipowners, and increased costs for end users and shippers, without showing any signs of the 'revitalisation' it was intended to bring about. Policy and economic decisions need to address whether the Australian Government should persist with attempts to reinvigorate the ailing Australian coastal trading fleet through cabotage, or whether the reform ought to focus on increasing competition and encouraging foreign vessels to operate in Australia in support of Australian manufacturing, mining and exports. It is clear that to prioritise one industry at the expense of the other will be unsustainable.

Any investment in the shipping industry requires a long term view, and continued growth in the Australian shipping industry will only be seen if shipowners view the Australian industry as a stable and viable option in the global marketplace.

Option 2 received a significant amount of industry support, but the need for stability suggests a bipartisan policy approach is needed to ensure that any further reform is lasting, effective and sends positive signals to investors. Therefore, the retention of some form of cabotage policy along the lines of the proposal in Option 3 would be preferred, in order to obtain union endorsement and support from both sides of the political spectrum.

It is clear, however, that the current cabotage policy cannot be sustained. The increased administrative burdens and costs on users will not have the effect of revitalising an ailing industry. With expected increases in overall shipping tonnage in coming years, opportunity exists for Australia to develop a strong and prosperous maritime industry, and this opportunity to review and improve current regulation must be grasped.

⁶⁶ Tourism and Transport Forum Australia, above n 61.

⁶⁷ North Star Cruises Australia Pty Ltd, above n 51; Coral Princess Cruises, above n 51; Australian Expedition Cruise Shipping Association, above n 51.

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

Luke Knights*

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

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

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

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

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

³ *Maritime Transport Act 1994* (NZ).

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

1 Historical Background

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

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

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

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

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

⁵ 1982, 1833 UNTS 3 art 1(4).

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

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

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

⁹ Weber and Crew, above n 2, 161.

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

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

¹² *Ibid.*

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

¹⁴ 1954, 327 UNTS 3.

¹⁵ Young, above n 13, 33.

¹⁶ *Ibid* 7-8.

¹⁷ *Ibid* 33.

¹⁸ *Ibid* 37.

¹⁹ *Ibid* 1.

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

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

1.1 UNCLOS

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

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

1.2 MARPOL

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

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

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

²³ Pozdnakova, above n 8, 6.

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

²⁵ Khee-Jin Tan, above n 21, 23.

²⁶ Ibid.

²⁷ Ibid 203.

²⁸ UNCLOS, 1982, 1833 UNTS 3 art 228.

²⁹ Khee-Jin Tan, above n 21, 24.

³⁰ Ibid.

³¹ Ibid 223.

³² Young, above n 13, 7-8.

³³ Hewison, above n 24, 26.

³⁴ Khee-Jin Tan, above n 21, 232-233.

³⁵ MARPOL, 1978, 1340 UNTS 61.

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

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

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

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

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

2 MARPOL and the National Regime

2.1 New Zealand

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

³⁸ Young, above n 13, 33.

³⁹ Ibid 40.

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

⁴¹ Young, above n 13, 53.

⁴² Ibid.

⁴³ Wayne Mapp, above n 2, 10.

⁴⁴ Young, above n 13, 74-75.

⁴⁵ Ibid.

⁴⁶ Hewison, above n 24, 27.

⁴⁷ Ibid.

⁴⁸ Pozdnakova, above n 8, 8.

⁴⁹ Ibid 313-314.

⁵⁰ Young, above n 13, 57.

⁵¹ Khee-Jin Tan, above n 21, 132.

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

⁵³ Ibid.

⁵⁴ Ibid ii.

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

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

2.2 Maritime Transport Act 1994 (NZ)

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

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

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

⁵⁷ *Ibid.*

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

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

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

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

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

⁶³ Dobson, above n 61, 195.

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

⁶⁵ *Ibid* s244(1)(a).

⁶⁶ *Ibid* s244(3)(a).

⁶⁷ *Ibid* s244(3)(b).

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

2.3 Objective

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

2.4 Benchmark

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

3. MARPOL and Comparable Regimes

3.1 Australia

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

⁶⁹ Maritime Transport Act 1994 (NZ).

⁷⁰ Ibid s 5(b).

⁷¹ Ibid s 225.

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

⁷³ Ibid art 1.

⁷⁴ Ibid art 4(1).

⁷⁵ Ibid art 4(4) (emphasis added).

⁷⁶ Ibid art 6(1).

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

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

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

⁸⁰ Davies and Dickey, above n 77, 555.

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

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

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

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

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

3.2 Canada

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

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

⁸¹ Leddy, above n 10, 124.

⁸² Ibid.

⁸³ White, above n 79, 166.

⁸⁴ Davies and Dickey, above n 77, 556.

⁸⁵ Maximum penalties current as of 13 May 2015.

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

⁸⁷ Ibid.

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

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

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

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

4 Sentencing Practices

4.1 Case Law

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

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

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

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

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

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

⁹⁴ *Ibid* s191(4).

⁹⁵ Van der Zwaag, above n 89, 352.

⁹⁶ *Ibid* 358-359.

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

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

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

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

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

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

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

¹⁰⁴ *Ibid* [25].

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

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

Application

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

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

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

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

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

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid [8].

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

¹¹² Ibid [12].

¹¹³ Ibid [16].

¹¹⁴ Ibid [18].

¹¹⁵ Ibid.

¹¹⁶ Ibid [20].

¹¹⁷ Ibid.

¹¹⁸ Ibid [21].

¹¹⁹ Ibid [22].

¹²⁰ Ibid [25].

¹²¹ Ibid [26] and [27].

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

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

4.1.2 *R v The Tahkuna*

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

¹²² Ibid [8].

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

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

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

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

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

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

¹²⁹ Ibid [4].

¹³⁰ Ibid [7].

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

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

¹³³ Ibid [12].

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

4.1.3 *Morrison v Defence Maritime Services Pty Ltd*

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

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

4.2 Evidential Difficulties

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

¹³⁴ Ibid.

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

¹³⁶ Ibid, [1].

¹³⁷ Ibid [39].

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

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

¹⁴⁰ Ibid [41]-[48].

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

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

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

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

4.3 A New Sentencing Approach

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

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

¹⁴⁴ *Ibid* [3].

¹⁴⁵ *Ibid* [4].

¹⁴⁶ *Ibid* [5].

¹⁴⁷ *Ibid* [16].

¹⁴⁸ *Ibid* [39].

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

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

¹⁵¹ *Ibid*.

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

¹⁵³ *Ibid* [14].

¹⁵⁴ *Ibid* [29].

¹⁵⁵ *Ibid* [32].

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

¹⁵⁷ *Ibid*.

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

4.3.1 *Maritime New Zealand v Daina Shipping Company*

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

4.3.2 *Filipowski v Fratelli D'Amato*

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

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

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

¹⁶⁰ *Ibid* [5].

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

¹⁶² *Ibid* 208.

¹⁶³ Weeks and Stoltz, above n 156, 5.

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

¹⁶⁵ Weeks and Stoltz, above n 147, 7.

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

¹⁶⁷ *Ibid*, [6].

¹⁶⁸ *Ibid* [90].

¹⁶⁹ *Ibid* [94].

¹⁷⁰ *Ibid* [60].

¹⁷¹ *Ibid* [65]-[72].

¹⁷² *Ibid* [99].

¹⁷³ *Ibid* [127].

4.3.3 Newcastle Port Corporation v MS Magdalene

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

4.3.4 R v The CSL Atlas

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

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

¹⁷⁵ *Ibid* [131]-[245].

¹⁷⁶ *Ibid* 210.

¹⁷⁷ *Ibid* [25].

¹⁷⁸ *Ibid* [249].

¹⁷⁹ *Ibid* [279].

¹⁸⁰ *Ibid* [224].

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

¹⁸² *Ibid*.

¹⁸³ *Ibid*.

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

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

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

5 Future Directions

5.1 Criminological Theory

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

5.2 Deterrence

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

5.2.1 Harsher fines?

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

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

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

¹⁸⁹ Ibid.

¹⁹⁰ Ibid 134.

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

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

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

¹⁹⁴ Cullen and Agnew, above n 191, 408.

¹⁹⁵ Ibid 405.

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

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

¹⁹⁸ Ibid.

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

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

5.3 Reintegrative Shaming

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

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

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

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

²⁰¹ Cohen, above n 193, 31.

²⁰² Ibid 36.

²⁰³ Ibid 37.

²⁰⁴ Ibid.

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

²⁰⁶ Cullen and Agnew, above n 191, 6.

²⁰⁷ Braithwaite, above n 205, 69.

²⁰⁸ Ibid.

²⁰⁹ Ibid 71.

²¹⁰ Ibid 75.

²¹¹ Ibid.

²¹² Ibid 83.

²¹³ Braithwaite, above n 205, 280.

²¹⁴ Braithwaite, above n 207, 73.

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

5.4 Incapacitation

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

5.4.1 Old Path, New Direction

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

²¹⁵ Ibid 127.

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

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

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

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

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

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

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

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

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

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

6 Conclusion

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

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

²²⁵ *Ibid* 390.

²²⁶ Yeager and Simpson, above n 187, 335.

²²⁷ *Ibid* 336.

²²⁸ Braithwaite, above n 207, 73.

²²⁹ Khee-Jin Tan, above n 21, 5.

²³⁰ *Ibid*.

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

IN THE WAKE OF THE MONTREAL CONVENTION: WHY MARITIME LAW SHOULD ABOLISH LIMITED LIABILITY FOR PERSONAL INJURY AND DEATH CLAIMS

Maxwell Smith*

1 Introduction

In 2002 a small inflatable boat operated by Yachting New Zealand collided with American windsurfer Kimberley Birkenfeld off the coast of Greece.¹ Ms Birkenfeld suffered severe injuries as a result of the collision and is now a tetraplegic suffering from post-traumatic stress disorder. She brought a claim for NZD 15 million in damages in the High Court of New Zealand. Yachting New Zealand brought a separate action and successfully limited their liability to less than NZD 400 000 on application of a tonnage formula.²

Given that the average first year costs alone associated with tetraplegia in California are between USD 700 000 and 1.2 million, the award to Ms Birkenfeld was consequently totally inadequate compensation for her injuries.³ She went from being a professional athlete to someone confined to a wheelchair for the rest of her life. The tragic nature of this accident and her failure to receive full compensation demonstrates the injustice that can result from maritime limitation of liability in a personal injury context.

Limitation of liability is the rule that allows the owner, charterer, manager or operator of a seagoing ship (hereafter referred to collectively as ‘shipowners’) to limit their liability for ‘claims in respect of loss of life or personal injury or loss of or damage to property’.⁴ Following an accident for which they are liable, the shipowner puts up a set fund in the amount of the liability limit.⁵ This can be done either by making a cash payment to the court or by presenting a letter of undertaking from a protection and indemnity (P & I) club.⁶ The funds are then distributed among claimants in proportion to their original claims (as been proved in court), so the amount of actual recovery depends on the number of claimants and the size of their respective claims.⁷ This payment constitutes full and final settlement.⁸

There are two situations where this system produces objectionable results. The first is where there is a catastrophic event in which there are numerous claimants and the limitation fund is exhausted. The second is where a small ship causes serious harm or fatality and its liability is determined by the application of a tonnage formula, as was seen in *Birkenfeld*. In both situations a claimant, having suffered harm at the hands of another, may be prevented from receiving full compensation.

I will argue that the limitation of liability is an unjust, discriminatory, and archaic rule that subsidises the shipping industry at the expense of those injured by vessels. The concept has been justified on protectionist and historical grounds that are no longer relevant. It is particularly difficult to defend its continuation following the passage of the *Convention for the Unification of Certain Rules for International Carriage by Air* (the ‘Montreal Convention’).⁹ This convention introduced unlimited liability to the aviation industry 15 years ago and provides useful evidence of the viability of an unlimited liability scheme.

I will first outline the historical origins of the concept and the various international limitation of liability instruments. Next, I will trace developments in aviation law and draw analogies with the maritime industry. Then, I will discuss the arguments put forward supporting limitation, including the need to protect the industry,

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¹ *Yachting New Zealand Inc v Birkenfeld* [2005] NZAR 727 (HC).

² The result was unsuccessfully appealed to the Court of Appeal in *Birkenfeld v Yachting New Zealand Inc* [2007] NZCA 314; [2007] 1 NZLR 596. Leave to appeal to the Supreme Court was denied in *Birkenfeld v Yachting New Zealand Inc* [2006] NZSC 93; [2007] 1 NZLR 596.

³ Joseph Farzam Law Firm, *Paralyzed Accident Lawyer California* (2014) Joseph Farzam Law Firm <<http://farzamlaw.com/spinal-cord-injury-lawyer/>>.

⁴ Gotthard Gauci, ‘Limitation of Liability in Maritime Law: An Anachronism’ (1995) 19 *Marine Policy* 65, 65.

⁵ Either by making a separate application or by pleading it as a defence to proceedings: High Court Rules (NZ) r 792.

⁶ *Cosmotrade SA v Kairos Shipping Ltd* [2014] EWCA Civ 217 (6 March 2014); [2014] CP Rep 28.

⁷ Riaz Zaman, ‘Sailing on Troubled Waters - Antiquated US Maritime Liability Limits for Death and Injuries of Ship Passengers: Options for Reform’ (2013) 42 *Denver Journal of International Law and Policy* 41, 56.

⁸ Serge Killingbeck, ‘Limitation of Liability for Maritime Claims and its Place in the Past Present and Future: How Can it Survive?’ (1999)

3 *Southern Cross University Law Review* 1, 2.

⁹ *Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)*, 1999, 2242 UNTS 309.

the ability to get insurance, and the avoidance of litigation. Finally, I will discuss the ethical arguments against limitation and consider the purpose of private law. I will conclude by recommending the adoption of a two-tiered system of liability based on the Montreal Convention.

2 Historical Background

Limitation of liability arose originally as a European concept dating back to the 17th century.¹⁰ However, the United Kingdom did not adopt limited liability until the decision of *Boucher v Lawson*.¹¹ In that case, a shipowner was held fully liable for a load of gold bullion stolen by the ship's master, despite having no knowledge of the theft. Shipowners consequently petitioned Parliament in 1733 complaining that the common law exposed them to:¹²

... insupportable and unreasonable hardships to which no owners of ships are exposed in other nations ... Unless some provision be made for their relief, trade and navigation will be greatly discouraged; since owners of ships find themselves, without any fault on their part, exposed to ruin.

At this time, the United Kingdom's trade frontiers were expanding and the shipping fraternity was becoming a powerful lobby.¹³ It was argued that the common law would discourage investment in the English merchant marine and put them at an unfair advantage with their European competitors. Consequently, the *Responsibility of Shipowners Act 1733* was enacted with the express intention of assisting the shipping industry to flourish:¹⁴

[It was] of the utmost consequence and importance to the general welfare of this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants... which will necessarily tend to the prejudice of the trade and navigation of this kingdom.

The policy underlying the limitation of liability legislation was thus to protect a fledgling maritime trade and encourage investment in the shipping industry. This is clearly reflected in a statement of the Privy Council: 'the principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons.'¹⁵ Similarly, Lord Denning stated in *The Bramley Moore* that '[l]imitation of liability is not a matter of justice. It is a rule of public policy which has origins in history and its justification in convenience...'¹⁶

Although initially confined to claims arising from the dishonest acts of masters, the limitation of liability was extended to personal injury and loss of life in 1854¹⁷ following the enactment of the *Fatal Accidents Act 1846* ('Lord Campbell's Act').¹⁸ That legislation gave surviving relatives a right of action and coincided with an increase in the number of sea-going passengers.¹⁹

3 International Limitation of Liability Instruments

Being an international business, shipowners were keen to make the laws governing the limitation of liability uniform. Certainty in outcome would mean parties could operate shipping ventures with full knowledge of their rights and duties: this being conducive to international trade and investment.²⁰ This has been achieved, to some extent, through international conventions that provide the basis for national law. Today almost all maritime jurisdictions have limitation of liability for maritime claims.

The first international instrument relating to the limitation of liability was the 1924 *International Convention for the Unification of Certain Rules to the Limitation of Liabilities of Owners of Sea-Going Ships*.²¹ This provided shipowners the right to limit their liability for the acts or faults of the master, crew, pilot or any other party

¹⁰ Killingbeck, above n 8, 3.

¹¹ *Boucher v Lawson* (1733) 95 ER 53 (KB).

¹² Lord Mustill, 'Ships Are Different – Or Are They?' [1993] *Lloyd's Maritime and Commercial Law Quarterly* 490, 496.

¹³ Killingbeck, above n 8, 4.

¹⁴ *Responsibility of Shipowners Act 1733* (GB).

¹⁵ *Cail v Papayanni (The Amalia)* [1863] 15 ER 778, 780 (PC).

¹⁶ *The Bramley Moore* [1964] 1 WLR 1330, 1334 (PC).

¹⁷ *Merchant Shipping Act 1854* (UK) s 504.

¹⁸ *Fatal Accidents Act 1846* (UK).

¹⁹ Nigel Taylor, 'Limitation of Liability of Aircarriers to Aircrash Victims - Has the Warsaw Convention Reached its Retirement Age?' [1994] *Journal of Personal Injury Litigation* 113, 117.

²⁰ Bevan Marten, 'Limitation of Liability for Personal Injury in New Zealand: ACC Meets the Sea' (2006) 20 *Australia and New Zealand Maritime Law Journal* 16, 17.

²¹ *International Convention for the Unification of Certain Rules to the Limitation of Liabilities of Owners of Sea-Going Vessels*, 1924, 120 LNTS 123.

serving the vessel, except where the owner themselves was at fault.²² It also created separate limits (and hence separate funds) for property damage and personal injury/loss of life claims. However, this convention did not receive widespread acceptance.²³

The next attempt at international uniformity was the 1957 *International Convention relating to the Limitation of Liability of Owners of Sea Going Ships*.²⁴ This convention was much more widely accepted, although it only received a sufficient number of ratifications to enter force in 1968. Although the limits were originally based on the value of the ship, they were now expressed by a monetary amount per ton of the ship's tonnage.²⁵ The right to limit was again subject to the proviso that it was lost if it 'resulted from the actual fault or privity of the owner'.²⁶

The law quickly became unsuitable because inflation rendered the limit inadequate for plaintiffs and courts increasingly made it difficult to show lack of actual fault or privity.²⁷ Consequently, the *International Convention on Limitation of Liability for Maritime Claims* (the 'LLMC')²⁸ was adopted in 1976 and came to be the predominant liability regime around the world. The LLMC made several significant changes to the previous regimes. Firstly, the right to limit liability was extended to parties other than the owner, including charterers, managers, operators and salvors of a seagoing ship.²⁹

Secondly, the conduct barring limitation provisions of the 1924 and 1957 Conventions based on 'actual fault or privity' of the owner were replaced. Instead, the shipowner's right to limit liability is barred only if the loss resulted from 'his personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result'.³⁰ This effectively introduced a *mens rea* element.³¹ 'Knowledge' in this context means actual knowledge; constructive knowledge – that the person should have known – will not suffice.³² The onus was also reversed so that the claimant must establish the fault of the shipowner.³³ This has led many commentators to describe the test as 'almost unbreakable'.³⁴ The LLMC thus protects shipowners who are not aware that their operators are acting negligently. For example, a shipowner will be able to limit their liability for a collision caused by an operator's error in navigation.³⁵

Thirdly, the LLMC significantly increased the limitation levels.³⁶ It also established that where the life/personal injury fund is insufficient, the property fund could potentially contribute to the outstanding balance.³⁷ This arguably increases the likelihood of a claimant receiving full compensation. However, in this situation claims for personal injury and loss of life rank equally with any concurrent property claims, so complete compensation may still be impossible following a catastrophic incident that gives rise to a great number of claims.³⁸

The LLMC was further amended in 1996 to increase limitation limits by an average of 240%.³⁹ The new limit of liability for claims for loss of life or personal injury on ships not exceeding 2 000 gross tonnage was 2 million SDR. For larger ships, 800 SDR is added on for each ton from 2 001 to 30 000 tons, 600 SDR for each ton from 30 001 to 70 000 tons, and 400 SDR for each ton in excess of 70 000 tons.⁴⁰ These amendments came into force in 2004.

Article 6 of the Protocol also introduced an 'opt-out' provision permitting States to set higher maximum compensation limits for personal injury and death. This was included to encourage certain states that had

²² Ibid art 7.

²³ Killingbeck, above n 8, 6.

²⁴ *International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships*, 1957, 1981 ATS 2.

²⁵ Ibid art 3.

²⁶ Ibid art 1.

²⁷ Peter Heerey, 'Limitation of Maritime Claims' (1994) 10 *Australia and New Zealand Maritime Law Journal* 1, 3.

²⁸ *Convention on Limitation of Liability for Maritime Claims (LLMC)*, 1977, 1456 UNTS 221.

²⁹ Ibid art 1(2).

³⁰ Ibid art 4.

³¹ Zaman, above n 7, 62.

³² Norman Gutiérrez, *Limitation of Liability in International Maritime Conventions: The relationship between global limitation conventions and particular liability regimes*, (Routledge, 2011) 65.

³³ Heerey, above n 27, 12.

³⁴ Proshanto Mukherjee and Mark Brownrigg, *Farthing on International Shipping* (Springer, 2013) 325.

³⁵ Zaman, above n 7, 62.

³⁶ Compensation was initially set by reference to the gold franc but this was replaced, through a 1979 Protocol, by the Special Drawing Rights (SDR) of the International Monetary Fund in order to mitigate future inflation: Taylor, above n 19, 120.

³⁷ Grahame Aldous, 'Claims by Personal Injury and Fatal Accident Claimants on Property Funds in Limitation Proceedings' [2001] *Lloyd's Maritime and Commercial Law Quarterly* 150.

³⁸ LLMC, 1977, 1456 UNTS 221, art 6(2).

³⁹ *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976*, 1996, 2004 ATS 16.

⁴⁰ Ibid art 3.

expressed a desire for higher limits, such as Japan, to ratify the convention.⁴¹ However, even if a state opts out of the LLMC there may still be limits on what a passenger can claim under the 1974 Athens *Convention relating to the Carriage of Passengers and their Luggage by Sea* (the 'Athens Convention')⁴² or other regime. Thus, states that wish to have unlimited liability for personal injury and death claims of passengers must take further action and denounce the Athens Convention or, if not a party to it, then abolish the provisions in their domestic law which allow limitation.⁴³ Furthermore, the opt-out provision defeats the goal of creating an internationally uniform liability scheme and possibly encourages forum shopping.

Recently the International Maritime Organisation (IMO) Legal Committee agreed to increase the limit for personal injury, loss of life and property claims by 51% to reflect inflation. This increase takes effect from 8 June 2015.⁴⁴

3.1 Athens Convention

A separate convention was drafted for the international carriage of passengers. The Athens Convention established that carriers were liable for passenger claims for personal injury or death if the claimant could prove that they were at fault. However, there is a rebuttable presumption that the carrier was liable for shipwrecks, collisions, stranding, explosions, fires, or defects in the ship.⁴⁵ Liability was limited at 46 666 SDR.⁴⁶ An attempt was made in 1990 to increase this amount to 175 000 SDR.⁴⁷ However, this Protocol has still not obtained sufficient ratification to bring it into force. Some commentators suggest the lack of support can be attributed to the perception that the new level was too low.⁴⁸ Indeed, the figure had been 300 000 SDR in the United Kingdom since 1999.⁴⁹

Renewed efforts led to another Protocol being created in 2002⁵⁰ (the 'Athens Convention 2002'). This instrument established a two-tiered liability system. In the first tier, the carrier is strictly liable up to 250 000 SDR unless it can prove that the loss was caused solely by an act of war, natural phenomenon, or the act of a third party.⁵¹ If the provable damage exceeds this amount, the carrier is further liable unless it proves that the loss occurred without its fault or neglect.⁵² This second tier is subject to an overall liability limit of 400 000 SDR multiplied by the number of passengers the ship is authorised to carry.⁵³

Carriers are not strictly liable, however, for non-shipping incidents (such as slips, trips and falls) and claimants have the burden to prove that the shipowner was at fault.⁵⁴ This distinction is important because the drafting delegations were concerned that strict liability for all incidents occurring on board a ship would effectively render the shipowner an insurer of all injuries, thereby encouraging frivolous claims.⁵⁵ The 2002 protocol also introduced compulsory insurance for carriers of 250 000 SDR per passenger.⁵⁶ Like the LLMC, there is an 'opt-out' provision allowing individual states to set higher liability limits for personal injury and death.⁵⁷

Compensation under the Athens Convention is thus significantly higher than under the LLMC. The conflicts between the LLMC and the Athens Convention have been resolved by giving contracting states the option as to which is to apply.⁵⁸ States have the power to decide if a shipowner can limit liability for personal injury and

⁴¹ Baris Soyer, 'Sundry Considerations on the Draft Protocol to the Athens Conventions Relating to the Carriage of Passengers and Their Luggage by Sea 1974' (2002) 33 *Journal of Maritime Law and Commerce* 519, 533.

⁴² *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens Convention)*, 1974, 1463 UNTS 19.

⁴³ Baris Soyer, '1996 Protocol to the 1976 Limitation Convention: A More Satisfactory Global Limitation Regime for the Next Millennium?' [2000] *Journal of Business Law* 153, 167.

⁴⁴ International Maritime Organisation, *Convention on Limitation of Liability for Maritime Claims (LLMC)* (2015) International Maritime Organisation <[http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-\(LLMC\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-(LLMC).aspx)>.

⁴⁵ Athens Convention, 1974, 1463 UNTS 19, art 3(3).

⁴⁶ Mukherjee and Brownrigg, above n 34, 329.

⁴⁷ *Protocol of 1990 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974*, 1990, IMO Doc LEG/CONF.8/10 (not yet in force).

⁴⁸ Mukherjee and Brownrigg, above n 34, 329.

⁴⁹ *Ibid* 329.

⁵⁰ *Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (Athens Convention 2002)*, 2002, IMO Doc LEG/CONF.13/20.

⁵¹ *Ibid* art 3(1).

⁵² *Ibid* art 3(1).

⁵³ *Ibid* art 7(1).

⁵⁴ *Ibid* art 3(2).

⁵⁵ Soyer, above n 41, 522.

⁵⁶ Athens Convention 2002, 2002, IMO Doc LEG/CONF.13/20, art 4(1).

⁵⁷ *Ibid* art 7(2).

⁵⁸ Barnabas Reynolds and Michael Tsimplis, *Shipowners' Limitation of Liability* (Kluwer Law International, 2012) 240.

death under either, neither or both of the conventions.⁵⁹ This freedom, however, undermines the goal of an internationally uniform limitation of liability regime.

The Athens Convention has several other fundamental flaws. Firstly, it is arbitrary to have a strict liability scheme for passengers of a cruise ship but not other potential victims of shipping. Passengers' lives are not more valuable than those of crew or swimmers. Secondly, countries are only likely to sign up to the Athens Convention if they have a direct interest in the cruise industry, as opposed to simply being a destination.⁶⁰ This explains why many countries, like New Zealand, have signed up to the LLMC but not the Athens Convention. Thirdly, it is still possible for claims of compensation to exceed the limitation fund because there is a maximum liability cap of 400 000 SDR.

In summary, the Athens Convention 2002 is a step in the right direction because the two-tiered system of liability allows for swift compensation of minor incidents without sacrificing the ability to sue for greater sums. However, it does not go far enough because it only applies to passengers of cruise ships and is ultimately capped at 400 000 SDR so exceptional claims may not be covered.

4 Analogy with the Aviation Industry

Both the maritime and aviation industries involve the 'utilisation of movable, high value assets to carry passengers and freight over long distances, often from one country to another'.⁶¹ Consequently, they face similar challenges both legally and economically, and are similarly subject to international legal regimes. However, David Steel QC, a well-known proponent of the limitation of liability, outlined several characteristics of the shipping industry that he believed to be in 'stark contrast' with the airline industry.⁶² First, the costs of maintenance and crew are low. Second, competition is intense and is not restricted by bilateral treaties in terms of price or route. Third, the market is mostly freight not passenger oriented, making safety considerations less of a premium. Fourth, the shipping industry is largely unsubsidised.

These differences are not as pronounced today as in the past and do not necessarily preclude comparisons being made between the two industries. Firstly, it is no longer possible to say there is not intense competition in the aviation industry following the privatisation of most airlines.⁶³ Besides, the competition within the shipping industry will not be affected if there is universal adoption of a new convention barring limitation. Secondly, the fact that the shipping industry predominantly carries freight does not justify second-rate safety measures or in any way lessen an individual's claim for compensation. In fact, if the airline industry can cope with unlimited liability for claims of personal injury and death, then by implication the maritime industry can do so too (given the former has a greater number of potential claimants). Thirdly, although the shipping industry was largely unsubsidised when Steel wrote his article, the limitation of liability can be seen as an artificial subsidy itself.⁶⁴

Thus, none of these differences detract from an analogy between the maritime and aviation industries because they are either negligible or no longer applicable. The next step is to trace the development of aviation law in the personal injury context and analyse why two industries that are fundamentally alike now have divergent approaches to the limitation of liability.

4.1 Aviation Law

Until recently the liability of airlines toward their passengers was governed by a combination of international conventions, legislation and contractual commitments, collectively referred to as the 'Warsaw system'.⁶⁵ The foundation of the system was the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (the 'Warsaw Convention'), which entered into force on February 13 1933.⁶⁶ This convention introduced limited liability to passengers in exchange for a reversal of the traditional burden of proof; that is, the onus was on the airline to prove that the loss was not caused by their negligence or wrongdoing. Although the

⁵⁹ Ibid 240.

⁶⁰ Marten, above n 20, 21.

⁶¹ Taylor, above n 19, 117.

⁶² David Steel, 'Ships Are Different: The Case for Limitation of Liability' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 77, 81.

⁶³ Michael Milde, 'Liability in International Carriage by Air: The New Montreal Convention', (1999) 4 *Uniform Law Review* 835, 837.

⁶⁴ This was the view of Black J in *Maryland Casualty Co v Cushing* (1954) 347 US 409, 429.

⁶⁵ Taylor, above n 19, 113.

⁶⁶ *Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention)*, 1929, 137 LNTS 1.

limit on injury and death claims was initially set at 125 000 Francs per passenger, later instruments subsequently increased this to nearly five times that amount.⁶⁷

Like the maritime industry, limitation of liability was adopted when the aviation industry was in its infancy. Flying was one of the most dangerous modes of transportation and carriers had difficulty obtaining insurance that would protect them from bankruptcy following a crash.⁶⁸ The government was thus keen to encourage a fledgling industry. There were, however, significant technological developments to the point that flying is now one of the safest forms of transportation. This was accompanied by enormous growth in the industry and its revenues.⁶⁹

Consequently, major airlines started paying full compensation to passengers in the 1960s regardless of the legal limitations. Compensation to the relatively few people who were injured or died constituted only a fraction of their revenue.⁷⁰ In addition, international instruments were introduced which attempted to replace the system of liability from one of presumed fault to strict liability. The IATA Passenger Liability Agreement of 1995 was one such example.⁷¹ The trend towards full compensation culminated in the Montreal Convention, which was adopted by the International Civil Aviation Organization (ICAO) on May 28 1999. It entered into force on 4 November 2003 with 97 parties and will eventually replace the Warsaw Convention and its protocols after having been ratified by all states.⁷²

The Montreal Convention established a two-tier liability system. On the first tier, air carriers are strictly liable for proven damages up to 100 000 SDR per passenger.⁷³ Under Article 24 this figure is reviewed every five years by the ICAO and was increased to 113 100 SDR in 2009.⁷⁴ For damages above this figure, the airline is liable for an unlimited amount unless it can prove that it was not negligent or that a third party was solely responsible for the loss.⁷⁵ The burden of proof remains with the airline, as in the Warsaw Convention. The Montreal Convention requires all air carriers to have liability insurance up to the limits specified in the first tier so they always have the funds to pay out claims.⁷⁶

Thus, air carriers cannot contest claims for compensation up to 113 100 SDR. The plaintiff merely has the burden of establishing that there was an 'accident' within the meaning of the Montreal Convention,⁷⁷ which occurred on the aircraft or while embarking or disembarking and caused bodily injury or death.⁷⁸ Above this amount, the airline can only defend itself by proving that 'it was not negligent or otherwise at fault.'⁷⁹

This burden of proof will never be easy to discharge because of the 'technical and operational complexity of aviation'.⁸⁰ The complicated chain of facts makes it difficult to prove the complete absence of any negligence, wrongful act or omission.⁸¹ Consequently, aviation lawyer Jonathan Reiter says 'there is a very low standard for proving negligence in the second tier' and that 'the airlines don't really contest it.'⁸² Nevertheless, there have been few exceptionally high compensation claims. This is because claimants can only recover actual proven compensatory damage. 'Punitive, exemplary or any other non-compensatory damages' are specifically

⁶⁷ 1 250 000 Gold Francs under the *Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955, 1971, 478 UNTS 371.

⁶⁸ Taylor, above n 19, 115.

⁶⁹ Ibid 116.

⁷⁰ Ibid 127.

⁷¹ Milde, above n 63, 847.

⁷² Zaman, above n 7, 58.

⁷³ Montreal Convention, 1999, 2242 UNTS 309, art 21(1)

⁷⁴ Butterworths, *Personal Injury Litigation Service*, 'Division XVIII Personal Injury Litigation Outside the United Kingdom, Personal injury in the USA, C Private international law with travel conventions and US air and sea law, 12 The Warsaw Convention 1929, the Montreal Protocol 1975 and the Montreal Convention 1999', 257: equivalent to approximately USD 167 000.

⁷⁵ Montreal Convention, 1999, 2242 UNTS 309, art 21(2).

⁷⁶ Ibid art 50.

⁷⁷ There has been a notable divergence between the approaches of the highest courts in the United States, the United Kingdom and Australia as to what constitutes an 'accident': Milde, above n 63, 846.

⁷⁸ *Siddiq v Saudi Arabian Airlines Corp* No 6:11-cv-69-Orl-19GJK (MD Fla Jan 9, 2013) [14]. In that case, a passenger who had a heart attack during a flight and sued the carrier for refusing to declare an emergency and land at the nearest suitable airport was denied summary judgment because it did not satisfy the required meaning of 'accident'.

⁷⁹ Butterworths, above n 74, 259.

⁸⁰ Milde, above n 63, 847.

⁸¹ Ibid 847.

⁸² Miriam Kelliher, *Plane Crash Victim Compensation Under the Montreal Convention* (3 April 2014) Consumer Eagle <<http://www.consumereagle.com/2014/04/03/plane-crash-victim-compensation-under-the-montreal-convention/>>. Jonathan Reiter represented relatives of victims in litigation arising out of the '1999 EgyptAir crash, the crash of SwissAir Flight 111, and the American Airlines crash into Belle Harbor, Queens'.

excluded.⁸³ Consequently, a large number of claims are fairly modest.⁸⁴ For example, under both English and US law the estate of an unmarried adult with no financial dependents will only be entitled to the cost of a funeral.⁸⁵ If the deceased had financial dependents they may be awarded damages for lost income or mental distress, but these are usually well below USD 3 million.⁸⁶ In addition, the air carrier is still free to bring actions against third parties and plead a defence of contributory negligence.⁸⁷

The aviation industry has now had unlimited liability for personal injury and death claims for over 15 years. The continuing success of the Montreal Convention provides cogent evidence that can be used to assess the arguments for and against the limitation of liability for maritime claims.

5 Parties Affected by Limitation

Before evaluating the arguments for the limitation of liability, it is useful to identify the parties affected by its operation. Lord Mustill, in his seminal address ‘Ships Are Different – Or Are They?’⁸⁸ outlined three ‘situations’ where limitation of liability arose:

5.1 Closed Situations

This category comprises specific parties who voluntarily enter into an agreement and thereby assume a level of risk. The parties are fully aware of and accept the risks of the venture. Lord Mustill provides the example of a standard contract of carriage between a cargo owner and a carrier. Both parties are aware of the limitation of liability and obtain a long-term benefit from it.⁸⁹

5.2 Partly Closed Situations

This category comprises parties who are regularly involved in situations where their liability is limited, such as a regular exporter of goods by sea. They also obtain a long-term financial benefit, such as cheaper insurance. This supposedly encourages them to remain in that area of business.⁹⁰

5.3 Open Situation

The third situation envisages innocent third parties who have not chosen to run any risk. They are only connected to the incident by an ‘unfortunate convergence of place and circumstance.’⁹¹ Lord Mustill provided the striking example of a passenger aircraft crashing in a residential area. The victims suffer equally despite an uneven distribution of risk. The victims on the ground have nothing to gain from the carrier’s right to limitation. They suffer through no fault of their own and in no way, directly or indirectly, accrue some benefit from the right to limit the carrier’s liability.⁹² Nevertheless, they must compete with other claims for the limitation funds and may not receive full compensation.

Lord Mustill’s categories fail to account for the parties of the venture who are not regularly involved in the shipping industry, such as one-off shippers or passengers. These parties do not receive the benefit of limitation from regular involvement. On the other hand, it could be argued that they voluntarily assumed a risk when embarking on the voyage (so as to fall under Lord Mustill’s ‘closed’ situation). Some may even go so far as saying that the onus is on the passenger to be fully aware of the risks and liabilities of his or her journey.⁹³

Nevertheless these classifications are useful because there are numerous parties affected by the limitation of liability, each with different priorities and liabilities. When analysing the arguments for and against the limitation of liability, it is therefore important to bear in mind that each argument will be stronger for some parties more than others.

⁸³ Montreal Convention, 1999, 2242 UNTS 309, art 29.

⁸⁴ Taylor, above n 19, 118.

⁸⁵ Ibid 118; for example, a jury upheld a verdict awarding only funeral costs to the estranged spouse of a man killed in a car accident in *McGowan v Estate of Wright* 524 So 2d 308 (Miss 1988).

⁸⁶ Eric Posner and Cass Sunstein, ‘Dollars and Death’ (2005) 72 *The University of Chicago Law Review* 537, 549.

⁸⁷ Montreal Convention, 1999, 2242 UNTS 309, art 20.

⁸⁸ Mustill, above n 12.

⁸⁹ Ibid 493.

⁹⁰ Ibid 493.

⁹¹ Killingbeck, above n 8, 12.

⁹² Mustill, above n 12, 494.

⁹³ Killingbeck, above n 8, 11.

6 Arguments for Limitation

6.1 Protecting the Industry

As already discussed, the historical justification for the limitation of liability was to protect a fledgling shipping industry. Limitation was allowed to attract investment in shipping and help develop a national merchant marine. However, Lord Mustill points out that ‘the original economic considerations that generated the development of limitation of liability in shipping no longer have any resemblance to the business environment of the modern shipping industry.’⁹⁴

Indeed, maritime limitation dates back to an era when ocean voyages were incredibly perilous and ‘[s]ailing ships spent many months, sometimes years, away from their home ports, out of touch with the shipowner’.⁹⁵ The shipowner’s involvement was restricted to preparation and selection of trustworthy masters and crew.⁹⁶ Once the ship set sail it was essentially at the mercy of the masters and crew. It was also relatively common for the value of the cargo to exceed that of the ship. This meant that following the failure of the venture through the ‘neglect, dishonesty or incompetence’ of the crew, the shipowner would ‘almost certainly face financial ruin: having lost his ship and incurred legal liability to the cargo owner’.⁹⁷

In the centuries since there have been massive improvements in the speed and reliability of ships.⁹⁸ The shift toward prefabrication, made possible through innovations such as welding, has greatly improved the quality of construction and safety of ships.⁹⁹ Navigational aids such as radar, global positioning technology, and weather satellites have greatly reduced the unpredictability and danger of ocean voyages.¹⁰⁰ Radio and satellite technology allows instant communication with the shipowners so there is constant oversight, and shipowners are able to do instantaneous background checks of masters and crew.¹⁰¹ There have also been a plethora of international rules and regulations governing safety following the establishment of the IMO in 1948.¹⁰²

Consequently, the loss of life and property in shipping is now relatively modest and the overall trend is one of reduction in the number of fatalities. For instance, amongst bulk carriers an average of 26 lives and 5.9 ships was lost per year in the period 2001-2010 compared to 74 lives and 135 ships a decade earlier.¹⁰³ In addition, the fatal accident rate in UK shipping per 100 000 seafarers was 358 in 1919 compared to just 11 from 1996 to 2005.¹⁰⁴ These statistics are even more impressive given the increasing number of ships in the world fleet and the corresponding increase of passengers and crew at risk.¹⁰⁵ The European Transport Safety Council data now ranks marine transport in Europe as the fourth safest means of passenger transport after bus, rail and air.¹⁰⁶ This is supported by the fact that the US transport fatality figures for 2009 show that ship-related fatalities were the second safest only to air transport.¹⁰⁷ Thus, shipping today is considerably safer and only slightly behind airlines in regards to loss of life.

There have also been several significant commercial developments that have reduced the financial risk of shipping. Modern finance and ownership arrangements are complex and involve many parties beyond a single owner risking their life savings.¹⁰⁸ Limitation of liability was created ‘in an era before the corporation had become the standard form of business organization’.¹⁰⁹ Modern corporations distribute risk amongst

⁹⁴ Mustill, above n 12, 499.

⁹⁵ AHE Popp, ‘Limitation of Liability in Maritime Law – An Assessment of its Viability from a Canadian Perspective’ (1993) 24 *Journal of Maritime Law and Commerce* 335, 336.

⁹⁶ Killingbeck, above n 8, 10.

⁹⁷ Taylor, above n 19, 117; as was seen in *Boucher v Lawson*, above n 11.

⁹⁸ Mustill, above n 12, 492.

⁹⁹ Carly Fields, *Safety and Shipping 1912-2012: From Titanic to Costa Concordia* (2012) Allianz Global Corporate & Specialty <<http://www.agcs.allianz.com/insights/white-papers-and-case-studies/safety-and-shipping-report/>>.

¹⁰⁰ Killingbeck, above n 8, 2.

¹⁰¹ Mustill, above n 12, 492.

¹⁰² Fields, above n 99, 28.

¹⁰³ International Maritime Organisation, *International Shipping Facts and Figures – Information Resources on Trade, Safety, Security, Environment* (2012) International Maritime Organisation

<<http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/MaritimeTransport/Pages/default.aspx>>.

¹⁰⁴ Fields, above n 99, 13.

¹⁰⁵ These statistics exclude the loss of life when overcrowded ships sink whilst carrying migrants from the developing world, as well as acts of piracy and armed robbery, because they do not reflect safety standards on ships in general.

¹⁰⁶ Fields, above n 99, 15.

¹⁰⁷ *Ibid* 15.

¹⁰⁸ Killingbeck, above n 8, 2.

¹⁰⁹ *Ibid* 20.

shareholders and ‘an individual is only liable for a company’s debts to the extent of their investment’.¹¹⁰ In addition, more than one limitation regime may be applicable to a particular loss, such as where a property claim under the Hague-Visby Rules is further limited under the LLMC.¹¹¹ The development of maritime insurance, enabling shipowners to obtain extensive cover, has also mitigated the financial risk. Thus, a shipowner is provided several layers of protection beyond the maritime limitation of liability.

Finally, the maritime industry is no longer fledgling; it has come a long way since the 18th century and now generates multi-billion dollar revenues. The industry no longer needs protection, and even if it did, it is more appropriate that subsidies come from the state and not at the expense of injured parties.

Thus, the limitation of liability can no longer be justified on protectionist grounds in the context of the modern shipping industry. Given the comparable casualty rate to the airline industry, it is unlikely that shipowners will be exposed to an excessive number of claims for compensation.

6.2 Joint Venture

The idea of a joint venture was another one of the early motives behind the limitation of liability in shipping, with roots in the general average concept of the common adventure.¹¹² It was reasoned that even if there was no formal partnership, the shipowner and the cargo owner were participants in a common adventure ‘for the benefit of both, and at the cost of both, and ... at the risk of both.’¹¹³ It was seen as inappropriate that only one co-adventurer bore the full risk of the venture. In *Boucher v Lawson* the cargo owner was able to sue the shipowner for the theft of its gold bullion despite the latter not being privy to the theft.¹¹⁴ Parliament consequently allowed limitation of liability so that shipowners were not exposed to financial risks greater than their share of the venture.¹¹⁵

However, the extension of the limitation of liability to personal injury and death represents a departure from this logic because third parties, such as passengers, could not be said to be co-adventurers.¹¹⁶ Similarly, the adoption of a tonnage formula meant the shipowner’s liability was not limited to the value of his ship.¹¹⁷ The effect of these developments is that the limitation of liability is no longer confined to the venture capital of each party.

From this perspective, the limitation of liability has served its purpose and is now redundant.

6.3 Ability to get Insurance

The major argument for the maritime limitation of liability has shifted from encouraging trade and investment to that of capping potential insurance payouts so that insurance can be purchased at a reasonable rate.¹¹⁸ Indeed, ‘if the maximum liability of the shipowner can be assessed in advance then it should be easier and cheaper to obtain insurance cover.’¹¹⁹ This sentiment was seen in the legal committee of the IMO prior to adopting the LLMC.¹²⁰

The earlier concept of limitation held that a shipowner should be able to free himself from liabilities which exceeded his total interest in a venture subject to marine perils. The more modern view is that the shipowner should be able to free himself from liabilities which exceeded amounts recoverable by the insurance at reasonable cost.

¹¹⁰ Ibid 26.

¹¹¹ Gotthard Gauci, ‘Compulsory Insurance Under EC Directive 2009/20/EC – An Adequate Solution for Victims, or is it also Time for Abolition of Maritime Limitation of Liability and the Establishment of an International Fund as an Insurer of Last Resort?’ (2014) 45 *Journal of Maritime Law and Commerce* 77, 80.

¹¹² Killingbeck, above n 8, 9.

¹¹³ Mustill, above n 12, 492.

¹¹⁴ *Boucher v Lawson*, above n 11.

¹¹⁵ Killingbeck, above n 8, 9.

¹¹⁶ Mustill, above n 12, 498.

¹¹⁷ Ibid 498.

¹¹⁸ Steel, above n 62.

¹¹⁹ Yang Ming, ‘Limitation of Liability for Claims for Personal Injury & Death Following a Collision’, in *Proceedings of the International Congress of Maritime Arbitrators XIIIth Meeting, Auckland, New Zealand* (International Congress of Maritime Arbitrators, 1999) 3, 4 <<http://gmaa.de/images/stories/gmaa/pdf/icma/ICMA%20Auckland%201999.pdf>>.

¹²⁰ Steel, above n 62, 79.

Steel argues that if shipowners' liability is unlimited then insurance companies will demand excessive premiums or refuse coverage because shipping is particularly susceptible to catastrophic incidents.¹²¹ Consequently, shipowners will be encouraged to pursue bad practices such as self-insurance and there will be an increasing number of one-ship companies to avoid claims against the owner's other assets.¹²²

Steel greatly underestimates the insurance market's ability to provide the levels of cover required by shipowners with unlimited liability. Killingbeck notes that 'the forms of modern marine insurance are at least as numerous and comprehensive as those available to other commercial and transport enterprises.'¹²³ If an individual can get insurance for a hurricane or an earthquake in the Lloyd's reinsurance market, for example, it seems very odd that a shipowner could not get insurance for major maritime catastrophes.¹²⁴ Shipping has the added advantage of P&I clubs to provide extra liability cover.¹²⁵ Moreover, the airline insurance industry is functioning well and efficiently with unlimited liability. In 2012 insurers experienced the lowest level of airline insurance losses for over 25 years and consequently premiums are generally being reduced.¹²⁶ It may even be possible for air insurers to fill the void if P&I clubs are unable to provide adequate insurance to shipowners.¹²⁷

There is little evidence that unlimited liability will lead to excessive premiums. This seems particularly unlikely in light of the global trend of declining losses. In fact, experience tells us that it is unlikely that unlimited liability will result in significantly higher insurance costs. Professor Peter Wetterstein addressed the point, by saying that:¹²⁸

The role played by insurance costs in competition... seems to have been exaggerated in international discussion. The introduction of unlimited liability would mean only a marginal - if even that - increase in costs. I cannot accept insurance costs as a key argument for limitation of maritime liability. Such arguments are not normally acceptable in other fields and, furthermore, there exist other means to give favourable treatment to national merchant fleets and to improve their international competitiveness. This should not be at the expense of the injured party/ies.

Many airlines made similar arguments against removing liability limits prior to the signing of the Montreal Convention. They argued that unlimited liability would bankrupt them due to uninsurable claims, which benefits neither claimants nor the industry.¹²⁹ Yet 15 years later the airline industry is not excessively burdened by abolishing the limits of the Warsaw Convention, with most claims being fairly modest.¹³⁰ The adoption of the Montreal Convention demonstrates that even a substantial increase in passenger liability cover has a very small effect on the overall insurance costs. Liability premiums paid by the world's airlines amount to approximately 0.15% of global operating revenues and are actually decreasing.¹³¹ Furthermore, the highest levels of liability cover can usually be bought at lower premium rates that reflect the smaller risk of paying out.¹³²

Even if unlimited liability did increase the cost of insurance, it is more effective and fair to spread the risk (and therefore the cost) of maritime disasters amongst all participants in international trade. Following a catastrophe there will always be an ultimate insurer or State that has to cover the loss, so it is preferable to spread the loss to as wide a base as possible. One suspects that most rational actors in the shipping industry would prefer to pay slightly higher freight costs to protect themselves from the eventuality of catastrophic events. The position is comparable to product liability where businesses do not enjoy the ability to limit their liability beyond the corporate structure. In the celebrated case *Escola v Coca-Cola Bottling Co*, Justice Traynor explains that:¹³³

... the cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

¹²¹ Ibid 82.

¹²² Ibid 81.

¹²³ Killingbeck, above n 8, 25.

¹²⁴ Dwight Jaffee and Thomas Russell, 'Catastrophe Insurance, Capital Markets, and Uninsurable Risks' (1997) 64 *The Journal of Risk and Insurance* 205, 207.

¹²⁵ Killingbeck, above n 8, 25.

¹²⁶ Willis – Global Risk Advisor, Insurance and Reinsurance Broker, *Airline Insurance Market* (2013) Willis – Global Risk Advisor, Insurance and Reinsurance Broker
<http://www.willis.com/documents/publications/industries/aerospace/Q1_2013_Airline_Insight_PDF_version.pdf>.

¹²⁷ Zaman, above n 7, 72.

¹²⁸ Peter Wetterstein, 'Damage From International Disasters in the Light of Tort and Insurance Law' in *Proceedings of the AIDA 8th World Congress, Copenhagen, General Reports* (AIDA, 1990) 102-103.

¹²⁹ Zaman, above n 7, 72.

¹³⁰ Ibid 72.

¹³¹ Taylor, above n 19, 120.

¹³² Ibid 120.

¹³³ *Escola v Coca-Cola Bottling Co* 150 P 2d 436 (Cal 1944) 441.

Some may argue that individuals should get their own insurance instead of the carriers.¹³⁴ However, shipowners can purchase appropriate insurance much more economically and efficiently than individuals and pass the cost on through pricing. This is because shipowners are in a better position to assess the risks and potential liabilities of the venture (for example, they will have extensive knowledge of the safety measures in place). In contrast, individuals cannot foresee all risks to themselves and it would place an undue burden on victims to require them to insure against the negligence of others. This is especially the case considering bystander victims, such as swimmers, that are not in a common venture and may not even be aware that they are in danger. It is also unrealistic to expect the average seafarer to be able to afford personal injury insurance.

Thus, in an industry where insurance is vital it is inappropriate to insert an artificial subsidy that interferes with actuarial risk spreading. Unlimited liability is unlikely to have a significant impact on insurance rates, yet it would make a substantial difference for the few victims of maritime accidents whose compensation would otherwise be limited.

6.4 Quid Pro Quo

Another justification for the limitation of liability is that all users of the shipping industry benefit from reasonably priced transport.¹³⁵ It is argued that unlimited liability would expose shipowners to large claims that could put them out of business, thus reducing competition and choice amongst carriers. This reduction of competition, combined with increased insurance premiums, is then supposedly passed on to the customer through increased rates.¹³⁶

There are two key flaws in this argument. Firstly, as already discussed, unlimited liability is unlikely to increase insurance costs significantly, if at all, and modern insurance and finance arrangements will protect shipowners from going out of business. Secondly, this argument does not account for victims that are not regularly involved in the maritime industry, such as one-off travellers or swimmers in the water (Lord Mustill's 'open' category). One cannot benefit from reasonably priced transport if they do not in fact use it.

Another quid pro quo for shipowners being able to limit their liability under the current regime is said to be that the aggrieved party has the benefit of a reversed burden of proof.¹³⁷ However, the value of a reversed burden of proof is greatly reduced by the fact that a plaintiff may rely on the legal principle of *res ipsa loquitor* in cases of catastrophic accident.¹³⁸ The current liability regime is tipped heavily in favour of shipowners, and one suspects that most claimants would prefer to take back the burden of proof if it meant removing the limits on compensation.

Thus, neither a reversed burden of proof nor marginally cheaper rates sufficiently justify the maritime limitation of liability scheme.

6.5 Avoidance of Litigation and Certainty of Compensation

A pragmatic argument for the limitation of liability is that it provides simplicity and certainty to the compensation process by encouraging settlement.¹³⁹ Steel put forward a compelling argument that a limited claim that is certain is better than an unlimited claim against potentially insolvent parties.¹⁴⁰ This is because the LLMC provides a limitation fund even where the vessel has lost all value following the accident, so there will always be some compensation. Furthermore, limitation arguably avoids costly litigation since only a single action is necessary to prove elements such as negligence.¹⁴¹

However, there is no evidence that the limitation of liability reduces litigation. In fact, Taylor believes that before the Montreal Convention was adopted 'the single most important reason for the volume of litigation that arises from air crashes [was] the limitation of liability...' ¹⁴² He suggests that placing an artificial cap on the compensation of victims with a legitimate claim is likely to provoke conflict and litigation, not avoid it. The

¹³⁴ Popp, above n 95, 355.

¹³⁵ Killingbeck, above n 8, 11.

¹³⁶ Ibid 11.

¹³⁷ Taylor, above n 19, 121.

¹³⁸ Ibid 121.

¹³⁹ Killingbeck, above n 8, 17.

¹⁴⁰ Steel, above n 62, 87.

¹⁴¹ Killingbeck, above n 8, 16.

¹⁴² Taylor, above n 19, 121.

limitation of liability may in fact increase the amount of litigation. This is because where the provable damage exceeds the limitation figure the claimant is forced to cast his net wide and pursue other parties that do not enjoy the limitation of liability, such as the manufacturer of the ship and its components.¹⁴³

Killingbeck suggests that the only real alternative to the limitation of liability is 'an American style unlimited liability with free for all litigation'.¹⁴⁴ However, the Montreal Convention demonstrates that there is in fact a workable middle-ground. By having strict liability of 113 100 SDR coupled with compulsory insurance, all claimants are guaranteed to have funds available to them. This arrangement also enables advance payments so families avoid suffering immediate hardship following an accident.¹⁴⁵ In many cases this payout may be sufficient compensation in itself. However, in circumstances where the provable damage exceeds this amount then claimants are still able to sue for additional compensation. They may wish to avoid the costs associated with litigation and forgo extra compensation, but that is their choice as a victim.

Thus, a system of strict liability coupled with compulsory insurance would provide at least the same level of certainty as limitation of liability, without having to sacrifice the victim's right to full compensation.

6.6 Channelling Liability

It could be argued that the limitation of liability has a procedural advantage in that all claims are channelled to a single forum where the fund is constituted. This avoids parallel proceedings where the claimants come from different jurisdictions. Where a limitation fund has been constituted under the LLMC and a person has made a claim against the fund, all other parties are debarred from 'exercising any right' in respect of that same claim against any other assets of the shipowner.¹⁴⁶ This has the effect that once a limitation fund is formed all the claims are channelled through that forum, and the shipowner's other ships are free to carry on trading.¹⁴⁷ The aim of the subsection is to protect the assets of the shipowner from arrest or detention. If this protection were not available then there would be a rush around the world to arrest the shipowner's vessels (similar to when a multinational shipowner becomes insolvent). That would freeze the shipowner's business, which is adverse to international trade.¹⁴⁸

There are several critiques of this argument. Firstly, the convention's protection of shipowners is misplaced. Maritime law should prioritise full compensation to victims regardless of the disruption it may cause the defendant or the fact that parallel proceedings may result. It is difficult to imagine a land-based company wanting to carry on 'business as usual' immediately following a catastrophe before settling its liability. Secondly, the advantage of channelling liability does not apply to the many one-ship companies that do not have other assets vulnerable to arrest. In 2012 40% of world shipping involved one-ship companies registered in Liberia, Panama and the Marshall Islands.¹⁴⁹ Thirdly, and most significantly, the channelling of liability is essentially a procedural issue that does not necessitate a limit of liability. This could just as easily be resolved with a convention that requires shipowners to put up a set fund that must be topped up if it proves inadequate and have all claims go there; it being in the interest of all parties that the actions are brought together.

Thus, the channelling of liability is a completely separate issue to the limitation of liability and can be achieved through more attractive means.

¹⁴³ Ibid 123.

¹⁴⁴ Killingbeck, above n 8, 28.

¹⁴⁵ Butterworths, above n 74, 257.

¹⁴⁶ LLMC, 1977, 1456 UNTS 221, art 13(1).

¹⁴⁷ Patrick Griggs, Richard Williams and Jeremy Farr, *Limitation of Liability for Maritime Claims* (Informa, 4th ed, 2004) 74-75.

¹⁴⁸ Ibid 76.

¹⁴⁹ Malcolm Wallis, 'Recovery of Maritime Debts and the Role of the Associated Ship' (2012) 28 *Banking & Finance Law Review* 103, 109-110.

7 Arguments Against Limitation

7.1 Ethics

In his paper Lord Mustill suggests ‘the time will come when the ethics of limitation of liability will be firmly put in issue.’¹⁵⁰ Having debunked the traditional justifications of maritime limitation in light of the successful implementation of the Montreal Convention, that time is now.

Lord Mustill complained about the unsystematic way in which the limitation of liability is applied. Indeed, the amount of compensation that an injured passenger can expect depends on a range of arbitrary variables such as the form of transport used, the legislation in force at the location of the accident, and where the claimant brings proceedings.¹⁵¹ The resulting ‘lottery’ is ‘not only illogical but immoral.’¹⁵² For example, had Ms Birkenfeld’s injuries resulted from a car crash then precedent tells us she could have been awarded USD 3 million.¹⁵³ Had she been able to bring a claim in a jurisdiction where the higher limits of the 1996 Protocol were in force then she would have received closer to NZD 3.7 million. Had the collision occurred within 12 nautical miles of New Zealand then she would have been fully compensated under ACC.¹⁵⁴ It is ‘unacceptable that the financial future of injured persons should depend on chances as whimsical as these.’¹⁵⁵

The maritime limitation of liability is also arbitrary in the sense that the limit depends on the tonnage of the culpable ship. As was seen in *Birkenfeld*, a vessel of any size can do serious damage to an unprotected human. The fact that she was run over by a small inflatable boat being driven at high speed meant she received the minimum level of compensation. Had she had been run over by a container vessel, in contrast, she would have received substantially greater compensation. While a rough formula that bigger ships cause more damage may be generally justifiable, *Birkenfeld* illustrates that it can produce perverse results. There is much less correlation between the size of a vessel and the severity of the personal injury it can cause, as compared with property damage. Moreover, the values of the tonnage formula itself are completely arbitrary, having been based on the levels of insurance available at the time of drafting and not the value of the ship.¹⁵⁶

The current liability system is thus totally arbitrary and unjust, at times producing ‘freakish results’.¹⁵⁷ This lottery of compensation is advantageous for insurers because they are able to spread their risks.¹⁵⁸ It is in their interest to continue the limitation of liability because it significantly limits their exposure to risk. It is the victims of maritime accidents who suffer under this regime because the amount of compensation they can expect to receive depends on what appears to be chance as much as anything.

Lord Mustill also critiqued the discriminatory nature of maritime limitation of liability. He considers it ‘unreasonable that a single group in society are the beneficiaries of a rule whilst others exposed to similar risks are left unprotected.’¹⁵⁹ He points out that that we have protected the solvency of shipowners for centuries through the limitation of liability, but have not extended the benefit to other situations where the moral case is just as great. He provided several notable examples – the momentary inattention of a motorist, or a simple slip of the surgeon – of single faults which potentially result in substantial liabilities and yet are not protected by limitation.¹⁶⁰ Lord Mustill concluded over 20 years ago that ships were no longer different, with ‘no more right to protection than any other commercial enterprise.’¹⁶¹

Limited liability is, of course, still available to businesses through the corporate structure provided by company law. Consequently, if a person is killed or injured and a company is held liable, his or her compensation is essentially limited to that company’s assets. It is questionable whether this form of limitation is justified, but there are several distinguishing features that may justify the limitation of liability in the financial sphere, such as the ongoing need to foster innovation in the market. Regardless of whether limited liability via the corporate

¹⁵⁰ Mustill, above n 12, 500.

¹⁵¹ Ibid 500.

¹⁵² Ibid 500.

¹⁵³ *Waldorf v Shuta* 142 F 3d 601 (3rd Cir 1998) 96.

¹⁵⁴ *Accident Compensation Act 2001* (NZ) s 20.

¹⁵⁵ Mustill, above n 12, 500.

¹⁵⁶ Ibid 499.

¹⁵⁷ Ibid 500.

¹⁵⁸ Killingbeck, above n 8, 14.

¹⁵⁹ Ibid 15.

¹⁶⁰ Mustill, above n 12, 491.

¹⁶¹ Killingbeck, above n 8, 15.

structure is justified (an issue beyond the scope of this paper), the extension of this benefit through maritime limitation of liability clearly lacks justification.

Finally, it is rather troubling that in this instance the law appears to put a cash amount on the life of a human being. Limitation law does not discriminate between the unique circumstances of each individual but rather treats them all the same. That is not to say that some people deserve compensation more than others, but rather that the financial sum required to compensate each individual is necessarily unique. These Conventions value life based on the number of passengers on board the ship at the time of an accident, whereas tort law looks at a range of complex factors. For example, compensation can be based on 'loss of economic support to a decedent's family, loss of services, loss of companionship, and pain and suffering'.¹⁶² The money available in the limitation fund will not always be adequate to compensate the victims according to their individual circumstances.

Thus, the limitation of liability is applied in an unsystematic manner that discriminates against other modes of transportation and puts an arbitrary figure on an individual's level of compensation.

7.2 The Purpose of Private Law

7.2.1 Functionalism

The dominant contemporary view is that private law is the legal manifestation of independently justifiable goals.¹⁶³ These goals are independent from both the law to which they are applied and from each other, and may require balancing when in conflict.¹⁶⁴ This goal-oriented understanding of private law stems from the idea that 'the object of the law is to serve human needs' and promote human welfare.¹⁶⁵ The primary goals of tort law are said to be compensating accident victims and deterring behaviour that might produce injuries (thus minimising the frequency and seriousness of accidents).¹⁶⁶ The maritime limitation of liability achieves neither of these goals.

As already discussed, maritime limitation of liability produces two clear situations where victims are barred from receiving full compensation from the tortfeasor. Firstly, where there is a catastrophic event in which there are numerous claimants and the limitation fund is exhausted, all the victims receive limited compensation in proportion to their original claims. Secondly, where a small ship causes serious harm or fatality the application of a tonnage formula can result in a limitation fund that does not cover the injury. In both situations a claimant, having suffered harm at the hands of another, may be prevented from receiving full compensation. The limitation of liability thus infringes the fundamental tort principle of *restitutio ad integrum* by partially absolving shipowners from responsibility. By limiting the right of compensation and unjustly allocating responsibility to the victims, the limitation of liability undermines one of tort law's fundamental goals.

Furthermore, the incentive for shipowners to maintain safe and seaworthy vessels is greatly reduced by unbreakable and low limits in the LLMC.¹⁶⁷ By partially absolving shipowners of responsibility following an accident and capping their liability so that they can easily cover it with insurance, the incentive to avoid tortious conduct is significantly less. Lord Donaldson claims that unlimited liability would not make shipowners implement stricter safety measures.¹⁶⁸ He believed the only way to do this was by 'making other groups in the maritime industry put pressure on shipowners, such as encouraging insurance companies to only provide cover for vessels that meet minimum standards.'¹⁶⁹ However, Lord Donaldson failed to elaborate exactly how to put pressure on insurance companies to do so. Unlimited liability is the solution. Insurance companies always look to minimize their exposure to risk so they will be incentivised to take precautions if shipowners face unlimited liability. It will be in the interest of insurance providers to require higher safety standards and conduct regular inspections as a condition of providing cover.¹⁷⁰

¹⁶² Zaman, above n 7, 57.

¹⁶³ Ernest Weinrib, *The Idea of Private Law* (OUP, 2012) 3.

¹⁶⁴ *Ibid* 5.

¹⁶⁵ *Ibid* 4.

¹⁶⁶ *Ibid* 4.

¹⁶⁷ Zaman, above n 7, 64.

¹⁶⁸ Killingbeck above n 5, 18.

¹⁶⁹ *Ibid* 18.

¹⁷⁰ Soyer, above n 41, 526.

Tort law incentives have the greatest impact on corporate tortfeasors; that is, businesses that are held liable for not preventing particular accidents.¹⁷¹ This is because if a company has regular involvement in the industry, and the type of accident is likely to happen again, then it is more likely that the company or others in a similar position will take efforts to prevent those accidents from occurring again.¹⁷² It therefore follows that corporate shipowners, at least, would respond to the deterrent threat of unlimited liability. The fact that a company has liability insurance does not diminish the economic deterrence of tort law if responsively priced to the company's level of risk.¹⁷³ If shipowners are fully liable for their losses they will be incentivised to implement stricter safety measures in order to avoid future loss and keep insurance premiums low.

From an instrumental perspective, the maritime limitation of liability fails to achieve either of the goals of tort law: neither compensation nor deterrence. Limitation creates situations where victims do not receive full compensation and it fails to deter future accidents by partially absolving shipowners of responsibility.

7.2.2 Corrective Justice

Professor Ernest Weinrib, among other leading scholars, has argued against the functionalist understanding of private law.¹⁷⁴ He posits that private law is an autonomous and non-instrumental moral practice, which must be understood from within the structure of tort liability itself and not in reference to extrinsic and independent goals.¹⁷⁵ Private law, according to Weinrib, is a 'juridical enterprise in which coherent public reason elaborates the norms implicit in the parties' interaction'.¹⁷⁶

Weinrib points out that the fundamental feature of our private law system is that the liability of any given defendant is also a liability to a particular plaintiff.¹⁷⁷ The parties are treated as doer and sufferer of the same injustice and each party's position is only intelligible in light of the others.¹⁷⁸ The individual agents are thus linked together in a 'single, coherent bipolar relationship'.¹⁷⁹ Weinrib asserts that this relationship functions as a form of corrective justice, as formulated by Aristotle.¹⁸⁰

According to Weinrib, '[c]orrective justice regards the interaction between the plaintiff and defendant as an integrated whole in which both parties have an equal standing'.¹⁸¹ The action required to do justice depends on the correlativity of normative gains and losses between the parties.¹⁸² As the tortfeasor gains what the victim loses, it is insufficient to simply remove the tortfeasor's gain or restore the victim's loss.¹⁸³ The law must both restore the victim's loss and remove the tortfeasor's gain. Thus, when a defendant breaches its duty and infringes the correlative right of a plaintiff, corrective justice requires a remedy (usually damages) paid directly from the defendant to the plaintiff so as to restore the latter's rightful position as far as money allows.¹⁸⁴

Corrective justice thus rejects the idea that private law is justified by independent goals irrespective of whether it is fair to both parties.¹⁸⁵ Courts are not required to consider what is the best remedy for the future all things considered.¹⁸⁶ The role of private law is simply to correct the injustice done by one party to the other.

From this perspective as well, maritime limitation of liability undermines and perverts the entire purpose and framework of private law because it creates situations where victims are not fully compensated. It is a major failing of our private law that it does not always correct the injustice done to victims of maritime accidents at the hands of shipowners.

¹⁷¹ Willem van Boom, 'Compensating and Preventing Damage: Is There Any Future Left for Tort Law?' in Hugo Tiberg (ed), *Essays on Tort, Insurance Law and Society in Honour of Bill W. Dufwa* (Jure, 2006) 287, 289.

¹⁷² Ibid 289.

¹⁷³ Gary Schwartz, 'Ethics and the Economics of Tort Liability Insurance' (1990) 75 *Cornell Law Review* 313, 363.

¹⁷⁴ Weinrib, above n 163.

¹⁷⁵ Ibid 6.

¹⁷⁶ Ibid 8.

¹⁷⁷ Jared Marshall, 'On the Idea of Understanding Weinrib: Weinrib and Keating on Bipolarity, Duty, and the Nature of Negligence' (2010) 19 *Southern California Interdisciplinary Law Journal* 385, 386.

¹⁷⁸ Ernest Weinrib, *Tort Law as Corrective Justice* (2009) *VR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law* <www.ivr-enc.info>.

¹⁷⁹ Marshall, above n 177, 389.

¹⁸⁰ Ibid 386.

¹⁸¹ Ernest Weinrib, 'The Insurance Justification and Private Law' (1985) 14 *The Journal of Legal Studies* 681, 686.

¹⁸² Marshall, above n 177, 389.

¹⁸³ Ibid 389.

¹⁸⁴ Weinrib, above n 163, 56.

¹⁸⁵ Weinrib, above n 178.

¹⁸⁶ Ibid.

8 The Way Forward

The Montreal Convention confirms that unlimited liability is a viable and desirable option for reform. I therefore propose that the maritime industry adopt a new convention modelled on the Montreal Convention. This would involve a two-tiered liability system. On the first tier, shipowners would be strictly liable for proven damages up to a set amount per passenger. This could initially be set at 113 100 SDR so as to mirror the liability in the aviation industry, but it would ultimately be subject to negotiation by the various drafting parties. There would, however, need to be a mechanism for the IMO to review this amount every 5 years in order to counter inflation. For damages above this figure, the shipowner will be liable for an unlimited amount unless it can prove that it was not negligent or that a third party was solely responsible for the loss.

Like the Athens Convention 2002, it is reasonable to distinguish between shipping and non-shipping ‘incidents’ with strict liability only attaching to the former. The alternative would render the shipowner an insurer of all risks, even if unrelated to shipping and beyond the shipowner’s control. The term ‘incident’ or ‘event’ is preferable to ‘accident’ because they have a much wider scope. This should avoid divergent interpretations of ‘accident’ across major jurisdictions, as is seen under the Montreal Convention.¹⁸⁷ The term ‘personal injury’ as opposed to ‘bodily injury’ is also preferable because it will also avoid disagreement as to whether mental injury can be compensated.¹⁸⁸

Like the Montreal Convention, the new convention would have to make it compulsory for all shipowners to have liability insurance up to the limit amount in the first tier. This would allow swift payment of compensation and certainty to victims of maritime accidents, as well as providing financial security to the shipping companies themselves. This concept is not foreign to the maritime industry having been introduced in the Athens Convention 2002. Moreover, an EC Directive in 2009 made it compulsory for ships exceeding 300 gross tonnage to have insurance up to the liability limitation thresholds under the LLMC.¹⁸⁹ Port state authorities will play a crucial role because they are in a position to check that visiting vessels have proof of their liability insurance.¹⁹⁰

One commentator has suggested that the IMO should also establish an international fund as a top-up system and insurance of last resort in a similar vein to marine pollution schemes.¹⁹¹ Although this is a good idea to address the possibility that an uninsured or inadequately insured ship will go undetected, it has yet to be seen whether such a system is feasible or even necessary.

Some may argue that unlimited liability ‘coupled with a presumption of liability tips the scales too far in favour of the claimants’.¹⁹² While I believe that such a balance is justified when dealing with personal injury and death, a possible compromise is to remove the presumption of liability so that the claimant must prove fault of the carrier. However, this arguably places too great a burden on the claimant in regards to gathering sufficient evidence to prove the shipowner’s wrongdoing in a technically complex industry.

The success of any convention depends on it being signed by a large number of states. Indeed, Steel made the point that ‘maritime nations move at the speed of the slowest country.’¹⁹³ If some countries cling to previous regimes of limited liability then forum shopping is likely to be a significant problem. The difficulty with reaching the required international consensus is that each part of the world has different concerns, expectations and priorities.¹⁹⁴ One division that is particularly acute is that between developed and developing countries.

India led a Third World initiative during negotiations of the Montreal Convention which expressed the view that unlimited liability ‘would be against the interests of air carriers, especially the small and middle size’, and ‘would make the very survival of the carriers questionable’.¹⁹⁵ It was also suggested that ‘the main beneficiaries of unlimited liability would be the passengers of developed countries,’ even though all carriers would have top

¹⁸⁷ Milde, above n 63, 846.

¹⁸⁸ Ibid 846.

¹⁸⁹ Directive 2009/20/EC of the Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims [2009] OJ L 131/128.

¹⁹⁰ Soyer, above n 41, 527.

¹⁹¹ Gauci, above n 111, 96; see also the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992*, 1992, 1110 UNTS 57.

¹⁹² Taylor, above n 19, 130.

¹⁹³ Steel, above n 62, 81.

¹⁹⁴ Soyer, above n 41, 154.

¹⁹⁵ Milde, above n 63, 842.

pay higher insurance premiums.¹⁹⁶ A similar division was seen when the LLMC was first negotiated. The developed countries advocated very high limits but a few developing nations were reluctant to do so. The latter ‘saw such increases as a threat to their own small but growing fleets.’¹⁹⁷ This indicates the likely reaction if there was a proposal to abolish the maritime limitation of liability.

However, the successful implementation of the Montreal Convention shows that a model catering for all interests can be achieved. Drafters were able to reach a ‘delicate balance between the needs and interests of all partners in international civil aviation, States, the travelling public, air carriers and the air transport industry.’¹⁹⁸ Moreover, at the Correspondence Group at the seventy-seventh session of the Legal Committee proposing the 2002 Protocol to the Athens Convention, several delegations including Japan, Belgium and Norway pushed for the two-tier liability system because they thought maritime law should follow aviation law toward strict liability.¹⁹⁹

It will require a few determined states to take the initiative and a thorough discussion with all the actors of the industry, but reform is necessary to ensure adequate compensation of those injured by vessels.

9 Conclusion

The shipping industry is currently subjected to a one-sided regime that places the victims of maritime accidents in a worse position than those killed or injured in other circumstances. There needs to be serious reform to reflect modern realities and unify private law compensation.

The historical justification that limitation of liability is needed to protect the maritime industry can no longer be sustained. Today, sea voyages are much safer and the industry is well established. Shipowners are typically complex corporations that are able to control all aspects of the ship’s operation through modern technology: a far cry from single owners risking their life savings. It is difficult to justify a rule created in a long-gone social and business environment. Tradition alone cannot be a defence.

Modern insurance markets can undoubtedly provide adequate coverage for shipowners if liability limits are abolished. There is no evidence that unlimited liability will significantly increase premiums but, even if it did, it is more efficient and fair to spread the cost of maritime disasters amongst all participants in international trade.

A system of strict liability coupled with compulsory insurance will provide the same level of certainty as the limitation of liability without having to sacrifice the victim’s right to full compensation. Similarly, the channelling of litigation is essentially a procedural issue that can be achieved through more attractive means.

The maritime limitation of liability for personal injury and death claims is ethically objectionable. It places a monetary value on a human life, produces a lottery of compensation, and discriminates against all other modes of transportation. Innocent parties who have been injured by the actions of another should not be expected to subsidise industrial interests by receiving less than full compensation.

From both instrumental and non-instrumental perspectives of private law, the limitation of liability undermines and perverts the purpose and framework of our private law because it creates situations where victims are not fully compensated. It also decreases the incentive for shipowners to maintain safe and seaworthy vessels.

In 1999, most countries around the world accepted that protecting and subsidising the airline industry through limiting its liability to passengers was no longer justifiable. Undoubtedly those same conditions exist in the maritime industry today. Ships are no longer different.

¹⁹⁶ Ibid 842.

¹⁹⁷ Popp, above n 95, 347.

¹⁹⁸ Milde, above n 63, 843.

¹⁹⁹ Soyer, above n 41, 522.

TRANS-TASMAN SHIP ARRESTS: A MISSED OPPORTUNITY

Luke Strom*

1 Introduction

On the 12 May 1995, the ship *Barde Team* was in dock at Timaru, New Zealand. While it was discharging goods, it tilted and caused damage to machinery below deck. The damage was estimated at USD 3 000 000. The owners of the machinery did not arrest the ship in Timaru and the ship sailed for Australia. The ship was arrested on its arrival in Australia to recover damages for the damaged machinery. The case was heard in Australia, however, the damaged machinery, witnesses and evidence were mostly in New Zealand.¹

This scenario is not uncommon in shipping. Ships come and go quickly from ports. The chance to arrest a ship and have an action in rem heard within the same jurisdiction as that which gave rise to the claim is often missed. This paper enquires into whether there is a more effective way of dealing with trans-Tasman Admiralty disputes in light of the commercial and legal developments that have taken place between Australia and New Zealand.

The Australia-New Zealand Closer Economic Relations Trade Agreement (CER),² the Single Economic Market initiative (SEM) and the *Trans-Tasman (Proceedings) Acts* (TTPAs) of Australia³ and New Zealand⁴ have brought both countries closer in trade, commerce and law. Importantly, the TTPAs have made it easier to initiate proceedings or to have judgments recognised and enforced between Australia and New Zealand. This allows trans-Tasman civil disputes to be resolved more effectively and efficiently. However, despite these improvements, actions in rem and arresting property have been excluded from the TTPAs. This exclusion means that the majority of Admiralty law is also excluded from the TTPAs. Thus, despite the improvements to trans-Tasman disputes under the TTPA, if the *Barde AS* was decided today, the machinery owner would still not be able to bring their claim in New Zealand while an Australian court held the ship on arrest for the New Zealand claim.

2 The Relationship Between Australia and New Zealand

The relationship between Australia and New Zealand is close. In a recent poll of feelings toward other countries, Australia ranked New Zealand as the most favourable nation out of a group of 21 nations including the United States, the United Kingdom and Canada.⁵ We have fought alongside each other in war and against each other on the sports field. We share similar histories of British colonialism and still retain the monarch as our respective Head of State. New Zealand was under the jurisdiction of the New South Wales Colony until 1840 and was invited to join the Federation in 1901.⁶ Furthermore, Australians and New Zealanders have moved freely between the two countries since the 1840s, with the free movement becoming formalised in the 1920s and in 1973.⁷ We also share similar judicial and political systems based on the British model.⁸ Most obviously, we are geographically proximate.

Trade between Australia and New Zealand is also substantial. Trade in goods between the two countries exceeds NZD 18 billion per annum and grows each year.⁹ Australia is New Zealand's largest trading partner.¹⁰ Australia

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¹ *Barde AS v ABB Power Systems* [1995] FCA 1602 (17 October 1995) ('*Barde AS*').

² 1983, [1983] ATS 2.

³ *Trans-Tasman Proceedings Act 2010* (Cth).

⁴ *Trans-Tasman Proceedings Act 2010* (NZ).

⁵ Alex Oliver, *The Lowy Institute Poll 2014* (Lowy Institute, 2014) 15.

⁶ Michael Kirby, 'Trans-Tasman Federation – Achievable, Impossible, Unnecessary?', (2010) 16 *Canterbury Law Review* 1, 4-5. The Australian Constitution still leaves open the possibility of New Zealand joining the Federation by defining the States of Australia to include New Zealand. See *Commonwealth of Australia Act 1900* (Imp) cl 6. See also John H Farrar, 'Harmonisation of Business Law Between Australia and New Zealand', (1989) 19 *Victoria University of Wellington Law Review* 435, 436-7.

⁷ Robert Scollay, Christopher Findlay and Uwe Kaufmann, *Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) and Regional Integration* (Institute of Southeast Asian Studies, 2011) 21.

⁸ Kirby, above n 6, 9; and Scollay, *Ibid*, 19.

⁹ New Zealand Ministry of Foreign Affairs and Trade (NZMFAT), *Australia – Trade and Economic Links* (2013) <www.mfat.govt.nz>; and Australian Department of Foreign Affairs and Trade (ADFAT), *Australia-New Zealand Closer Economic Trade Agreement* (2014) <www.dfat.gov.au>.

¹⁰ By the March 2013 Quarter, China overtook Australia for the largest market of imports and exports of goods into New Zealand. However, Australia is still that largest trading partner when goods and services are combined. See ADFAT, *New Zealand Country Brief* (2014) <www.dfat.gov.au>.

takes 23% of all New Zealand's exports. Conversely, New Zealand is Australia's 7th largest trading partner. Since 1991, trade between the two countries has grown on average 6.2% per annum.¹¹ Shipping supports most of the trade between Australia and New Zealand as our major goods of trade are oil and petroleum products, gold, timber, cars and wheat.¹² In fact, ships transported 87% of exports and 76% of imports by value to and from New Zealand between the years 2000-2010.¹³ Several moves have been made to strengthen commercial and political ties between Australia and New Zealand over the last several decades.¹⁴ The developments have brought the two countries so close that it has even been argued that the relationship forms a sort of 'loose confederation'.¹⁵

3 CER and SEM

Agreements between Australia and New Zealand to liberalise trade are not a recent phenomenon. In 1966, both countries signed the *New Zealand Australia Free Trade Agreement* (NAFTA).¹⁶ However, the agreement was seen as largely unsuccessful.¹⁷ There was a desire to continue to liberalise trade between the two countries and thus a new agreement was entered into. CER came into force in 1983. The objectives of the agreement included: the strengthening of the broader relationship between the countries; developing closer economic relations through mutually beneficial trade; eliminating barriers to trade; and developing conditions of fair competition in trade.¹⁸ CER was designed to create a relationship or framework for trade that would benefit both countries and by 1990s, trade in goods was completely liberalised.¹⁹ The CER model has generally been viewed as a success.²⁰ The World Trade Organisation describes CER as 'the world's most comprehensive, effective and mutually compatible free trade agreement'.²¹

The framework of CER included measures to review the relationship. In 1988, further agreements were reached and the governments of both countries signed a Memorandum of Understanding (MOU) toward the harmonisation of business law.²² The MOU recognised that more was required to liberalise trade than simply removing barriers and tariffs. It recognised that different business laws and regulations may impede trade between the countries and that harmonisation of business laws would create a trade environment that would be mutually beneficial. The MOU noted that the governments would look into areas of business law that might be harmonised. These included such areas as: companies, securities and futures law; competition law; consumer protection; intellectual property; commercial arbitration; sale of goods and services law; and mutual assistance between regulatory agencies. Additionally, agreements were made to look into harmonising quarantine procedures.²³

In 1992, the governments met again. The result was another commitment to business harmonisation, the inclusion of services under the CER umbrella, and a scheme to mutually recognise product standards and registration of occupations.²⁴ In 1995, a further review led to improving regulatory impediments such as food standards and establishing an annual review of CER. In 2000, a further MOU was signed to replace the 1988 MOU with a renewed focus on specific areas of business law harmonisation.²⁵

The thread running through these developments between Australia and New Zealand under the CER umbrella is built on the idea of harmonisation. Paul Myburgh noted as early as 1995 that 'it has become usual, indeed almost obligatory, to discuss the issue of harmonisation of New Zealand and Australian laws within the context of CER and its harmonisation programme'.²⁶ The concept of harmonisation might be an elusive concept to nail down.²⁷ However, for the purposes of this paper, harmonisation under CER seems to be a process of developing

¹¹ NZMFAT, *Australia* (2013) <www.mfat.govt.nz>.

¹² Ibid.

¹³ Statistics New Zealand, *Methods of transporting imported and exported goods* (2012) <www.stats.govt.nz>.

¹⁴ Discussed below.

¹⁵ JLR Davis, 'Closer Economic Relations – A Trans-Tasman Confederation?', (2010) 16 *Canterbury Law Review* 47, 60.

¹⁶ 1966, [1966] ATS 1; ADFAT, *Closer Economic Relations: Background guide to the Australia New Zealand Economic Relationship* (AGPS, 1997) 6.

¹⁷ Scollay, above n 7, 22.

¹⁸ NAFTA Art 1.

¹⁹ Scollay, above n 7, 26.

²⁰ Scollay, above n 7, 18.

²¹ NZMFAT, above n 11.

²² See Farrar, above n 5, 442-5.

²³ Ian Barker and B A Beaumont, 'Trans-Tasman Legal Relations – Some Recent and Future Developments', (1992) 66 *Australian Law Journal* 566, 567.

²⁴ ADFAT, above n 16, 7.

²⁵ Scollay, above n 16, 46-47.

²⁶ Paul Myburgh, 'The Harmonisation of New Zealand And Australian Maritime Laws', (1995) 6 *Canterbury Law Review* 69, 69.

²⁷ For an in-depth look at the topic of harmonisation and CER, see Ibid, 70-73.

laws and regulations between Australia and New Zealand that will enhance mutually beneficial trade between the two countries. It was noted in the 1998 MOU that the laws do not need to be identical to achieve harmonisation.²⁸ However, it seems that reciprocity, in the sense of a commitment to develop mutually beneficial laws together, is an essential part of the harmonisation process.²⁹

From 2000, Australia and New Zealand entered trade agreements with other trading nations.³⁰ This raised questions about the role CER would play in the 21st century. Instead of CER dwindling away, both governments decided in 2004 to enhance the relationship with a commitment towards a Single Economic Market (SEM).³¹ The idea of the SEM was to build 'upon the very open trading environment created by CER and related agreements and aims to address behind-the-border impediments to trade deepening economic linkages'.³² Its aim is to 'reduce trans-Tasman discrimination and transaction costs, and make it as easy for New Zealanders to do business in Australia as it is to do business in and around New Zealand'.³³ While developments in the years immediately after the 2004 agreement have been seen as slow,³⁴ there have still been substantial developments. These include cooperation between each country's competition commissions, mutual recognition of securities offerings and a council to supervise trans-Tasman banking.³⁵ Furthermore, in 2009, in a joint press statement of intent, the Prime Ministers of both countries confirmed their commitment to the SEM initiative.³⁶ The press statement of intent proposed more developments in insolvency law, financial reporting, financial services policy, competition policy, business reporting, corporation law, personal property securities law, intellectual property law, and consumer policy.³⁷

Australia and New Zealand have signed more than 80 agreements under the CER/SEM umbrella.³⁸ Other than the ones already mentioned, these include harmonisation of customs processes, healthcare and social security agreements, double taxation and opening up the aviation markets, to name a few.³⁹ A recent joint press statement by the Prime Ministers of both countries shows the extent of harmonisation: as Australia and New Zealand will be co-hosting the Cricket World Cup in 2015, people coming from other parts of the world will only be required to obtain one visa for both countries.⁴⁰ While not exhaustive of the trans-Tasman relationship, these developments highlight how close the two countries have become politically, economically and legally.

4 Trans-Tasman Proceedings Acts, the Mozambique Rule and the Exclusion of Actions in Rem

4.1 Working Group Discussion Paper

In light of the developments made under the CER/SEM umbrella and the closeness of the two countries, it was recognised that there will be an increase in disputes between parties on either sides of the Tasman.⁴¹ The Australian Attorney-General's Department and the New Zealand Ministry of Justice set up a Working Group to research this area and make recommendations. In 2005, the Working Group released a public discussion paper. The paper recognised that integrating the civil justice systems more closely would help resolve such disputes and that this would be necessary for the success of CER/SEM.⁴² It was also recognised that the current arrangements for cross-border disputes were the same as for any other foreign country and this was insufficient considering the 'special relationship'.⁴³ The paper highlighted that a successful trans-Tasman legal framework would result in a reduction of costs, an increase in efficiency, a reduction of forum shopping and would support the other developments under the CER umbrella.⁴⁴

²⁸ Ibid 70.

²⁹ See generally Ibid, 71; and Farrar, above n 6, 445-447.

³⁰ Scollay, above n 7, 58.

³¹ Scollay, above n 7, 58.

³² NZMFAT, *Australia – CER and SEM* (2013) <www.mfat.govt.nz>.

³³ Ibid.

³⁴ Achim Rogmann, 'The Trans-Tasman Single Economic Market: Best Practice For Regional Integration?' (2013) 16 *International Trade & Business Law Review* 1, 19.

³⁵ Scollay, above n 7, 66-7.

³⁶ Rogmann, above n 34, at 19.

³⁷ *Single Economic Market Outcomes Framework as Identified in Prime Ministers Rudd and Keys Joint Statement of Intent* (20 August 2009) <http://archive.treasury.gov.au>. See also Rogmann, above n 33, 19.

³⁸ Rogmann, above n 34, 5.

³⁹ Rogmann, above n 34, 60-61; and Davis, above n 15, 48-53.

⁴⁰ 'Joint Statement by Prime Minister Tony Abbott and Prime Minister John Key' (Press Release, 7 February 2014) <www.pm.gov.au>.

⁴¹ Trans-Tasman Working Group, *Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper* (Australian Attorney-General's Department and the New Zealand Ministry of Justice, 2005) 1.

⁴² Ibid 1.

⁴³ Ibid 2.

⁴⁴ Ibid 2.

4.2 Issues and Recommendations

The paper raised 11 issues. This paper is concerned with two of those issues. First, the paper noted the '[p]ractical difficulties in recognising and enforcing judgments between Australia and New Zealand'.⁴⁵ As noted above, at the time of the paper, Australia and New Zealand treated the decisions of each other's courts as they did any other foreign court.⁴⁶ A problem highlighted with this arrangement was that a default judgment from a foreign court might not be registered because the foreign court lacked jurisdiction over the defendant simply by a lack of presence on the defendant's part in the proceedings or a lack of submission to the jurisdiction.⁴⁷ Thus, people could potentially avoid the enforcement of a judgment against them by residing across the Tasman and out of the jurisdiction. The paper noted how easy it was for people to change residence between Australia and New Zealand.⁴⁸

The paper recommended a model based on the *Service and Execution of Process Act 1992* (Cth) (SEPA).⁴⁹ SEPA, and its predecessor in 1901,⁵⁰ were remedies to the problem highlighted above, but between the states of Australia. The model allows a claimant to serve on a defendant in a different jurisdiction without leave of the court, and to have a judgment from a different jurisdiction recognised and enforced as if it had been delivered from the local jurisdiction.

The second issue was that interim orders in support of foreign proceedings were not readily available between the Australia and New Zealand.⁵¹ The paper highlighted that at common law, it was difficult to get an award for interim relief to protect a claimant's rights prior to a final award when the defendant or their assets were in another jurisdiction.⁵² A claimant would need to bring proceedings in the defendant's jurisdiction for interim relief, which would be costly and inconvenient. However, the most likely way to be awarded interim relief is if the proceedings are on the substantive claim. The problem with this approach is that the foreign court may decline relief, on the basis that it is not the appropriate forum.⁵³ The paper recommended that legislation be passed to allow Australian and New Zealand Courts to award interim relief in support of trans-Tasman proceedings.⁵⁴

4.3 Actions in Rem Left Out and the Mozambique Rule

The Working Group recommended that their proposed solutions apply only to actions in personam and not actions in rem.⁵⁵ The reason why actions in rem were left out was that the Working Group did not 'propose to address the *Moçambique* rule' (*Moçambique*).⁵⁶ The *Moçambique* rule means that a court has no jurisdiction over claims involving title or possession of immovable property or land in a foreign jurisdiction, nor can it hear claims for damages for trespass when the land, the subject of the claim, is in a foreign jurisdiction.⁵⁷ The paper noted that the rule is applied variously throughout the Australian States and New Zealand and this was a sufficient reason to not include actions in rem into any proposed legislation.⁵⁸ The effect of this reasoning meant that not only are actions in rem of immovable property excluded from the trans-Tasman legislation but Admiralty actions in rem for moveable property are also excluded. The result is problematic as the *Moçambique* rule rests on different conceptual underpinnings that do not apply to Admiralty actions in rem. Thus, due to the significant effect the Working Group's reasoning had on Admiralty law, this paper will thoroughly cover the *Moçambique* rule and why it should not have been used as a reason to exclude actions in rem – or at least Admiralty actions in rem – from the trans-Tasman legislation.

⁴⁵ Ibid 9.

⁴⁶ Except tax and lower court judgments.

⁴⁷ Trans-Tasman Working Group, above n 41, 9-10; *Foreign Judgments Act 1991* (Cth) s 7(2)(a)(iv); Reciprocal Enforcement of Judgments Act 1934 (NZ) s 6.

⁴⁸ Trans-Tasman Working Group, above n 401, 10.

⁴⁹ Ibid 11.

⁵⁰ *Service and Execution of Process Act 1901* (Cth).

⁵¹ Trans-Tasman Working Group, above n 41, 21.

⁵² Ibid 21-22.

⁵³ Ibid 22.

⁵⁴ Ibid 22.

⁵⁵ Ibid 31.

⁵⁶ Ibid 31.

⁵⁷ Ibid 31 and *British South Africa Co v Companhia de Moçambique* [1893] AC 602, 629 (HL) ('*Moçambique*'). For Australia, see *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479. For New Zealand, see *Re Fletcher Deceased* [1921] NZLR 46 (SC); *Dowson v Lloyds Bank NZA Ltd* (Unreported, New Zealand High Court, 13 March 1991) and *Nippon Credit Australia Ltd v Girvan Corporation New Zealand Ltd* (1991) 5 PRNZ 44 (HC).

⁵⁸ Trans-Tasman Working Group, above n 41, 31.

4.4 Reliance on the Mozambique Rule was Flawed

The legislation that resulted from the paper excludes enforcing actions in rem and arresting property for interim relief.⁵⁹ Although the paper was not addressing Admiralty law, Admiralty actions in rem and arresting ships and property are excluded from the provisions.⁶⁰ Aside from the ease with which the Working Group dismissed actions in rem,⁶¹ the reasoning in the discussion paper regarding the *Mozambique* rule and the result it produced may be regarded as flawed and insufficient, for several reasons.

First, as the Working Group rightly noted, '[t]he *Moçambique* rule has been acknowledged to be difficult to justify except on historical grounds, and neither logical nor satisfactory in the result it produces'.⁶² The rule can be traced back to the 12th century in England.⁶³ The jury performed a role more akin to a witness than a judge of facts.⁶⁴ For this reason, the jury was chosen from the same village where the matter arose, as they would be already acquainted with the facts of the case. Jurors from outside the village were not permitted to sit on the case. As disputes became more advanced in the 13th and 14th centuries and involved transactions across different regions, the rule that only people from the village could serve on the jury was problematic, as the cases would normally deal with facts covering different locations.⁶⁵ Thus, the courts created a distinction between local and transitory actions.⁶⁶ Local actions had a necessary connection to the location, and required local jurors. An example would be ejectment from land. Transitory actions did not have a necessary connection to the location and could be heard in different jurisdictions. An example would be a breach of contract. By the 16th century the role of the jury became that of a trier of fact, but a requirement created for local actions remained the same.⁶⁷ That is, if it was a local action, it could only be heard in that locality. The *Judicature Act 1873* (Eng) 'abolished the need for a local venue to be laid'.⁶⁸ Thus, it was thought that the English courts would not be limited to matters involving local actions. In the *Mozambique* case it was argued that the *Judicature Act* did not restrict the courts from awarding damages for trespass to land when the land was foreign.⁶⁹ However, it was held that along with questions of title and possession to land, questions of damages for trespass to land were also barred when the matter involved foreign land.⁷⁰

In a report on the jurisdiction of local courts over foreign land, the NSW Law Reform Commission highlighted the problems with the *Mozambique* rule, as interpreted in Australia,⁷¹ with a hypothetical example of a trans-Tasman property dispute:⁷²

Suppose that P, a resident of New South Wales, owns a house in New Zealand, which he lets for a month to D, also a resident of New South Wales, and that, while in occupation of the house, D negligently causes damage to the house. On D's return to New South Wales, P would not be able to bring an action in the Supreme Court of this State ... Furthermore, P would be denied any effective remedy against D, even if the former were to commence proceedings in the New Zealand High Court. That court would have the power to entertain the matter, despite the fact that D was no longer, present in that country ... But if D did not appear, and took no part, in the New Zealand proceedings, the default judgment which ... would be made in P's favour could not be enforced against D in New South Wales, since the Supreme Court of this State would not regard the New Zealand High Court as having had sufficient jurisdiction over D. It may be observed that if P's house were in another, State or Territory of Australia, a judgment given in P's favour in that other jurisdiction could be enforced in New South Wales by virtue of Part IV of the *Service and Execution of Process Act 1901* (Cth).

Furthermore, the Commission highlighted a peculiar result the rule produces by allowing some actions relating to the foreign land but not others.⁷³ This can be explained with the example above. Say D also breached the

⁵⁹ *Trans-Tasman Proceedings Acts 2010* s 12(2)(b), 31(2)(c), 61(2)(c).

⁶⁰ Discussed below.

⁶¹ Three short paragraphs.

⁶² Trans-Tasman Working Group, above n 41, 31, citing *Hesperides Hotels Ltd v Muftizade* [1979] AC 508, 543-4 (HL) ('*Hesperides*').

⁶³ NSW Law Reform Commission (NSWLRC), *Jurisdiction of Local Courts Over Foreign Land*, Report 63 (1988) [2.15]. See also W Rupert Johnson, 'The Mozambique Rule and the (Non) Jurisdiction of the Supreme Court of Western Australia over Foreign Land' (2003)

31 *University of Western Australia Law Review* 266, 270-2.

⁶⁴ *Ibid* [2.15].

⁶⁵ *Ibid* [2.16].

⁶⁶ *Ibid*.

⁶⁷ *Ibid* [2.17].

⁶⁸ *Ibid* [2.18].

⁶⁹ *Moçambique* [1893] AC 602.

⁷⁰ *Ibid* 624-5.

⁷¹ See *Commonwealth v Woodhill* (1917) 23 CLR 482, which includes tort damages into the rule.

⁷² NSWLRC, above n 63, [2.26].

⁷³ *Ibid*, [2.26] and [4.3].

tenancy agreement (contract) along with causing the damage to the house (tort). P could bring proceedings for the breach of contract in New South Wales against D but not for the damage to the house.

The purpose of establishing the Working Group was to look into such problems and remedies in trans-Tasman disputes. Some were resolved but unfortunately not all. Thus, the arbitrary,⁷⁴ unjust,⁷⁵ and illogical⁷⁶ results from the *Mozambique* rule would continue to thrive under the recommendations of the Working Group, despite the rationale for developing the trans-Tasman legislation. W Rupert Johnson clearly sums up the problem when he states:⁷⁷

The origin of the *Mozambique* rule is steeped in the development of the ancient common law doctrine of venue, which has no contemporary relevance ... The rule has been the subject of much curial and academic criticism but has remained in existence, chiefly due to judicial adherence to stare decisis.

Second, other jurisdictions are relieving themselves of the *Mozambique* rule. Lord Wilberforce in *Hesperides* argued that the rule is accepted in other common law jurisdictions.⁷⁸ This has been doubted, as the cases relied on did not establish that the *Mozambique* rule was accepted in other jurisdictions but simply the cases were questioning the ambit of the rule as they considered themselves bound by it.⁷⁹ However, a stronger reason to reject the Working Group's acceptance of the rule was that there had been moves to abolish the rule or part of its ambit at the time the paper was published.⁸⁰ New South Wales had abolished the rule with the *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW). The Australian Capital Territory had weakened its ambit by the *Law Reform (Miscellaneous Provisions) Act 1995* (ACT).⁸¹ At the Federal level there had been moves which practically removed some of the issues of the *Mozambique* rule by the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth). The Act allows the State and Federal courts to work alongside each other to enable disputes covering different States by having rules to transfer actions to the more appropriate court.⁸² Further afield, the United Kingdom had partially reduced the ambit of the rule by s 30(1) of the *Civil Jurisdiction and Judgments Act 1982* (UK). There has also been a long history of developments in the United States to abolish the rule.⁸³

Third, the Working Group's recommendations were based on the SEPA model which was designed to remove the difficulties of dealing with cross-border disputes in Australia, and is not limited to in personam claims. The SEPA model allows for service of proceedings, execution of warrants and recognition and enforcement of judgments throughout the states of Australia. The SEPA model does not have an in rem exception and yet the Working Group suggested the in rem exception should apply to the trans-Tasman model.⁸⁴

Fourth, the development of conflict of laws rules and specifically *forum non conveniens* has meant that firm adherence to the *Mozambique* rule is no longer needed.⁸⁵ Courts are now more willing to look into private international law claims subject to an appropriate forum test. The Working Group highlighted that Australia and New Zealand apply different tests. Australia adopts the 'clearly inappropriate' test⁸⁶ and New Zealand applies the 'more appropriate' test.⁸⁷ The Working Group rightly highlighted that the different tests between Australia and New Zealand might result in a claimant being left without any forum in the Tasman as they might fail on both tests.⁸⁸ Peculiarly, even though there was a clear example of varying application of tests here, just like the *Mozambique* rule, the Working Group were willing to recommend that there be a common statutory test to replace the different tests in Australia and New Zealand.⁸⁹ The test is based on the SEPA model and is closer to the New Zealand approach. Although the recommendations based on the SEPA model include several criteria to

⁷⁴ See Ibid [2.2], [6.5]-[6.8] and Johnson, above n 62, 284.

⁷⁵ See NSWLRC, above n 63, [6.9] and Johnson, above n 63, 286.

⁷⁶ See NSWLRC, above n 63, [6.10] and Johnson, above n 63, 286-7.

⁷⁷ Johnson, above n 63, 291.

⁷⁸ *Hesperides* [1979] AC 508, 536-8 and see Johnson, above n 63, 279-80.

⁷⁹ Johnson, above n 63, 280 and NSWLRC, above n 63, [5.2].

⁸⁰ The Working Group did mention this but did not explore the topic.

⁸¹ s 31(1).

⁸² There are arguments regarding whether the cross-vesting legislation diminished the *Mozambique* rule completely; see Johnson, above n 63, 288-90.

⁸³ NSWLRC, above n 63, [3.5]-[3.12]. The US equivalent is *Livingston v Jefferson* (1811) 15 Fed Cases 660.

⁸⁴ The SEPA model does not apply to Admiralty claims. I will deal with this point below.

⁸⁵ NSWLRC, above n 63, [1.4]. See also David Goddard and Campbell McLachlan, *New Zealand Law Society Continuing Legal Education Seminar Paper: Private International Law – litigating in the trans-Tasman context and beyond* (NZLS CLE, 2012) 157. The authors suggest that the rule should be rejected by an appellate court in NZ as the rules of jurisdiction and *forum non conveniens* are 'perfectly adequate to deal with proceedings relating to foreign land'.

⁸⁶ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

⁸⁷ *Fournier v The Ship Margaret Z* [1997] 1 NZLR 629 (HC).

⁸⁸ Trans-Tasman Working Group, above n 41, 27-28 citing *Gilmore v Gilmore* [1993] NZFLR 561 (HC) and in *Marriage of Gilmore* (1993) 110 FLR 311 (FamCA).

⁸⁹ Trans-Tasman Working Group, above n 41, 28.

determine whether jurisdiction should be declined if it is not the most appropriate forum, it nonetheless frees the court to make an enquiry into the claim and transfer it to the more appropriate forum, rather than leaving a claimant without any remedy.

4.5 The Justifications for Retaining the *Mozambique* Rule do not Apply to Admiralty

The *Mozambique* rule has been justified on the merits of the rule itself.⁹⁰ The first justification is that ‘a court has jurisdiction only over matters in which it can give effective judgment’.⁹¹ That is, land is immovable and when it is located in another jurisdiction, it is difficult for a court to enforce any judgment it might give. This reason seems generally plausible. However, the rationale does not apply to trans-Tasman disputes or Admiralty. This is because the purpose of the paper was to look at ways to make trans-Tasman judgments enforceable. Moreover, courts can have effective judgments over foreign Flagged ships in Admiralty law.

The second justification is that the rule ‘is in accord with the comity of nations’.⁹² That is, jurisdiction should be exclusive to the sovereign state regarding matters that relate to title to land within its own jurisdiction.⁹³ Again, this justification cannot be supported in light to the purpose of the working paper, the CER/SEM initiative and the confidence the Australian and New Zealand courts have for each other.⁹⁴ To maintain the *Mozambique* rule in light of the trans-Tasman developments requires maintaining an arbitrary distinction between in personam and in rem. That is, in the interests of comity the court will not entertain any question in relation to specific things (land, ships, etc) across the Tasman, but the courts are free to enforce judgments across most other areas which, until now, were to be decided exclusively within the jurisdiction.

4.6 The *Mozambique* Rule is Based on Different Conceptual Underpinnings to Admiralty

The above points suggest that the *Mozambique* rule should have been dealt with to better resolve trans-Tasman disputes. Those arguments apply to the *Mozambique* rule generally. However, there is an even stronger argument which applies specifically to Admiralty law. That is, while actions in rem concerning land may look similar to Admiralty actions in rem, they are nonetheless built on different conceptual underpinnings. Thus, even if the *Mozambique* rule is justified in relation to land, that justification does not equally apply to Admiralty law.

Admiralty law has been explained as one of the several exceptions to the *Mozambique* rule. The discussion paper highlighted some of these exceptions, but failed to mention Admiralty.⁹⁵ The English Court of Appeal in *The Tolten* most famously states the exception.⁹⁶ The question was whether the Admiralty court had jurisdiction to hear a case regarding damage done by a ship to a wharf in Nigeria. The Court held that it did, and was not barred by the *Mozambique* rule.⁹⁷ Lord Justice Scott stated:⁹⁸

In my opinion (Admiralty Jurisdiction) ... is today so wide, so self-sufficient and of such a character that in an Admiralty ‘cause of damage’ the *Mozambique* rule can have no place, whether the proceeding be in rem or in personam, and even apart from a maritime lien to which the damage gives rise. The *Mozambique* rule is, in short, a conception wholly foreign to the essential nature of Admiralty jurisdiction, as shown by its history, judicial and Parliamentary. The limiting rules of the common law about venue were unknown in the Court of Admiralty, and the universality of the world area, over which it is administered justice both civil and criminal, affords a striking contrast to the locally restrictive rules of common law jurisdiction.

Thus, on the most basic level, Admiralty actions in rem are an exception to the *Mozambique* rule. However, describing Admiralty as an exception does not fully appreciate the different conceptual underpinnings or give justice to Lord Justice Scott’s passage above. That is, Admiralty actions in rem look similar to actions involving title or possession to land in that they both deal with claims to a particular thing. This is especially so with

⁹⁰ See *Hesperides* [1979] AC 508, 543-4 and Johnson, above n 63, 277-9.

⁹¹ *Hesperides* [1979] AC 508, 543-4; see also Johnson, above n 63, 277 and NSWLRC, above n 63, 6.11.

⁹² *Hesperides* [1979] AC 508, 544 and see Johnson, above n 63, 278-9.

⁹³ Johnson, above n 63, 279.

⁹⁴ Trans-Tasman Working Group, above n 41, 2.

⁹⁵ Ibid 31.

⁹⁶ [1946] P 135. See Law Reform Committee on Admiralty Jurisdiction (LRCAJ), *Admiralty Jurisdiction; Report of the Special Law Reform Committee on Admiralty Jurisdiction* (New Zealand, 1972) 52.

⁹⁷ LRCAJ, above n 96, 154.

⁹⁸ Ibid 154.

maritime liens as they possibly attach proprietary interests in the ship itself.⁹⁹ However, Admiralty law is premised on the idea that ships come and go from different ports all over the world. They are not situated in one jurisdiction like land. Thus, Admiralty actions in rem will almost inevitably be heard in foreign courts to the ship's Flag. Moreover, the rationale for having Admiralty claims in rem and allowing the arrest of ships for the in rem claim was that without it, ships could sail off and creditors would be left without any remedy. These features of Admiralty are non-existent in land law. Land is, and will always remain, situate in the one jurisdiction.

Additionally, the reasons why Admiralty was seen as an exception to the *Mozambique* rule is that Admiralty is a separate jurisdiction to the common law, and is thus not limited by its rules. However, it might be argued that if Admiralty is a separate jurisdiction to the general jurisdiction, then Admiralty law should not be included under any trans-Tasman legislation that was of a general nature.¹⁰⁰ This might be a reasonable argument for excluding Admiralty specifically from the TTPAs but it does not generally form a good argument for two reasons. First, based on the exclusions noted in the paper, the Working Group might not have: (a) considered whether Admiralty actions in rem should be excluded or not; or (b) whether they should be included because they were an exclusion to the *Mozambique* rule. Second, if trans-Tasman Admiralty disputes could be made easier and more efficient with the TTPAs, then it should have been considered.

4.7 TPA Legislative History¹⁰¹

The remaining legislative history was no more enlightening on the question of the *Mozambique* rule or the exclusion of actions in rem. The Working Group report dealt with the matter quickly by stating that '[a]ctions in rem should also not be covered'.¹⁰² Interestingly, the report stated that '[t]he range of eligible interim orders should not be limited, so could include Mareva injunctions ... at the discretion of the court'.¹⁰³ One might question the logic for excluding arresting property for interim relief while at the same time allowing assets, including property, to be frozen.

The working group report was the basis for a joint governmental agreement¹⁰⁴ and the parliamentary bills.¹⁰⁵ Throughout the parliamentary process, the question of the *Mozambique* rule or the exclusion of actions in rem was not raised. This seems unsurprising considering the legislation was passed under urgency.

4.8 The Trans-Tasman Proceeding Act 2010

The *Trans-Tasman Proceedings Act 2010* (NZ) (TTPA) came into force on the 13 October 2013. The purpose of the Act is to streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency; minimise existing impediments to enforcing certain Australian judgments and regulatory sanctions; and implement the Trans-Tasman agreement in New Zealand law.¹⁰⁶ As per s 12(2)(b), the Act excludes serving initiating documents in Australia for proceedings that relate wholly or partly to actions in rem. As per s 31(2)(c), warrants for the arrest of property are excluded as interim relief in support of Australian proceedings provisions. As per s 54(2)(a), the recognition and enforcement of Australian in rem judgments are excluded.

5 Should there be a Mechanism for Trans-Tasman Ship Arrests in Light of the Trans-Tasman Developments?

5.1 The Problem Generally

As stated above, the problem that the TTPAs were concerned with was that there was no effective way to deal with trans-Tasman legal disputes and that they would increase with the CER/SEM developments. This problem should apply equally to Admiralty and maritime disputes. Australia and New Zealand engage in substantial

⁹⁹ This is a topic in itself and will not be discussed here.

¹⁰⁰ This point will be discussed in greater depth when the paper looks at different solutions.

¹⁰¹ The New Zealand legislative history only is covered due to the scope of the paper.

¹⁰² Trans-Tasman Working Group, *Trans-Tasman Court Proceedings and Regulatory Enforcement: A Report* (Australian Attorney-General's Department and the New Zealand Ministry of Justice, 2006) 4.

¹⁰³ *Ibid* 14.

¹⁰⁴ *Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement*, 2008, [2008] ATNIF 12. See *Trans-Tasman Proceedings Act 2010* (NZ), sch 1.

¹⁰⁵ *Trans-Tasman Proceedings Bill 2009* (105-1).

¹⁰⁶ s 3.

trade with one another. Nearly all of that trade is via ships. Allowing these claims to be made across the Tasman would also decrease transaction costs and potentially make for more effective dispute resolution.

The scenario in *Barde AS v ABB Power Systems* highlights the problem. Under the current arrangement, the owner of the damaged machinery could bring a claim in personam against the ship owner in a court in New Zealand and have that enforced in Australia via the TTPA. This solution might be ineffective as the owner of the ship might be located overseas or be hard to find. Such a situation is not rare as Australia and New Zealand are primarily countries of shippers rather than ship owners.¹⁰⁷ Moreover, the structure of many ship companies makes it difficult to locate the owners to enforce an in personam claim. The owner of the damaged machinery would be barred from bringing a claim in rem across the Tasman via the TTPAs.¹⁰⁸ The last option is for the machinery owner to bring a claim in rem in Australia (as they did) when the ship visits Australia.¹⁰⁹ If the ship went to another country, then the machinery owner would have to bring an action in rem in that country. One might argue that this process is as simple as arranging with a solicitor across the Tasman (or in another country) to arrange for its arrest. However, the inefficiency, inconvenience and transaction costs were a sufficient justification for the creation of the TTPAs. Under the rationale of the TTPAs, resolving the dispute should be as simple as it would be within one's own country. Furthermore, the court dealing with the substantive issues might find it easier to resolve the case, as they would likely have better access to witnesses and evidence.

5.2 The Current Interim Relief Under the TTPA is Insufficient

It might be argued that the TTPAs already provide for interim relief and that this relief would be sufficient, as a party could apply for a Mareva injunction from across the Tasman to prevent the defendant's assets, most likely only the ship, from leaving the country. This view is rejected on the basis that Mareva injunctions are an insufficient remedy in comparison to arresting a ship for an action in rem for several reasons discussed below.

5.2.1 Actions in Rem and Ship Arrest

Arresting a ship for an action in rem is a 'recognised feature of international maritime commerce and international maritime jurisdiction'.¹¹⁰ Damien J Cremean notes that '[t]he ability to proceed in rem is the most distinctive feature of Admiralty jurisdiction. It allows a party to sue a thing – the res – and to carry on proceedings against it'.¹¹¹ Verónica Ruiz Abou-Nigm notes, 'it is the speed with which the defendant's main asset – the ship – could leave the jurisdiction that the arrest of ships is primarily trying to counteract'.¹¹² The effect of commencing proceedings in rem allows a warrant to be issued to arrest the ship.¹¹³ This provides a 'protective function' as it secures the ship, as security, under the court's custody until the claim is adjudicated.¹¹⁴ The action in rem indirectly forces the ship owner¹¹⁵ to make an appearance.¹¹⁶ If the ship owner does not enter an appearance to defend the ship and the claimant is awarded a default judgment, then the court can sell the ship and the proceeds will provide a remedy for the claimant, subject to priorities.¹¹⁷ However, the action in rem is not just a 'procedural device'.¹¹⁸ If the ship owner enters an appearance the claim becomes both in personam and in rem.¹¹⁹ Thus, the claimant may have recourse against both the ship and the ship owner.

Ruiz further explains that the rationale for the arrest of ships 'is to provide a useful device for international commerce and to compensate for the difficulty of enforcing judgments aboard'.¹²⁰ She elaborates that the ship will normally be the only asset that the claimant will have access to for security for the judgment.¹²¹ Thus:¹²²

¹⁰⁷ Australian Law Reform Commission (ALRC), *Civil Admiralty Jurisdiction*, Report No 33 (1986) [96].

¹⁰⁸ I will discuss the Admiralty Acts out of jurisdiction provisions below.

¹⁰⁹ This is presumed to be frequent in either trans-Tasman trade or international trade routes servicing both countries.

¹¹⁰ Damien J Cremean, *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (Federation Press, 3rd ed, 2008) 221.

¹¹¹ Damien J Cremean, 'Admiralty and maritime' (2012) 86 *Australian Law Journal* 296, 296.

¹¹² Verónica Ruiz Abou-Nigm, *The Arrest of Ships in Private International Law* (Oxford University Press, 2011) 219.

¹¹³ Cremean above n 110, 24.

¹¹⁴ Ruiz, above n 112, 9.

¹¹⁵ Or in some cases the beneficial owner or charterer.

¹¹⁶ Cremean above n 110, 24; and *The Parlement Belge* (1880) 5 PD 197, 205.

¹¹⁷ Cremean above n 110, 24.

¹¹⁸ *Ibid* 24.

¹¹⁹ *Ibid* 25 and see *Caltex Oil v Dredge Willemstad* (1976) 136 CLR 529, 538; *Rankura Moana Fisheries Ltd v The Ship Irina Zharkikh* [2001] 2 NZLR 801, 822 (HC) at 822; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 63.

¹²⁰ Ruiz, above n 112, 19.

¹²¹ *Ibid*.

¹²² *Ibid*.

The possibility to arrest a ship in an appropriate jurisdiction is of paramount importance to the international shipping and trading community ... Ships trade worldwide; they spend their economic life moving between different jurisdictions often far from the country of registry; and their commercial management poses peculiar problems for those faced with unpaid debt incurred in the course of shipping. Against this background, the arrest of ships, inherently connected with jurisdiction and security, has played a key role since ancient times.

She argues furthermore that the importance of arresting a ship is not dependent on the number of times ships are actually arrested.¹²³ The value of it is in the ability to do so. Or as Dr Lushington noted, 'an arrest offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment'.¹²⁴

5.2.2 Mareva Injunctions Vis-à-Vis Ship Arrests

On the other hand, a Mareva injunction,¹²⁵ is 'an interlocutory injunction ... prohibiting the defendant, before or during a suit, or even after judgment, from removing assets (real or personal, moveable or immovable) from the court's jurisdiction or from dealing with them, where it appears to the court that without such an order the plaintiff's recovery on his claim will be jeopardized'.¹²⁶ As noted above, these are available under the interim relief provisions of the TTPAs. A Mareva injunction can be issued to prevent a ship from leaving a jurisdiction and thus it might have a similar effect to arresting the ship for an action in rem.¹²⁷ However, ship arrests and Mareva injunctions are distinct remedies and there are several benefits to the former over the latter.

Gregory Nell SC, highlights the differences between Mareva injunctions and arresting a ship for an action in rem.¹²⁸ The advantages of arresting a ship over Mareva injunctions are numerous. First, by arresting a ship, a claimant is less likely to be effected by an insolvent defendant.¹²⁹ When the ship is arrested the security is the ship itself and it is in the safe custody of the court at the commencement of proceedings.¹³⁰ On the other hand, a Mareva injunction only holds the assets and is not necessarily secured before proceedings. If the claimant is successful against the claimant in an action in rem, then they will be paid out subject to other maritime claims.¹³¹ Whereas, if the claimant is successful and they only had a Mareva injunction and the defendant became insolvent, then they would be paid subject to all other claims against the defendant. Thus, the judgment is arguably more likely to be paid out under an action in rem than under a Mareva injunction based on the same claim. Additionally, banks and P & I clubs routinely offer security to release the ship. This form of security is generally not affected by the solvency of the plaintiff.

Second, arresting a ship is of right when a claimant has an action in rem,¹³² whereas a Mareva injunction is a discretionary order of the court.¹³³ For a Mareva injunction, a claimant must prove that its claim is likely to be successful and that there is a risk that the defendant will move assets from the jurisdiction rendering the judgment valueless.¹³⁴ The claimant must also prove that it will not inconvenience third parties. However, it is irrelevant if the arrest of the ship inconveniences third parties.¹³⁵

Third, the procedure to arrest a ship is arguably easier.¹³⁶ A claimant does not need to go through the court. They only need to complete the relevant forms and give them to the Registrar. The ship or alternative security is also held for the entire judgment or until the claim is settled. A Mareva injunction might need to be extended when the defendant enters an appearance.

¹²³ Ibid 20.

¹²⁴ *The Volant* (1842) 166 ER 615, 618, quoted in Cremean, above n 110, 222.

¹²⁵ Also known as freezing order or injunction.

¹²⁶ William Tetley, *International Maritime and Admiralty Law* (Les Éditions Yvon Blais, 2002) 410; see also Cremean, above n 109, 234-5.

¹²⁷ Cremean, above n 110, 234-5.

¹²⁸ Gregory Nell, 'The Interaction between Admiralty and Insolvency Law: A Commentary on Some Recent Issues Concerning the Arrest of Ships' (Paper presented at the MLAANZ 2009 Annual Conference, Queenstown, September 2009). See also ALRC, above n 107, [245].

There are other potential differences but these seem to be most important.

¹²⁹ Nell, above n 128, [15], [25]-[26].

¹³⁰ Ibid [16].

¹³¹ Ibid [28]-[30].

¹³² And complies with the relevant legislation and rules.

¹³³ Nell, above n 128, [32]-[39] and ALRC, above n 107, [245].

¹³⁴ ALRC, above n 107, [245].

¹³⁵ ALRC, above n 107, [245].

¹³⁶ Nell, above n 128, [60]-[63].

Fourth, the court has jurisdiction over the ship regardless of the ship's Flag, registration, residence of owner or where the incident took place.¹³⁷ The court has jurisdiction simply by having the ship in its jurisdiction.

Fifth, judicial sale of a ship following an action in rem can be a more effective remedy as it may yield a higher price than if the ship were sold through other means.¹³⁸ This is because a judicial sale of the ship is free of all claims, liens and encumbrances and is sold with a clear title. This is not necessarily the case when a ship owner sells their ship. There may be outstanding claims and liens that follow the ship regardless of the change in title. Thus, the judicial sale is likely to return a higher price for the ship than if it was sold otherwise. Additionally, under certain circumstances, the ship may be sold before final judgment.¹³⁹ For example, where the value of the ship may deteriorate during the course of proceedings. This feature is not available with Mareva injunctions.

Sixth, Admiralty has its own unique priorities on the judicial sale of the ship, which are only available via an action in rem in the court's Admiralty jurisdiction.¹⁴⁰ For example, those with maritime liens will rank higher than mortgagees who would likely exhaust whatever fund may be generated from the sale of the ship. On the other hand, if the ship were sold after a Mareva injunction in the court's general jurisdiction, then those who would have had a maritime lien would only be unsecured creditors and rank after mortgagees.

There are some disadvantages to arresting a ship over a Mareva injunction. First, the action in rem is only limited to one ship, being the guilty ship or a sister ship.¹⁴¹ On the other hand, a Mareva injunction can apply to all the defendant's assets.¹⁴² The problem is that a single ship may be insufficient to cover the claim. However, it is also possible to arrest a ship as well as getting a Mareva injunction over the defendant's other assets.¹⁴³ This might be effective if the defendant has other assets in the jurisdiction, but will often not be effective since the ship owner is likely to be in another jurisdiction and/or a single ship company.¹⁴⁴ Second, a Mareva injunction is potentially cheaper than arresting the ship.¹⁴⁵ The claimant is potentially required to enter security for the costs of maintaining the ship while under arrest. However, this scenario is rare as other security is normally entered to release the ship.¹⁴⁶

5.3 Ship Arrests from out of Jurisdiction not Currently Available

The current Admiralty Acts of Australia and New Zealand do not allow for service out of jurisdiction. As per s 23 of the Australian Act, the provisions of the SEPA 1992 does not apply to service of initiating process on, or the arrest of, a ship or other property under the Act. Section 22 of the Act allows for service of initiating proceedings into any place within Australia if the proceedings are brought within a Federal court. If the proceedings are brought within a State court then service of initiating process can be into any place in Australia provided that the ship was within the jurisdiction of the court at the time when the process was effective for service. Thus, it is not possible to serve initiating process of an action in rem into a foreign country. It is only possible within Australia.

The New Zealand Admiralty Act does not provide such a provision for service out of jurisdiction or, understandably, between states. Rules 6.27-6.35 of the High Court Rules provide rules for notice of proceedings in rem from out of the jurisdiction.¹⁴⁷ However, these rules do not apply to trans-Tasman proceedings.¹⁴⁸ Trans-Tasman proceedings are dealt with solely by the provisions of the *Trans-Tasman Proceedings Act 2010*, which excludes actions in rem.

¹³⁷ Ibid [76]-[83]. Note that this is subject to a stay of proceedings on the grounds of *forum non conveniens*, or an arbitration or choice of forum clause.

¹³⁸ Ibid [87]-[92].

¹³⁹ *Judicature Act 1908* (NZ) r 25.51.

¹⁴⁰ See generally *ABC Shipbrokers v The Ship Offi Gloria* [1993] 3 NZLR 576 (HC).

¹⁴¹ Nell, above n 128, [52]-[54].

¹⁴² Ibid [55]; and ALRC, above n 107, [245].

¹⁴³ Tetley, above n 126, 418.

¹⁴⁴ ALRC, above n 107, [93].

¹⁴⁵ Nell, above n 128, [57].

¹⁴⁶ ALRC, above n 107, [245].

¹⁴⁷ *Judicature Act 1908* (NZ) r 25.7(3).

¹⁴⁸ Ibid r 6.36.

5.4 Trans-Tasman Ship Arrests Align with the Rationales of the TPA and the CER/SEM Development

The discussion under Part Five so far has shown some of the problems of resolving Admiralty disputes and that the TTPAs as they currently stand do not help. However, providing a mechanism to better resolve Admiralty disputes does not run counter to the rationale and purpose of either the TTPAs or the harmonisation developments under the CER/SEM umbrellas. In fact, it is supported by them.

The overarching goals of the trans-Tasman developments can be summed up as the desire to make trans-Tasman business, trade, commerce, travel and litigation easier, more efficient and more effective. Providing a trans-Tasman ship arrest mechanism would give potential applicants greater recourse to having their claims met and making the process easier. The main benefit would be the speed and ease at which one could arrest a ship from across the Tasman before the ship departs again and recourse to fulfilling one's claim might be lost temporarily or permanently within Australia or New Zealand, or still open but in another jurisdiction further afield. Additionally, the costs should reduce to not much more than if the ship were arrested within one's own country and the court would have better access to witnesses and evidence.

5.5 Are the Australian and New Zealand Admiralty Laws Compatible?

As mentioned, the laws of each country do not need to be identical for the CER/SEM harmonisation process. However, it is worth comparing the Australian and New Zealand Admiralty laws. The closer the laws are, the easier it would be for a trans-Tasman arrest mechanism to work efficiently and effectively, since the courts are less likely to be faced with different Admiralty claims and concepts.

5.5.1 Similarity in Maritime Law Generally¹⁴⁹

The broader maritime laws of Australia and New Zealand are already similar or have been harmonised to a considerable extent. Paul Myburgh highlights four reasons for this similarity and harmonisation.¹⁵⁰ First, the similarity and harmonisation is a 'natural consequence of British colonisation'.¹⁵¹ Australia and New Zealand were given similar or identical maritime laws from the Imperial administration, or the domestic laws were based on the Imperial statutes. Some examples include the *Merchant Shipping Act 1894* (Imp), *Bills of Lading Act 1855* (UK), *Marine Insurance Act 1906* (UK), and the *Colonial Courts of Admiralty Act 1890* (Imp).¹⁵² These Imperial statutes led to uniformity and reduced conflict of laws issues.¹⁵³ Myburgh notes that this point should not be overstated as there have been several significant moves to break with this tradition.¹⁵⁴

Second, comparative law reform in the two countries has tended to look to the UK for guidance.¹⁵⁵ Myburgh has labeled this 'importing harmony'.¹⁵⁶ An example includes the *Carriage of Goods by Sea Act 1992* (UK).

Third, while maritime laws have not been included specifically into the CER and business laws harmonisation process, other areas of harmonisation of business law under this umbrella have led indirectly to an impact on trans-Tasman maritime law and commerce; for example, international sale of goods and commercial arbitration.¹⁵⁷ To this we could add the moves under the TTPAs in relation to proceedings in personam. Additionally, CER has had a direct impact on maritime laws. For example, while looking into the adoption of the Hague-Visby Rules, the New Zealand Ministry of Transport looked to the CER and harmonisation of business laws with Australia as important.¹⁵⁸

¹⁴⁹ Even though Australia and New Zealand might have similar provisions, it is conceded that the courts might interpret them differently. This topic will not be discussed but it is assumed that the courts will look to each other for interpretation when the claim has a trans-Tasman flavour. See Gary A Hughes, 'Redirecting CER and the Harmonisation of Competition Law' (1995) 7 *Auckland University Law Review* 1039, from 1048.

¹⁵⁰ Myburgh, above n 26.

¹⁵¹ *Ibid* 73.

¹⁵² *Ibid* 73-74.

¹⁵³ *Ibid* 74.

¹⁵⁴ *Ibid* 75. An example given is the *Maritime Transport Act 1994* (NZ).

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid* 75-9.

¹⁵⁸ *Ibid* 79.

Lastly, international law and commerce has had a large impact on the harmonisation of maritime laws globally and within Australia and New Zealand.¹⁵⁹ For example, treaties and/or domestic legislation have been adopted giving effect to law relating to the carriage of goods by sea, maritime collisions, limitation of liability, marine pollution, salvage, trade finance, general average, international sales contracts and arbitration.¹⁶⁰ Such moves have had an ‘extremely effective and comprehensive harmonising influence on New Zealand and Australian maritime laws’.¹⁶¹

5.5.2 Similarity of the Admiralty Acts Generally

Harmonisation and similarity is also common between Australia and New Zealand in regards to the arrest of ships and Admiralty actions in rem. Before the current Admiralty Acts of Australia and New Zealand, both countries’ Admiralty jurisdiction was governed by the *Colonial Courts of Admiralty Act 1890* (Imp).¹⁶² This Act has been repealed and replaced by domestic legislation in Australia and New Zealand. The current Admiralty Acts are both based on the *Administration of Justice Act 1956* (UK), which gave effect to the 1952 *International Convention Relating to the Arrest of Sea-Going Ships*.¹⁶³ The New Zealand Act is closer than the Australian Act to the UK Act. In the Report that led to the Australian Act, it was noted that it was not within Australia’s interests simply to copy the UK Act, as NZ did.¹⁶⁴ However, the Report noted that it was nonetheless going to work with the UK model.¹⁶⁵ It is a reasonable conclusion that the Admiralty laws and rules within Australia and New Zealand are remarkably similar when viewed in general terms.

5.5.3 Differences of the Admiralty Acts Specifically¹⁶⁶

Although the Admiralty laws in Australia and New Zealand are similar, there are nonetheless several differences between the Admiralty Acts and rules that might prove to be problematic for a trans-Tasman ship arrest mechanism.

First, Australia and New Zealand do not have the same heads of jurisdiction in rem. Australia recognises additional actions in rem for: claims for marine insurance;¹⁶⁷ enforcement of arbitration awards and judgments;¹⁶⁸ maritime safety charges and oil pollution levies, charges and penalties;¹⁶⁹ and unpaid interest in respect for other maritime claims.¹⁷⁰ This might be an issue if the Registrar in New Zealand arrested a ship on an action in rem that was not a head of jurisdiction under the New Zealand Admiralty Act. The defendant could argue for a stay of proceedings on the basis of a lack of jurisdiction.¹⁷¹ Any proposed mechanism should align the heads of jurisdiction.

Second, Australia and New Zealand have different tests for unjustified or wrongful arrests of ships.¹⁷² The common law test of bad faith or gross negligence as per *The Evangelismos*¹⁷³ is applied in New Zealand.¹⁷⁴ Australia applies a less onerous test of ‘unreasonably and without good cause’ as per s 34 of the Act.¹⁷⁵ The result is that it should be easier on the ship owner to make a claim for damages for an unjustified arrest in Australia. This might give rise to forum shopping across the Tasman. A common statutory test could remedy this.

Third, the costs of arrest are arguably more in Australia than in New Zealand. As Williams J, speaking extrajudicially, notes, ‘in New Zealand, the taxpayer meets much of the cost of providing the service to the

¹⁵⁹ Ibid 80.

¹⁶⁰ Ibid 80-84.

¹⁶¹ Ibid 84.

¹⁶² See LRCAJ above n 96, Part 5; and ALRC, above n 107, at terms of reference.

¹⁶³ 1952, 439 UNTS 193. Cremean, above n 110, 8; and Myburgh, above n 26, 74. Neither Australia nor New Zealand are parties to the convention.

¹⁶⁴ ALRC, above n 107, [95].

¹⁶⁵ ALRC, above n 107, [95].

¹⁶⁶ It is beyond the scope of this paper to offer a full comparison of the Australian and New Zealand Admiralty laws and rules.

¹⁶⁷ *Admiralty Act 1988* (Cth) s 4(2)(s); see Paul Myburgh, *Extending New Zealand’s Admiralty Jurisdiction: A Modest Proposal For Reform*, (March 2004) <www.maritimelaw.org.nz> [3.17].

¹⁶⁸ *Admiralty Act 1988* (Cth) s 4(3)(u); see Myburgh, above n 167, 3.19.

¹⁶⁹ *Admiralty Act 1988* (Cth) s 4(3)(q); see Myburgh, above n 167, 3.21.

¹⁷⁰ *Admiralty Act 1988* (Cth) 4(2)(d) and s 4(3)(w); see Myburgh, above n 167, 3.27.

¹⁷¹ Currently the only Admiralty actions in rem are those brought under the Act.

¹⁷² Cremean, above n 110, 233-4.

¹⁷³ [1858] 166 ER 1174.

¹⁷⁴ *Transpac Express Ltd v Malaysian Airlines* [2005] 3 NZLR 709, 718 [74] (HC).

¹⁷⁵ ALRC, above n 107, [301]-[304] and Michael Woodford, ‘Damages for Wrongful Arrest: Section 34, *Admiralty Act 1988*’ (2005) 19 *Australian and New Zealand Maritime Law Journal* 115, 115-116.

maritime trade of the arrest and management of ships'.¹⁷⁶ This is because the costs in New Zealand to arrest a ship are an application fee for the warrant and a commission for the valuation and sale of the ship.¹⁷⁷ In Australia, however, the costs of arresting the ship might include: a filing fee; deposit; insurance; salary of officer; costs to execute; helicopter or vessel hire if the ship is at anchor; travel costs if the ship is in a regional location and there is no local officer to execute arrest; and ship movement costs or tugs.¹⁷⁸ Additionally, if the proceedings are protracted, then the amounts will likely increase. It might be argued that the costs are effectively the same as the costs of arrest will be paid out of the proceeds before all other claims. However, the costs of arrest must still be borne initially by the arresting party. Furthermore, if the arresting party is commercially small, then arresting a ship will be more burdensome in Australia. This again might lead to confusion between the courts as to the upfront costs of arrest. For example, the arresting party could bring a claim in New Zealand when the ship is in Australia and argue for the expenses that it would pay under a New Zealand arrest. Again, a common statutory schedule of fees could remedy this.

6 Resolving Trans-Tasman Admiralty Disputes: Two Possible Models

The discussion thus far has shown that the trans-Tasman developments would support resolving Admiralty disputes more effectively and that the current arrangements are insufficient. Furthermore, the Admiralty laws are generally similar enough to allow for a platform to push harmonisation further. However, the specific differences noted above between the Admiralty Acts and rules will most likely need to be completely harmonised to make any trans-Tasman ship arrest mechanism work effectively. There seem to be two possible models or mechanisms for trans-Tasman ship arrests. The first is the TTPA model and operates under the TTPAs. The second is the Admiralty model and operates separately to the TTPAs.

6.1 TTPA Model

This model is based on the developments already made under the TTPAs. It would use the TTPAs as the framework but make it also apply to ship arrests. The amendments needed would be to remove the exclusions of actions in rem and arresting property in the TTPAs. The Admiralty Acts and rules would also need provisions to allow service of proceedings from across the Tasman.

The model would practically work as follows. The arresting party would arrange with their local solicitor to arrange for the ship's arrest for an action in rem. The solicitor would arrange for the arrest directly with the Australian Marshal/Registrar and they would have the ship arrested. The ship would be held in the port where it was arrested and the substantive claim would be held in the jurisdiction where the arresting party brought their action in rem i.e. in New Zealand. The court that hears the substantive claim could still decline jurisdiction on the ground that it was not the appropriate forum as per the TTPA, but it would transfer the claim across the Tasman to the appropriate forum.

There are several issues that must logically follow with this model. First, service of proceedings will be from out of the jurisdiction. This is how the example above and the TTPAs both operate. While this might not be problematic within the general jurisdiction, service from out of the jurisdiction for an Admiralty action in rem is generally a foreign idea to Admiralty law the world over. In the *Aichhorn & Co KG v Ship MV Talbot*, the High Court of Australia set aside a service of an action in rem issued out of Singapore.¹⁷⁹ The High Court agreed with the reasoning of the Court of Appeal that 'it would run counter both to the general practice of Admiralty courts and to the basic concept of Admiralty actions in rem to permit service of process in rem out of the jurisdiction'.¹⁸⁰ The court referred to *The Espanoleto* which stated that '[o]f course, a writ in rem cannot be served till the res comes within the jurisdiction, but I can see no reason why the writ cannot be issued and then served when the res comes within the jurisdiction'.¹⁸¹ The High Court then went on to remark that:¹⁸²

[s]ince the jurisdiction of the court to entertain an action in rem is based on the presence of the res within the territory of the state under whose authority the court sits, and since the purpose of such an action is to enable the judgment to be satisfied out of the res, it must follow, at least as a general rule, that a writ in an action in rem can only be served if the res is within the jurisdiction.

¹⁷⁶ Hugh Williams, 'Comparative Maritime Law Procedures and Changes to Admiralty Law: a New Zealand Perspective' (2007) 21 *Australian and New Zealand Maritime Law Journal* 17, 19.

¹⁷⁷ *Ibid* 19.

¹⁷⁸ Rainer Gilich, 'Practical Issues Arising from the Arrest of Ships' (2009) *Australian and New Zealand Maritime Law Journal* 63, 63-4.

¹⁷⁹ *Aichhorn & Co KG v Ship MV Talbot* (1974) 132 CLR 449 ('*Aichhorn*').

¹⁸⁰ *Ibid* 452.

¹⁸¹ *Ibid* 450, quoting *The Espanoleto* [1920] P 223, 225.

¹⁸² *Aichhorn* (1974) 132 CLR 449, 455.

There are practical reasons for such a rule. For example, if the ship is not within the jurisdiction then any judgment will be practically useless. However, a stronger reason for the rule is that the basis of having jurisdiction over the ship for an action in rem is not due to the ship's flag, owners or seamen's residence, or the location of the event which gave rise to the claim. The jurisdiction is based simply on having the ship within the geographical jurisdiction of the Admiralty court. Thus, to avoid uncertainty and to make judgments legitimate, the court that arrests the ship should also be the court that hears the substantive claim and deals with the consequences of that claim. While these reasons are plausible for the rule generally, they might not apply to the trans-Tasman context for several reasons. First, under the TTPAs, there would be an ability to have an effective outcome because the judgment would be recognised and enforced across the Tasman. Second, the TTPAs only apply between Australia and New Zealand and thus would not create the uncertainty that would arise if it were open to all countries.

The next issue that follows on the TTPA model is similar to the above point. It is that it splits the Admiralty jurisdiction between the part that holds the ship and the part that hears the substantive claim. Such a model resembles the South African security arrest.¹⁸³ The security arrest model means that a South African court will arrest a foreign ship when it is within its jurisdiction for pre-judgment security when the foreign ship is subject to a pending cause of action in another country.¹⁸⁴ The security arrest has been seen as a potentially oppressive mechanism that can be abused. In fact, the South African courts have tempered the rule by stating that the claim will only be enforced in South Africa if it is based on a substantive claim that would be enforced if it were brought in South Africa.¹⁸⁵ While this model might be seen as problematic, the issues faced by the South African model do not necessarily apply in the trans-Tasman context. This is because the model is only limited to Australia and New Zealand rather than being a security arrest for any country.¹⁸⁶ One could not use the model to arrest a ship within either country from a claim based in a third country. The arrest (and thus the ship) and the substantive claim must both be within Australia and/or New Zealand. However, the problem that might arise is when the ship is arrested in New Zealand on a claim based on a head of jurisdiction under the Australian Admiralty Act that is not a head of jurisdiction under the New Zealand Act.¹⁸⁷ This will likely cause issues. While the judicial solutions in the South African context might be plausible, they are unsatisfactory under the trans-Tasman model, as it will only go part way in making trans-Tasman Admiralty disputes more effective and efficient. For example, a New Zealand court might have difficulty arresting a ship in New Zealand on a head of jurisdiction that was available in Australia but not in New Zealand. This is because there would be a legitimate question as to whether the New Zealand court had jurisdiction to arrest the ship despite the Australian Admiralty Act and the TTPA. Thus, it is essential that the heads of jurisdiction, or even better, the Admiralty Acts and rules were completely harmonised at the same time.

6.2 Admiralty Model

The second possible model does not operate under the TTPAs. This model is based on the premise that Admiralty law is too separate and exceptional that it should not come under the general jurisdiction of the TTPAs. The model keeps Admiralty's separate status while still attempting to remedy trans-Tasman disputes more effectively. The model also attempts to not split the arrest jurisdiction, nor allow service from out of the jurisdiction, as the TTPA model does.

The practical aspects of the model would be the same as the TTPA above. That is, one would apply through their own solicitor who would apply to the registrar on the other side of the Tasman. The ship will be held in the port it was arrested in and the substantive claim would be heard in the court where the applicant is based.

However, the legal aspects of the model would be different to the TTPA model. The model would treat New Zealand and Australia as the same jurisdiction for the purposes of the Admiralty jurisdiction. In a way it would be a trans-Tasman Admiralty jurisdiction. This could either be done by a treaty with subsequent harmonised Admiralty laws or New Zealand could adopt the Australian Admiralty Act.¹⁸⁸ If we were to adopt the Australian Act, there would be several amendments needed. Under s 11, the jurisdiction under the Australian Act would need to include the New Zealand High Court. Additionally, the provisions for initiating service under the

¹⁸³ *Admiralty Jurisdiction Regulation 1983* s 5(3).

¹⁸⁴ See Gys Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa* (Juta and Company, 2nd ed, 2012) 172 and John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (Juta and Company, 2nd ed, 2009) 117-124.

¹⁸⁵ See *Babel Shipping Co Ltd: The Rosario Del Mar* 1995 (1) SA 716 (C) 724C-G and Hofmeyr, above n 184, 181.

¹⁸⁶ Note that this still covers ships under foreign flags and claims that were based on events that happened outside of Australia or New Zealand.

¹⁸⁷ As discussed above.

¹⁸⁸ The Australian Act is more up to date than the New Zealand Act and is the reason why it is suggested the Australian version be adopted.

Federal courts under s 22(1) would also need to include the New Zealand High Court. Thus, if initiating service has been made under the Australian Federal or New Zealand Courts, then the ship may be arrested anywhere within the jurisdiction of either Australia or New Zealand. The Australian Act already provides for transfer and remittal of proceedings between different state, territory and federal courts.¹⁸⁹ A court may transfer the case of its own accord or on application to it by the parties or another court. The courts will make orders in auxiliary of each other and the arrested ship can be held by the first court for the action in the second court. A statutory test for the transfer and remittal between the Australian and New Zealand courts could be made along similar lines as the TTPAs. That is, the court could transfer the case to the more appropriate forum having regards to certain specified criteria.

The result of this model is that the model would be neither splitting the Admiralty jurisdiction nor allowing for service out of the jurisdiction as the Admiralty jurisdiction would be trans-Tasman. Thus, the model is less offensive to Admiralty law conceptions of jurisdiction. However, the problem with this model is that framing the Admiralty jurisdiction as the same is somewhat artificial. The practical reality is that Australia and New Zealand will remain two distinct jurisdictions in every other way. Thus, while there might be a framework that says that the Admiralty jurisdiction is the same between Australia and New Zealand, people might question how accurate that idea really is. Furthermore, even though the TTPAs and CER/SEM have brought Australia and New Zealand much closer, the developments are still premised on making two *different* jurisdictions operate together more effectively rather than combining the jurisdictions. Thus, the Admiralty model might be bringing the trans-Tasman relationship much closer than was envisioned under CER/SEM or the TTPAs.

6.3 Which Model?

While both of the models have some issues, the TTPA model seems to be the better model of the two for several reasons. First, the Admiralty model might raise constitutional questions between Australia and New Zealand. For example, whether New Zealand was conceding its sovereignty to Australia. While this might not actually be the case as Australia and New Zealand would be joint partners in the Admiralty model,¹⁹⁰ it might possibly be unpalatable to the New Zealand public. Moreover, such constitutional questions should not be the result of an attempt to make Admiralty disputes more efficient. They are questions that should be developed on their own terms, if at all. Second, the Admiralty model is built on somewhat of an artificial concept to avoid splitting the Admiralty jurisdiction and service from out of the jurisdiction. Third, it is pushing harmonisation beyond what was envisioned under the trans-Tasman developments thus far. Fourth, the Admiralty model might also require a trans-Tasman Admiralty court as opposed to the Admiralty jurisdiction being shared by two separate courts. This is because the appeal process and the precedential status of judgments might be difficult to develop under the model. For example, there might be a rule that appeals follow the normal process under the particular countries rules i.e. appeals from the New Zealand High Court go to the New Zealand Court of Appeal. However, the jurisprudence from the appellate courts from Australia and New Zealand might develop along different lines and the lower courts would be faced with the question of which court they would be bound by. If the court considered itself bound by the courts within its jurisdiction, then the trans-Tasman Admiralty model might not work efficiently and effectively, as the Admiralty jurisdiction would contain opposing views. If the court considered itself bound by the court from the other side of the Tasman, then the constitutional questions suggested above might become a real issue. Thus, the way to resolve this possible tension would be to develop a final appellate Admiralty court for Australia and New Zealand. This development might be pushing the trans-Tasman developments further than what was originally envisioned under the trans-Tasman developments thus far. An even stronger reason for not having the one Admiralty court is that it would be submitting all Admiralty claims in Australia and New Zealand to a trans-Tasman court that did not have a trans-Tasman nature i.e. claims where the ship is arrested and the substantive claim is heard in the same jurisdiction.

The TTPA model has problems in that it splits the Admiralty jurisdiction and allows for service from out of the jurisdiction. Both ideas being potentially offensive to established Admiralty law and practice. However, these issues seem to be mitigated by that fact that the TTPAs only operate between Australia and New Zealand. Thus, the reasons for not splitting the jurisdiction or serving out of the jurisdiction seem to not apply under the trans-Tasman context. Additionally, the model would not increase uncertainty. It would simply enable would-be Admiralty claimants to better resolve trans-Tasman Admiralty disputes. Moreover, the model would sit comfortably with the rationales of CER, SEM and the TTPA.

¹⁸⁹ See *Admiralty Act 1988* (Cth) s 27-30, 40.

¹⁹⁰ Which is akin to European countries joining the European Union.

7 Conclusion

Australia and New Zealand are close economically, politically and legally. We partake in substantial trade between the two countries and shipping supports most of that trade. There have been significant developments to make trans-Tasman dealings easier. These developments have also provided legislation to resolve trans-Tasman legal disputes more effectively and efficiently. However, this legislation does not apply to actions in rem or for the arrest of property and thus excludes Admiralty law almost entirely. The reasoning for not including actions in rem or the arrest of property is flawed and insufficient. Australia and New Zealand's Admiralty jurisdictions are sufficiently compatible to push the harmonisation initiative further and provide for a trans-Tasman arrest mechanism. Furthermore, such a development would be supported by the rationale of the CER/SEM initiative. The possible models would either operate under the current TTPA framework or outside of it. The model under the TTPA appears to be the better model both conceptually and in line with the CER/SEM initiative. If such a model were implemented, it could enable more effective and efficient resolutions of Admiralty disputes that involve Australia and New Zealand.

***Svitzer Salvage v Z Energy Limited and Another* [2013] NZHC 2585**

Alistair Sullivan*

With ongoing environmental protection developments in the maritime industry and the associated changes to the way in which salvage services are conducted, questions arise as to how the peculiar and ancient principles of salvage law should interact and develop with other areas of the law. These issues and developments were discussed in relation to a question of duress in conclusion of a salvage contract in the recent New Zealand High Court decision of *Svitzer Salvage v Z Energy Ltd.*¹ The issues arising in light of this decision demonstrate the complex interaction between the common law, Admiralty law and the *Salvage Convention 1989*,² in these circumstances and indicate the possible ways in which the law may evolve. The relationship between these three areas of law is nuanced and without the Court being able to discuss these matters in great detail due to the fact the decision was on an application for summary judgment, a discussion as to the various approaches that a court might ultimately take, given consideration of the rationale of salvage law and its place in the maritime world today, is warranted. Although the Court was unable to fully explore these approaches the case demonstrates the importance of salvage law today and how it may apply where duress is claimed in circumstances such as those encountered in the case.

Facts

The *Svitzer Salvage* case arose from the grounding of the container ship the MV *Rena*. The *Rena* grounded on the Astrolabe Reef, off the Port of Tauranga in the Bay of Plenty, New Zealand on October 5 2011 at approximately 2.20am.³ The *Rena*, a 256 metre fully laden ship with a gross tonnage of 37 209, was travelling at approximately 17 knots at the time of the grounding.⁴ The response to the risk of significant environmental damage was initiated quickly, with the vessel declared ‘hazardous’ in accordance with the New Zealand *Maritime Transport Act*⁵ the day after it grounded.⁶ On that same day Svitzer was appointed as salvor of the *Rena*, by way of an LOF contract.⁷ Pending risk of a major environmental disaster, Svitzer then sought to acquire the services of the bunker tanker *Awanui*, to remove fuels and oil from the *Rena* urgently. The *Awanui*, which was on a long-term exclusive charter to Z Energy, was being used to transport oil from the Marsden Point refinery for the bunkering of ships in Auckland Harbour.⁸ The second defendant Seafuels was the owner of *Awanui*. Svitzer and associated parties entered into negotiations with Z Energy and Seafuels for the temporary release of the *Awanui* from its existing contractual obligations. At the time there were no other appropriate vessels that would have been able to safely conduct the required salvage services.⁹ Svitzer entered into a short-term charterparty with Seafuels under protest, on the grounds that the terms were exorbitant and unfair.¹⁰

Following the salvage operation, Svitzer brought an action against both Seafuels and Z Energy on three grounds. First, it was alleged that the charterparty between Svitzer and Seafuels was entered into under duress in accordance with the law of contract; secondly, it was submitted that the charterparty was unjust, inequitable and exorbitant and therefore warranted equitable intervention in the Admiralty jurisdiction, and thirdly, it was contended that the charterparty was entered into under duress and was therefore able to be modified or annulled in accordance with the *Salvage Convention 1989*.¹¹

Duress and the Law of Contract

The claim of duress in accordance with the common law of contract was dismissed.¹² The Court found that the actions of Seafuels were not illegitimate in the circumstances and that the negotiation of terms was unable to be

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¹ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) (*‘Svitzer Salvage’*).

² *International Convention on Salvage 1989*, 1989, 1953 UNTS 165.

³ *Svitzer Salvage* [2013] NZHC 2585 (4 October 2013) [3]; *Svitzer Salvage v Z Energy Limited* [2012] NZHC 1650 (20 July 2012) [1].

⁴ *Svitzer Salvage v Z Energy Limited* [2012] NZHC 1650 (20 July 2012) [1].

⁵ *Maritime Transport Act 1994* (NZ).

⁶ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [5].

⁷ Lloyd’s Open Form contract (with SCOPIC clause invoked).

⁸ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [8].

⁹ *Ibid.*

¹⁰ *Ibid* [48].

¹¹ The *Maritime Safety Act 1994* (NZ) incorporates the *International Convention on Salvage 1989* into New Zealand law.

¹² *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [178].

completed in light of factors unrelated to Seafuels.¹³ These factors included: the likelihood of a maritime disaster if the services of the *Awanuia* were unable to be procured given an encroaching storm, the close monitoring of the situation by Maritime New Zealand, the possibility of the requisition of the *Awanuia* by Maritime New Zealand and the close monitoring of the situation by the Senior Claims Manager of the *Rena*'s liability insurers who were inquiring as to the reasonableness of costs to be incurred in accordance with SCOPIC protocols.¹⁴

Seafuels contended that, in accordance with the common law of contract, there was no illegitimate pressure exerted on Svitzer during the negotiations and that if pressure was applied, it was of a commercial nature and was therefore permitted in the circumstances. The Court agreed with Seafuels,¹⁵ considering that pressure to enter into the contract came from a variety of sources, and that Seafuels remained open to further negotiation of the hire rate.

The refusal of the Captain of the *Awanuia* to come alongside the *Rena* for practice maneuvers until the 'commercial details', including the job safety and hazard plan, had been concluded was deemed not to constitute illegitimate pressure.¹⁶

Admiralty Jurisdiction

With regard to the Court's Admiralty Jurisdiction Goddard J stated:

It is settled law that the Court can set aside a manifestly unfair or unjust agreement in the exercise of its admiralty jurisdiction, if the agreement was entered into in circumstances that allowed a party to avail itself of the calamities of others to achieve a contractual outcome that is in effect unjust, oppressive or exorbitant...¹⁷

It was argued by Svitzer that this jurisdiction does not only extend to agreements for salvage, but applies 'even if the agreement was not to salvage but to provide specified services in circumstances where salvage services were necessary'.¹⁸ Seafuels contended that it would be illogical to extend the Court's Admiralty jurisdiction to the parties' contractual relationship and that in any event the rights afforded to Svitzer in accordance with the SCOPIC clause would warrant a greater financial return. Therefore, the contract could not be considered manifestly unfair or unjust.¹⁹ The Court made note that in accordance with SCOPIC, Svitzer would only be entitled to remuneration for monies 'reasonably paid', thus doubting Seafuels' contention in this regard, although, ultimately, the issue was not able to be decided.²⁰

Given the wide jurisdiction cast by the Admiralty jurisdiction and the contention that parties can only avoid the jurisdiction where it is expressly excluded in the contract,²¹ it was opined that salvage contracts are a 'good example of the type of circumstance that will invoke the Court's equitable intervention'.²²

It was argued by Seafuels that the Admiralty jurisdiction of the Court was not intended to be invoked in circumstances where a salvage agreement had been entered into.²³ If this interpretation were to be accepted by a court, it would therefore be necessary to determine whether a charterparty – as this was the contractual relationship between the parties – could be defined as a 'salvage agreement'.

According to *The Whippingham*,²⁴ it was determined that a third party will have performed salvage services where, if not for the third parties intervention, further damage would have been incurred.²⁵ It is also noted that:

¹³ Ibid.

¹⁴ Ibid [176].

¹⁵ Ibid [178].

¹⁶ Ibid [170].

¹⁷ Ibid [181], citing *The Emulous* (1832) 1 Summ 207, 210-211 as cited in Rose, Shaw and Steel, *Kennedy and Rose The Law of Salvage* (Sweet and Maxwell, 8th ed, 2013) [10.153].

¹⁸ Rose, Shaw and Steel, above n 17, [10.159]; *Svitzer Salvage v Energy Limited* [2013] NZHC 2585 (4 October 2013) [186].

¹⁹ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [187].

²⁰ Ibid.

²¹ *The William Lushington* (1850) 7 N.o.C 261, 363.

²² *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [188]; *Akerblom v Price* (1881) QBD 129, 132-133.

²³ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [194].

²⁴ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [196] – [197]; *The Whippingham* (1934) 48 Lloyd's Rep 49 (Adm).

²⁵ *The Whippingham* (1934) 48 Lloyd's Rep 49 (Adm), 52.

the avoidance or diminution of the extent of potential liability to third parties is in principle capable of proving a distinct service whereby property is salvaged from danger.²⁶

In light of this, the Court found that Seafuels would likely be able to bring a claim for salvage against the owners of the *Rena*, but that it remained arguable as to whether the services provided to Svitzer under the charterparty were able to be defined as ‘salvage services’,²⁷ and therefore attract the Court’s Admiralty jurisdiction in light of a narrow reading of the test outlined in *Akerblom v Price*.²⁸

Salvage Convention

The *Maritime Transport Act 1994* (NZ) incorporates the *Salvage Convention 1989* into New Zealand law.²⁹ A contract may be modified or annulled in accordance with Article 7 of the Convention if the contract has been entered into under undue influence or the influence of danger and the terms are inequitable, or if the payment under the contract is to an excessive degree too large.³⁰ Article 7 is restricted by Article 6, which provides:

1. This Convention shall apply to any *salvage operation* save to the extent that a contract otherwise provides expressly or by implication...
3. *Nothing in this article shall affect the application of article 7 nor duties to prevent or minimize damage to the environment.*³¹

A ‘salvage operation’ in this context is defined by Article 1 as “any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever”.³²

In refusing to determine whether the charterparty was able to be set aside or modified in accordance with the *Salvage Convention* the Court took into account the potential harm that a premature finding in the form of summary judgment could have on the salvage industry, ‘without careful and detailed examination of the facts and the complex underlying policy considerations at issue’.³³

Seafuels contended that if the *Salvage Convention* were applicable to the charterparty, then Article 7 would not be applicable, given the charterparty expressly stated that it is not a contract for salvage. The Court outlined that the Convention shall apply to any ‘salvage operation’, and that in accordance with Article 6(3) the application of Article 6(1) shall not affect the application of Article 7 nor duties to prevent or minimize damage to the environment: ‘[t]hat suggests that Art 7 applies, provided the agreement is for a “salvage operation”’.³⁴ If that were correct, it would render the express statement in the charterparty, that it is not a salvage contract, irrelevant.³⁵ Seafuels argued that the application of the *Salvage Convention* to all contracts would preclude the operation of the common law and Admiralty principles in favour of the Convention. The Court stated that it is at least arguable, in light of the statement in *Kennedy and Rose*³⁶ that sub-contracts may be subject to Article 7.³⁷ In order to determine whether the Court should exercise its discretion in accordance with Article 7 of the Convention, Goddard J stated that the Court would require a full hearing and further testing of evidence.³⁸ The possible ‘chilling effect on the future incentive for professional salvors to assist in similar situations’³⁹ and the background of the development of modern salvage law were cited as justification by Goddard J for not deciding this point in the Court’s summary jurisdiction.⁴⁰

Comment

It is unfortunate but in the author’s opinion wise that the Court did not make a full determination on these issues. The case raises interesting issues as to how the Court would have resolved questions relating to duress

²⁶ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [197], citing *Rose, Shaw and Steel*, above n 17, [5.021].

²⁷ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2013) [198].

²⁸ *Ibid* [189], citing *Akerblom v Price* (1881) 7 QBD 129, 132–133.

²⁹ *Maritime Transport Act 1994* (NZ) s 216; sch 6.

³⁰ *International Convention on Salvage 1989*, 1989, 1953 UNTS 165, art 7.

³¹ *Ibid* art 6 (emphasis added).

³² *Ibid* art 1.

³³ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2012) [218].

³⁴ *Ibid* [225].

³⁵ *Ibid*.

³⁶ *Ibid* [226], citing *Rose, Shaw and Steel*, above n 17, [10.169].

³⁷ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2585 (4 October 2012) [226]–[227].

³⁸ *Ibid* [208].

³⁹ *Ibid* [211].

⁴⁰ *Ibid* [222].

and salvage, and in particular how the common law, Admiralty law and the *Salvage Convention* would interact today in a dispute between a salvor and a third party.

Provided Article 7 is applicable, it offers a broad interpretation of the requirements that will allow for a contract for salvage to be annulled or modified under the Convention given that there is no requirement for an illegitimate compulsion as under the common law.⁴¹ *Svitzer* would therefore only have needed to show that the terms of the agreement were substantially unfair, so much so that the sum was grossly disproportionate, in order to have the charterparty set aside or modified by the Court.⁴² It is submitted that the daily charter rate of \$200 000 per day plus GST under the charterparty would most likely have been found to be exorbitant, given it was unlikely that the *Awaniua* would have been chartered at a rate higher than \$30 000 per day in accordance with the long-term charter.⁴³

In the event that a court were able to make a finding that there was duress in relation to a salvage agreement, the question remains to be answered as to how the causes of action interact. Seafuels' contention that the applicability of the *Salvage Convention* to a charterparty would preclude the operation of the common law and Admiralty principles therefore warrants discussion.

In the *Tojo Maru* case,⁴⁴ Lord Diplock considered that Admiralty, the common law and equity have developed and have fused, so that they are no longer distinct bodies of law.⁴⁵ In regards to an LOF agreement, Lord Diplock likened it to a contract for labour.⁴⁶ He stated that an LOF contract must first be viewed in light of the common law of contract, with salvage law authority to be taken into account at a later stage if required.⁴⁷ His reasoning was based on the fact that most salvage authorities would stem from dated cases where salvage was conducted without a contract, and that it would therefore be of greater benefit to refer to the law of contract for guidance in the circumstances. Lord Diplock also considered whether there were any fundamental differences between an LOF contract and other types of contracts. The requirement for success and that reasonable value be provided for the services rendered were deemed to not to be confined to LOF contracts, and that therefore the law of contract precluded the operation of maritime law in such a case.⁴⁸ This approach was followed in the case of *The Unique Mariner (No. 2)*,⁴⁹ where it was stated that where salvors are engaged by a contract, the law of contract will govern the matter with maritime law only being applicable if it is expressed or implied by the contract.⁵⁰

Lord Diplock's approach does not highlight the role of policy in relation to the law of salvage, which has developed due to the unique nature of maritime law. The nature of Lord Diplock's comments combined with the judgment in *The Unique Mariner (No. 2)*, limit the general application of the Admiralty jurisdiction where salvage services have been performed under a contract. However, as both cases were decided before the *Salvage Convention* came into force there is uncertainty as to how the proposition now rests.⁵¹

In light of Lord Diplock's reasoning, the contractual laws that relate to the quality of consent under duress will overrule the Admiralty jurisdiction's discretion to apply substantive fairness on the basis of public policy grounds. This may be beneficial given the lack of authority in salvage cases regarding duress,⁵² but neglects the important policy considerations that ground salvage law. Such an approach would deny *Svitzer* the right to invoke the Admiralty jurisdiction of the Court in the present case.

The submitted view is that the nature of the *Salvage Convention*, being an international instrument that was drafted with the goal of uniformity and certainty in mind, should be considered paramount to the common law of contract. The concerns of protecting the environment and the need to encourage salvors should be seen to override common law and Admiralty principles.⁵³ It is therefore submitted that the Admiralty jurisdiction should

⁴¹ Rose, Shaw and Steel, above n 17, [10.168]; Olivia Lennox-King, 'Laying the Mark to Port and Starboard: Salvage Under Duress and Economic Duress at Contract Law' (2007) 21 *Australian and New Zealand Maritime Law Journal* 32, 50.

⁴² *International Convention on Salvage 1989*, 1989, 1953 UNTS 165, art 7 (a)-(b); Lennox-King, above n 41, 50.

⁴³ *Svitzer Salvage v Z Energy Limited* [2013] NZHC 2584 (20 December 2013) [91].

⁴⁴ *Bureau Wijsmuller NV v Owners of the Tojo Maru (No. 2)* [1972] AC 242 ('*The Tojo Maru*').

⁴⁵ *Ibid* 291.

⁴⁶ *Ibid* 292.

⁴⁷ *Ibid*.

⁴⁸ *The Tojo Maru (No. 2)* [1972] AC 24, 294; Lennox-King, above n 41, 54.

⁴⁹ *The Unique Mariner (No. 2)* [1979] 1 Lloyd's Rep 37.

⁵⁰ Lennox-King, above n 41, 51.

⁵¹ *Ibid* 55.

⁵² Rose, Shaw and Steel, above n 17, [10.099]; Lennox-King, above n 41, 55.

⁵³ Lennox-King, above n 41, 58.

retain its discretion to modify or annul agreements that it considers unfair.⁵⁴ With regard to the *Salvage Convention*, it is submitted that the common law and Admiralty should continue to apply apart from the circumstances in which the Convention is applicable.

Conclusion

It is unfortunate that the New Zealand High Court was not required to make a finding on the relationship between the law of contract, the Court's Admiralty jurisdiction and the *Salvage Convention* in the case of *Svitzer Salvage*. Clarification as to what constitutes a 'salvage operation', and the scope of the Admiralty jurisdiction would have been welcome in light of the limited opportunities presented to courts to make such determinations since the advent of the LOF contract. Nonetheless, it is submitted that the narrower view as to what constitutes duress in contract law should not overrule the intervention of Admiralty or the *Salvage Convention* in circumstances where a contract is entered into that is vital for the salvage of a vessel.

⁵⁴ *The Unique Mariner (No 1)* [1978] 1 Lloyd's Rep 438, 454-455.

Fair Work Ombudsman v Pocomwell Ltd (No 1) [2013] FCA 250; Fair Work Ombudsman v Pocomwell & Others (No 2) [2013] FCA 1139

R. E. Lindsay*

It is estimated that the Philippines provides around 460 000 seafarers on foreign flagged ships around the world.¹ There are more Filipino seafarers than any other nationality in the world,² and it is believed that some 20% to 30% of the world's seafarers are Filipino. A recent case explored the liability of employers for wage conditions of Filipino seafarers within Australia's Exclusive Economic Zone (EEZ).

Facts

Four of these seafarers, who carried out painting duties, were employed aboard a Chinese flagged oil rig, the *Nan Hai VI*, which is a semi-submersible mobile offshore drilling unit (MODU) and flies a Peoples Republic of China flag. The other oil rig upon which the painters briefly worked, flew a Singapore flag. The operator of the oil rigs was Maersk Drilling Australia Pty Limited. It was alleged by the Fair Work Ombudsman (FWO) that the four Respondents, in employing the painters on these oil rigs at Filipino rates, had underpaid these workers in relation to Australian Award rates laid down under the *Fair Work Act 2009* (Cth).³

The First Respondent was the nominal employer, Pocomwell Limited, which was registered in Hong Kong and had entered into written contracts with the seaman. The Second Respondent was the agent of Pocomwell Limited and had arranged for their recruitment on employment contracts with Pocomwell Limited, pursuant to an Agreement in writing made with the Third Respondent, Survey Spec Pty Limited, and its chief executive officer, Thomas Civiello, who was the Fourth Respondent. The Second Respondent, Supply Oilfield and Marine Personnel Services Inc (SOMPS) was a registered Filipino company and would receive USD 92.00 a day for providing the painters. Pursuant to an Agreement made between March and July 2009, Maersk Drilling Australia Pty Limited, the pleaded operator of the *Nan Hai VI*, agreed to pay Survey Spec some AUD 400 per day for each of the employees.⁴

It was alleged that from 1 January 2010 until 1 March 2011 the painters were not paid entitlements derived from the *Fair Work Act 2009* (Cth) and authorised under the relevant Australian award, the *Hydrocarbons Industry (Upstream) Award*. The MODUs were in the EEZ beyond Australia's territorial waters at all relevant times. The central issue, upon which the case was decided, was whether Australia had jurisdiction to assert breaches of the *Fair Work Act*. This question arose in three ways. First, whether jurisdiction for ascertaining and deciding the appropriate levels of wage remuneration in these circumstances rested with the Philippines, the flag state, or with Australia. Secondly, if it was appropriate for Australia to exercise jurisdiction in the EEZ in these circumstances, were the rigs 'fixed platforms' to which section 33 of the *Fair Work Act* would apply in the EEZ. Thirdly, if the MODUs were not 'fixed platforms', whether regulations made by Julia Gillard, when she was Minister for Employment, under regulation 1.15E of the *Fair Work Regulations 2009* (Cth), that make majority Australian resident crewed ships subject to the penalty provisions under the Act, applied in the circumstances. This raised the issue of how the *Fair Work Act* and its regulations were to be construed in light of Australia's international law obligations and the concurrent jurisdiction of other States.⁵

The painters on the *Nan Hai VI* were all under written contracts, prescribed by the Philippines Overseas Employment Administration (POEA), which is an agency attached to the Philippines Department of Labour and Employment (DOLE). The licensing of overseas principals, and manning agents, such as the First and Second Respondents, was and is subject to a stringent statutory contractual regime imposed by the Philippines government since seafaring is an important part of the nation's lifeblood. Pocomwell and SOMPS were accredited to recruit and deploy Filipino seafarers, and these painters were subject to

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¹ *Filipino seamen*, Wikipedia, http://en.wikipedia.org/wiki/Filipino_seamen fn 3.

² Wikipedia, above n 1, fn 4.

³ *Fair Work Ombudsman v Pocomwell Ltd (No 1)* [2013] FCA 250 (25 March 2013) ('*Pocomwell (No 1)*'); *Fair Work Ombudsman v Pocomwell & Others (No 2)* [2013] FCA 1139 (1 November 2013) ('*Pocomwell (No 2)*').

⁴ *Pocomwell (No 1)* [2013] FCA 250 (25 March 2013) [10], [16]-[29].

⁵ *Pocomwell (No 2)* [2013] FCA 1139 (1 November 2013) [1]-[7]. In addition, this recitation of the facts makes use of uncontested facts that was contained within the documentary evidence at trial.

administrative and disciplinary action in the event of any violations of statutory or other contractual terms of their employment either on the initiative of the POEA or by complaint of Filipino seafarers, unions or management. Each of the contracts, at the relevant time entered into with the painters, provided that the POEA statutory rules would apply. The POEA itself had jurisdiction to hear disciplinary action against foreign employers and principals and had a range of penalties open to it, including suspension and cancellation, which could be imposed upon the employer. An aggrieved person could institute disciplinary action against the employer if there were some violation of the contractual and statutory terms. Monetary and other penalties might be imposed for violations. The wage levels for seafarers in the Philippines are established after conferral with stipulated National representatives. Under Filipino law, the wage payments made to the painters were adopted as appropriate by the Filipino government. Although low compared with comparable Australia rates, they were significantly higher than the minimum statutory seafarers rates imposed under Filipino law, and the contracts said that the conditions of employment could not be changed without approval by the POEA. The position therefore was that the Philippines government had expressly endorsed the wage levels paid to the painters. The legislative rules governing the POEA, and the terms incorporated into the painters' contracts, provided for the law of the Philippines to apply and for the exclusive jurisdiction of the Manila Courts.

The Stay Application: The Argument in Pocomwell (No 1)

It was argued at the preliminary stage by the Respondents that the proceedings should be stayed in Australia for two reasons. First, by the first and second respondents that an Australian Court is a 'clearly inappropriate forum' to exercise jurisdiction. It was contended this was so because the First and Second Respondents are foreign corporations and have no place of business, residence or other connection with Australia. The painters were Filipino nationals who had no residential or other connection with Australia. The MODUs flew the flag of foreign States and did not dock in Australia. The payments made to the Respondents were made under contracts prescribed by the POEA as an agency of the Filipino government. The First and Second Respondents were licensed and accredited by the POEA to enter into the contracts. The wage payments were made in the Philippines and in Filipino currency. The Filipino law provided for exclusive Filipino jurisdiction to hear and determine disciplinary action. Secondly, it was contended by all the Respondents that the *Fair Work Act 2009* (Cth), should be read as subject to the concurrent jurisdiction of other States, such as the Philippines, and to Australia's international obligations in relation to foreign flagged ships, and that the Act was not an Act asserting exclusive jurisdiction, whereas the Filipino legislation asserted exclusive jurisdiction over the Filipino seaman, in relation to disciplinary action for the enforcement and observance of labour conditions.

The Clearly Inappropriate Test

The test for a stay of proceedings that an Australian Court is a 'clearly inappropriate forum' to exercise jurisdiction differs significantly now from the criterion adopted by the other English speaking jurisdictions. In *Voth v Manildra Flour Mills Pty Limited*⁶ the action arose out of damages sought for alleged negligent acts by the Appellant in the course of his practice as an accountant in Missouri. The Appellant had moved to have the service of the Statement of Claim set aside and, in the alternative, an order that proceedings be stayed pending determination of the issues between the parties in the United States. This contention failed before the single judge and before a majority of the New South Wales Court of Appeal (Kirby J dissenting) but succeeded in the High Court. However, notwithstanding their ultimate conclusion, the Court considered the test was whether the Australian Court was a 'clearly inappropriate forum' and not whether the Australian Court was 'the more appropriate forum' which appears now to be the test in the United Kingdom. In doing so, the joint judgment adopted what Deane J in *Oceanic Sun Line Special Shipping Company Inc v Fay*⁷ said: 'a party who has regularly invoked the jurisdiction of a competent Court has a prima facie right to insist upon its exercise and to have his claim heard and determined....'.⁸ Their Honours echoed that in saying that where a Plaintiff has regularly invoked the jurisdiction of a Court, it has a prima facie right to insist upon its exercise.⁹ Secondly, traditionally a stay of proceedings, which has been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principles empowering the Court to dismiss or stay proceedings which are oppressive, vexatious or an abusive process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the

⁶ (1990) 171 CLR 538 ('*Voth*').

⁷ (1988) 165 CLR 197 ('*Oceanic Sun*').

⁸ Ibid 241.

⁹ *Voth* (1990) 171 CLR 538, 554. (Mason CJ, Deane, Dawson and Gaudron JJ).

particular case.¹⁰ Thirdly, the mere fact that convenience favours another jurisdiction being a more appropriate forum, does not justify the grant of a stay.¹¹ However, Deane J said that the words ‘oppressive’ and ‘vexatious’ should not be too rigidly construed. ‘Oppressive’ in this context meant seriously and unfairly burdensome, prejudicial or damaging while ‘vexatious’ should be understood as meaning productive of serious and unjustified trouble and harassment.¹² The Court recognised that the availability of relief in a foreign forum will always be a relevant factor in deciding whether or not the local forum is clearly an inappropriate one.¹³ In stating that the principles are those which are set out by Deane J in *Oceanic Sun*,¹⁴ their Honours also said the discussion by Lord Goff in *Spiliada*¹⁵ of relevant ‘connecting factors’ and ‘legitimate personal or juridical advantage’ would provide valuable assistance.¹⁶ Lord Goff referred to Lord Keith’s allusion to the ‘natural forum’ being ‘that with which the action had the most real and substantial connection’. Lord Goff saw these connecting factors including not only convenience or expense (such as the availability of witnesses) but also factors such as the law governing the relevant transaction.¹⁷ In *Oceanic Sun*, Deane J explained that notions of vexation and oppression involved an essential element of injustice. Where an action has no significant connection at all with the territorial jurisdiction of a Court in which it is instituted, proceedings would be vexatious or oppressive, and where the expense and inconvenience are of such a character, to allow the action to go on, would result in real injustice, a stay should be ordered. Those words should be read as describing the objective effect of continuing the proceedings in the particular forum rather than a description of the conduct of those who initiated proceedings by selecting this forum.¹⁸

The Ruling on the Stay Application in Pocomwell (No 1)

In *FWO v Pocomwell Limited*,¹⁹ Barker J referred to the *Voth* case stating that in circumstances where it is the *Fair Work Act* that the FWO are seeking to apply, it cannot be said that the Australian Court is a clearly inappropriate forum. There is no prospect that any alternative foreign forum would be available to determine the rights and duties of workers in the application of an Australian Act such as the *Fair Work Act* which, on the face of it, appeared mandatory and not discretionary.²⁰ His Honour said that it is not true that the First and Second Respondents had no connection whatsoever with Australia. They have a connection in that they were alleged to have entered into employment contracts in respect of work to be conducted within the Australian EEZ.²¹ The Contracts did provide that the MODUs, upon which the seaman worked, would be off the Northwest Shelf of Australia. The other basis upon which the stay was applied for was that the *Fair Work Act* should be read as intending to be subject to competing jurisdictions, and to international obligations which Australia had entered into. In short, the Respondents contended the Act was not to be construed as a mandatory Act, when viewing its reach in regard to the operation of its civil penalty provisions as they related to platforms and, alternatively, majority Australian crewed ships.²² However, His Honour stated the purpose of the application had necessarily to be determined at that stage on the assumed basis that the two rigs in question might be ‘fixed platforms’.²³ As for the alternative contention that Regulation 1.15E was invalid, that would be determined at the trial if the Applicant’s primary case that the rigs were ‘fixed platforms’ did not succeed.²⁴

Akai Pty Ltd v People's Insurance Co Ltd²⁵ and Jurisdiction Clauses

Subsequent to the *Voth* case, the High Court by majority of three to two found that the interpretation of terms of an insurance policy would be determined in NSW and not England even though the policy provided that the law of England governed the policy and any dispute be heard in the English Courts. The majority judgment analysed the provisions of the *Insurance Contracts Act 1984* (Cth) and in particular, section 8 which extended the application of the Insurance Act to contracts of insurance where the proper law would be

¹⁰ Ibid 554.

¹¹ Ibid.

¹² Ibid.55, citing *Oceanic Sun* (1988) 165 CLR 197.

¹³ *Voth* (1990) 171 CLR 538, 558 (Mason CJ, Deane, Dawson and Gaudron JJ).

¹⁴ Ibid 564.

¹⁵ *Spiliada Maritime Corp v Consuler Ltd* [1987] AC 460 (‘*Spiliada*’)

¹⁶ *Voth* (1990) 171 CLR 538, 565.

¹⁷ *Spiliada* [1987] AC 460, 476.

¹⁸ *Oceanic Sun* (1988) 165 CLR 197 (Deane J)

¹⁹ *Pocomwell (No 1)* [2013] FCA 250 (25 March 2013).

²⁰ Ibid [14].

²¹ Ibid[11].

²² Ibid [28] – [30].

²³ Ibid [23].

²⁴ Ibid [37].

²⁵ (1996) 188 CLR 418 (‘*Akai*’).

the law of the State or Territory to which the Act extended.²⁶ It was the statute which ‘demands application in an (Australian) Court irrespective of the identity of the *lex causae*’.²⁷ The majority considered it was relevant to have regard to places of residence or business of the parties; the place of contracting; the place of performance and the nature and subject matter of the contract. The policy had no factual connection at all with England. The risk was very substantially situated in New South Wales.²⁸ Their Honours considered that public policy considerations may flow from, even if not expressly mandated by, the terms of the Constitution or Statute, enforcing the Australian forum.²⁹

Criticism of the Akai Principle

In an incisive chapter ‘Declining jurisdiction in principle’³⁰ Mary Keyes summarised the problems with *Akai* by stating:

Therefore, the majority expressly approved an approach to declining jurisdiction which commences with a consideration of whether a local mandatory law would be applied if a trial on the substantive issues were held in the forum. This is to be determined by reference to the criteria of application employed in the statute as interpreted. If the statute applies, the court’s constitutional obligation to ensure its application determines the resolution of the stay application. Unless the defendant can prove that the foreign court will apply Australian legislation, the court regards itself as constitutionally obliged to refuse the stay application, because otherwise the statute will not be applied. The majority observed that the potential application of a foreign statute was a ‘conceptually distinct’ situation and that in such cases, the foreign statute would only be applicable if it was indicated as part of the *lex causae*. This means that foreign mandatory laws are not to be treated any differently to other kinds of foreign law. The decision of the majority fails to appreciate the dangers of judicial chauvinism, especially when application of local law to protect a local litigant is sought. Conventionally, the question of balancing relevant state interests in the substantive resolution of international disputes has been deferred to the choice of law stage.

The minority in *Akai*, Dawson and McHugh JJ, took the conventional approach. They held that the ‘application for a stay of the New South Wales proceedings could and should have been determined by reference to the choice of courts provision alone’. In their view the law to be applied in the substantive resolution of the dispute was not relevant in determining whether the jurisdiction clause was effective.

The result in *Akai* is unfortunate. Certainly it is within legislative competence for the parliament to enact mandatory legislation which denies effect to contractual choices of foreign jurisdictions, and the court must give effect to such directions. This is the appropriate method of addressing concerns with evasion of the law. However, as the dissenting judges Dawson and McHugh JJ observed, the use of jurisdictional clauses is common in international contracts. They stated that it would be a serious and far reaching interference with the freedom of the parties to such contracts to prevent them from making provision to that effect. If that was the intention of the legislature one would expect at least express words

It may be that enforcement of civil penalties under the *Fair Work Act* will someday herald a markedly different approach from that which is applicable to choice of jurisdiction clauses in private contracts which conflict with Australian legislation. None of the cases cited related to enforcement of penal provisions where different conceptions and standards of unlawful conduct apply in different States, but the approach taken in *Pocomwell* inevitably follows that adopted in both *Voth* and *Akai* in the majority judgements. The heavy focus upon a Court’s constitutional obligation to enforce what it perceived to be mandatory laws, prevails over any balancing exercise which would take into account the existence of concurrent jurisdiction, ie. the Philippines, which has its own regime of penal enforcement. In *Pocomwell (No. 1)* the view was taken that since there was no alternative foreign forum available to determine rights and duties of workers for the application of an Australian Act, which was taken to be mandatory,³¹ the existence of a parallel regime stipulating contractual and penal obligations applicable to the painters was of no consequence.

A ‘Mandatory’ Act is here used in the limited sense of an Act which directs Australia to exercise jurisdiction. It does not mean an Act that asserts exclusive jurisdiction such as the Philippines Legislation.³²

²⁶ Ibid page 433 (Toohey, Gaudron and Gummow JJ).

²⁷ Ibid 436.

²⁸ Ibid 437.

²⁹ Ibid 447.

³⁰ Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 86.

³¹ *Pocomwell (No 2)* [2013] FCA 1139 (1 November 2013) [14].

³² Andrew Bell, *Forum Shopping in Venue in Transnational Litigation* (OUP, 2003) [5.37]-[5.48].

Pocomwell (No 2): Fixed Platforms

The omission here was that the Respondents did not pay wage rates prescribed under Awards recognised by the *Fair Work Act* during the time when the MODUs were in the exclusive economic zone (EEZ). Section 33 of the *Fair Work Act* made the provisions of the Act apply to ‘fixed platforms in the EEZ’ which under section 12 was defined to mean ‘...an artificial island, installation or structure permanently attached to the seabed for the purpose of exploration for, or exploitation of, resources or for other economic purposes’.³³ The rigs were there for the purpose of exploration and the question was whether it could be said that each of the rigs was an artificial island, installation or structure permanently attached to the seabed. It was accepted that the rigs were ‘structures’ but it was ultimately found that the MODUs were not ‘permanently attached to the seabed...’. His Honour arrived at this conclusion having analysed both the history of this wording, which was derived from earlier international conventions, and consideration of what structures the Act was intended to apply to.³⁴ Secondly, it involved an analysis of the MODUs which, as submersibles or semi-submersibles, as explained by an expert, were not, even during drilling exercises, permanently attached to the seabed³⁵.

Ships

However, His Honour did find that the MODUs would constitute ‘ships’ which are defined in section 12 of the Act to include ‘barge, lighter, or other vessel’. His Honour found each rig was a ‘vessel’ and therefore within the definition.³⁶ This then raised the question of whether Regulation 1.15E of the Regulations introduced in 2010 made the MODUs ‘majority Australian-crewed ships’ subject to the penal provisions of the Act. His Honour did find regulation 1.15E valid but the regulation necessarily required proof that the majority of the crews are residents of Australia and the operator is a resident of Australia; or has its principal place of business of Australia; or is incorporated in Australia. The Regulation had been made under section 33(3) of the Act which provided that regulations could prescribe further extensions of the Act or provisions of the Act to and in relation to the EEZ. The crews of these MODUs, which fluctuated in number and composition over the extended period pleaded, needed to be proved to be majority Australian residents, and the FWO case foundered irretrievably on this point in the face of the Third and Fourth Respondents’ detailed analysis accepted by his Honour that this had not been established by the available evidence³⁷.

The Exclusive Economic Zone

The EEZ is a maritime zone extending from the outer limit of the territorial sea (12 nautical) to 200 nautical miles from the base lines. Within the EEZ, Australia as the coastal state has sovereign rights over the natural resources whilst other states continue to enjoy certain freedoms associated with the regime of the high seas, such as freedom of navigation.³⁸ Ordinarily, and applying the *Interpretation Act*, a reference to Australia is taken to include a reference to the coastal sea of Australia which includes the territorial sea.³⁹ The territorial sea extends to a limit not exceeding 12 nautical miles from the coast but no further.⁴⁰ However, section 33 of the *Fair Work Act*, extends the operation of the Act and its penal provisions to the EEZ and the waters above the continental shelf.⁴¹

The definition of the EEZ in the Act refers to, and is defined by, the *Seas and Submerged Lands Act 1973* (Cth) which refers to the limited ‘sovereign rights’ enjoyed in the zone by Australia under articles 55 and 57 of UNCLOS which was adopted on 10 December 1982 and entered into force on 16 November 1994.⁴²

In a note to Regulation 1.15E, it is said that the operation of the *Fair Work Act* to and in relation to majority Australian crewed ships in the EEZ is subject to Australia’s international obligations relating to foreign ships and to the concurrent jurisdiction of a foreign State. It was argued by the Respondents that if Regulation 1.15E is capable of applying to foreign flagged ships in the EEZ, it should be considered ultra vires or read

³³ *Fair Work Act 2009* (Cth) s 12.

³⁴ *Pocomwell (No 2)* [2013] FCA 1139 (1 November 2013) [129]–[143].

³⁵ *Ibid* [114] – [117].

³⁶ *Ibid* [151].

³⁷ *Ibid* [231] – [235].

³⁸ *United Nations Convention on the Law of the Sea* (UNCLOS), 1982, 1833 UNTS 3 arts, 55, 56, 87.

³⁹ *Acts Interpretation Act 2001* (Cth) s 2B.

⁴⁰ *Seas and Submerged Lands Act 1973* (Cth)

⁴¹ An area defined in UNCLOS art 76..

⁴² 1982, 1833 UNTS 3.

down so as not to apply by reason of principles of international law. It was argued by the Respondents that the coastal States' rights in the EEZ, are limited under the *Fair Work Act*, having regard to relevant principles of international law.

Canons of Construction: the Fair Work Act 2009 (Cth)

In *Barcelo v Electrolytic Company of Australasia Limited*,⁴³ Dixon J stated⁴⁴ that every statute is to be interpreted and applied as far as its language admits, so as not to be inconsistent with the comity of nations or with the established rules of international law. Thus, it is to be understood and implied that the legislation of a country is not intended to deal with persons over which, according to the comity of nations, the jurisdiction properly belongs to some other foreign sovereign or State. In *Wanganui Rangitikei Electric Power Board v Australian Mutual Provident Society*,⁴⁵ Dixon J had said⁴⁶ that where an enactment describes Acts, matters or general words, so that it is intended that application would be universal, it is to be read as confined to what, according to the rules of international law, is within the province of the law to effect or control. General words should not be understood as extending to cases which, according to rules of private international law administered by the courts, are governed by foreign law.

While it was acknowledged by the Respondents in *Pocomwell* that it was open to Australia to pass laws and regulations which are inconsistent with UNCLOS, a statute is to be interpreted and applied as far as its language permits, so that it is in conformity with, and not in conflict with, established rules of international law or with a treaty or international convention to which Australia is a party.⁴⁷

It was submitted by the Respondents that Parliament did not intend to authorise under the Act the making of regulations that would be inconsistent with international law. It was argued that there was support for this both in the Explanatory Memorandum to the Bill and in section 3 of the Act which included, as one of the objects of the Act, that account be taken of Australia's International Labour Obligations. On this basis, the Regulation 1.15E should be read as not extending to the painters, who were subject to statutory imperatives under the Filipino Law and whose Courts asserted jurisdictional exclusivity. Secondly, as these were foreign flagged ships under UNCLOS, Australia does not have exclusive jurisdiction in relation to labour conditions on such ships in the EEZ. Therefore, if Regulation 1.15E could not be read down to accord with these competing claims of jurisdiction, then it was submitted 1.15E was ultra vires the *Fair Work Act* because the Act was not to be read as authorising legislative competence over foreign flagged ships whose crew members were subject to the jurisdiction of another state.⁴⁸

The UNCLOS Jurisdiction of the Flag State: and the Ruling in Pocomwell (No 2)

His Honour found that under Article 56, which provides that the coastal State has sovereign rights for the purpose of exploration of natural resources, the coastal State is the only State that can exploit them.⁴⁹ His Honour allowed that the coastal state's 'sovereign rights' in relation to the EEZ are more limited than its sovereignty' with respect to its territorial sea, but his Honour said that if the coastal state 'can regulate who can or cannot exploit the natural resources of its EEZ, then it logically follows, in my view, that it can regulate the manner in which, and the terms on which, such resources are explored and exploited, conserved and managed'.⁵⁰ Although articles of UNCLOS, such as Articles 92(1), 94(1) and 94(2)(b), may appear to give primacy to the Flag State in matters relating to labour relations on board ships, his Honour said such provisions needed to be read subject to Article 56(1)(a). That is, the coastal State retains the sovereign rights to regulate the manner in which the natural resources within its EEZ are explored and exploited, conserved and managed.⁵¹ His Honour concluded⁵² that a coastal State's sovereign rights do encompass the right to regulate labour relations on board foreign flagged ships engaged in the exploration and exploitation of natural resources in its EEZ. Therefore, since Australia has rights under UNCLOS in relation to the regulation of labour relations on vessels that may be classified as 'foreign flagged ships' that are operating in

⁴³ (1932) 48 CLR 391.

⁴⁴ Ibid 423-424.

⁴⁵ (1934) 50 CLR 581.

⁴⁶ Ibid.

⁴⁷ *Minister for Immigration, Ethnic Affairs v Teoh* (1995) 183 CLR73, 277-288.

⁴⁸ *Pocomwell (No 2)* [2013] FCA 1139 (1 November 2013) [35] – [54].

⁴⁹ Ibid [91]; UNCLOS art 56(1) provides that in the EEZ coastal States have '(a) sovereign rights for the purpose of exploration...'.
⁵⁰ Ibid [91].

⁵¹ Ibid [93].

⁵² Ibid [97].

the Australian EEZ, regulation 1.15E applies is not inconsistent with international law, and is not ‘ultra vires’ the Fair Work Act⁵³.

It can be seen therefore that Pocomwell’s case gave a wide construction to the rights of a coastal State in the EEZ in relation to foreign flagged ships. The limited sovereign rights which a coastal State has over the resources in this area prevails over the Flag State’s control of administrative matters and labour conditions in the circumstances mentioned in Articles 94(1), 94(2)(b) and 94(3)(b) of UNCLOS.⁵⁴ Both Australia and the Philippines are signatories to the *Maritime Labour Convention 2006*, which stipulates that each member state shall verify that ships that fly its Flag comply with the requirements of the Convention as those are implemented in national law and regulations.⁵⁵ Therefore, there is an obligation upon Flag States to ensure that there is compliance with statutory contractual terms. However, the *Maritime Labour Convention* had not entered into force until 20 August 2013, which was after the time the conduct in Pocomwell occurred. It could not therefore be said that Regulation 1.15E, in stipulating that on majority Australian crewed ships the crew was required to be paid Australian rates, contravened the articles of the *Maritime Labour Convention* which called for observance of national law, notwithstanding the apparent anomaly of imposing foreign wage rates upon Filipinos who would never be subject to Australian tax, cost of living or social conditions.

There was much media indignation expressed about the significantly lower pay provided to the painters over other members of the crew who were subject to Australian Awards. Yet had the *Maritime Labour Convention 2006* applied it would have required that member states, which include both the Philippines and Australia, shall verify that ships that fly its flag comply with national laws and regulations.⁵⁶ The obligation upon foreign Flag States is to ensure there is compliance with statutory contractual terms. Under general international law, States may exercise legislative jurisdiction over their nationals even when outside their territory.⁵⁷

However, in *Pocomwell (No 2)* it was found that there was no ambiguity in the Fair Work Act and Regulation. Under the Explanatory Memorandum⁵⁸ to the Bill it was said that ‘all seafarers working regularly in or beyond the waters of Australia’s EEZ and continental shelf will have the benefit of Australia’s Workplace Relations Law and a fair safety net of employment conditions in circumstances where there is an appropriate connection with Australia’.⁵⁹ Had that connection with Australia been successfully proved by the FWO, Regulation 1.15E was intended to extend the Act to foreign flagged ships. His Honour found that there was no inconsistency with Article 87(1)(a) of UNCLOS which gave rights of freedom of navigation to other states.⁶⁰ The extension of the Act to foreign flagged ships in the EEZ does not obviate or remove Australia’s international obligations relating to foreign flagged ships that may pass through the EEZ for purposes not connected with Australian sovereign rights under UNCLOS, but here the sovereign rights of exploration embraced the incidental right to impose labour conditions.⁶¹

Summary of Principles

The *Pocomwell* cases affirmed the Australian approach to jurisdictional competence which imposes a heavy burden upon an applicant seeking to argue that another state should be the preferred jurisdiction especially where an Australian Act is viewed as ‘mandatory’. Furthermore, a broad construction is now given to Australia’s ‘sovereign rights’ as a coastal state in the EEZ in relation to labour conditions, and consequently to the regulatory power given in that area to the Minister: provided always that the foreign flagged ship in the EEZ can be proved to be majority Australian resident crewed.

The *Fair Work Act* and Regulations afford a broad and extended definition of ‘ships’ so as to include mobile oil rigs, whether or not self-propelled, though the status of such rigs was not seriously considered by UNCLOS when the Convention was introduced over thirty years ago. It remains to be seen if the operation of the *Maritime Labour Convention* will modify the reach of the *Fair Work Act* and its successors in years to

⁵³ Ibid [104].

⁵⁴ ‘Art 94(2) In particular every State shall:

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.’

‘Art 94(3) Every state shall take measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia: (b) manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments.’

⁵⁵ *Maritime Labour Convention*, 2006, regulation B5.1.4

⁵⁶ *Pocomwell (No 2)* [2013] FCA 1139 (1 November 2013).

⁵⁷ Deidre Fitzpatrick and Michael Anderson, *Seafarers’ Rights* (OUP, 2005) 165 [4.73].

⁵⁸ *Fair Work Amendment Regulations 2009 (No 1)* (Cth)

⁵⁹ *Pocomwell (No 2)* [2013] FCA 1139 [74] (1 November 2013).

⁶⁰ Ibid [100].

⁶¹ Ibid [104].

come in relation to labour relations on foreign flagged ships that enter the area of the EEZ and continental shelf. The *Pocomwell* decisions are likely to influence the conduct of employers of foreign seafarers on foreign flagged ships, which do not dock in Australia, and which ships enter the EEZ carrying a crew with a preponderance of Australian residents on board.

BOOK REVIEW

**Malcolm Clark (ed). *Maritime Law Evolving: Thirty Years at Southampton*. Hart Publishing, Oxford, 2013. 338 pp.
ISBN: 9781849463997**

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For anyone wanting to see maritime law in a broader way – from a broader perspective – as an evolving phenomenon, then *Maritime Law Evolving* by Malcolm Clark (ed) is a very good read.

The sub-title to the book is *Thirty Years at Southampton*. The book consists of a collection of peer-reviewed papers written by present and past members of the Institute of Maritime Law at the Southampton Law School on the occasion of the thirtieth anniversary of the Institute. Each paper in the collection, which forms a chapter in the book, has a dual Janus-like purpose: to look back to the development of the law in the area during the last three decades and to look forward to the direction which that development may take in the future.

The contributors to the work include some very well known writers, teachers and authorities in the area: Prof Yvonne Baatz, Prof Malcolm Forster and Prof Nick Gaskell (now of the TC Beirne School of Law, University of Queensland) among them.

Part 1 of the book deals with ‘Developments in the Management of the Oceans’. I found the paper by Prof Forster – ‘Somali Piracy – An Affront to International Law?’ (Chapter 1) – quite fascinating reading. One conclusion he reaches (at p 21) is that ‘the solution to piracy off the Somali coast lies in the resolutions of the problems within Somalia itself’ but that ‘[sadly], despite the obvious international goodwill towards that end, the melancholy truth is that [that] seems as remote as ever’. Another paper in Part 1 is ‘Changing Perspectives on the High Seas Freedom of Navigation?’ (Chapter 2) by Dr Andrew Serdy. As the title suggests, this paper looks at the notion of the freedom of the seas particularly in light of the New Zealand decision in *Sellers v Maritime Safety Inspector*¹ and the subsequent case in the International Tribunal of the Sea (ITLOS) of *M/V Louisa (Saint Vincent and the Grenadines v Kingdom of Spain)*.² Another paper in Part 1 is by Richard Shaw and is titled: ‘Pollution of the Sea by Hazardous and Noxious Substances – Is a Workable International Convention on Competition an Impossible Dream?’ (Chapter 3). Marine pollution is a serious international issue and this paper focuses on 1996 amendments³ made to the 1976 *International Convention on Limitation of Liability for Maritime Claims* (‘LLMC’)⁴ following an HNS Conference of that year (1996).⁵ It then goes on to examine yet further changes adopted by Protocol at the Diplomatic Conference of 2010.⁶

The paper by Prof Gaskell is titled ‘Compensation for Offshore Pollution: Ships and Platforms’ (Chapter 4). In this paper he looks at developments in the law and practice relating to marine pollution liabilities particularly over the last 30 years. He points out (p 65) that since 1967 ‘the international community has had to grapple with a series of legal and practical problems in providing compensation to victims of oil pollution at sea’. That year (1967) was of course the year of the *Torrey Canyon* disaster. Subsequent disasters (including the *Deepwater Horizon* blow out in the Gulf of Mexico in 2010), Prof Gaskell points out (ibid), have focused attention away from oil spills from ships and in the direction of offshore platforms and structures and in doing so have raised ‘questions about the traditional boundaries of maritime law, eg. how far it can or should apply to activities at sea not directly involving ships’. Maritime law – certainly of old – will not supply answers to these sorts of questions (except analogously perhaps) because they are beyond its traditional understanding.

The final paper in Part 1 is titled ‘Shipping and the Marine Environment in the 21st Century’ and is by Prof Mikis Tsimplis (Chapter 5). In this paper Prof Tsimplis concludes (at p 126) that ‘the shipping of the future must (a) be part of a path for the sustainable development of each state; and (b) consider the (unknown) limits of

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¹ [1999] 2 NZLR 44.

² ITLOS Reports 2008-2010, 58.

³ [2004] ATS 16.

⁴ 1050 UNTS 16.

⁵ *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*, 1996, 35 ILM 1415.

⁶ [2010] ATNIF 55.

tolerance of the various aspects of the marine environment'. Clearly, if so, we can expect continuing tension between striving for financial gain, by developing maritime states, and the need to protect the marine environment for the good of all humanity.

Part 2 of the book deals with 'Developments in the Law Concerning Carriage of Goods and International Trade'. There are some very thought-provoking papers in this Part. They include: 'Reflections on the Rotterdam Rules' (Chapter 6) by Regina Asariotis. In this paper Ms Asariotis, who points out that the Rotterdam Rules were adopted in 2008, provides a 'bird's eye view' of those Rules to enable the reader (p 133) 'to better assess some of the implications that entry into force of the ... Rules may have'. The regime in Australia is still of course the Hague-Visby Rules enacted in the *Carriage of Goods by Sea Act 1991* (Cth) although provision is made for the possibility, some day, of the Hamburg Rules taking effect. Her conclusion (p 155) is interesting: 'While the Hague Rules, Hague-Visby Rules and Hamburg Rules are primarily geared towards protecting smaller shippers and consignees against a carrier's unfair standard contract terms, the Rotterdam Rules appear to be designed for use by commercial parties who are potentially equal negotiating partners'. As a result of this she says (ibid): 'there is an important shift in the established commercial risk allocation between carriers and shippers/consignees'. In 'Multimodal Transport Evolving: Freedom and Regulation Three Decades after the 1980 MTO Convention'⁷ (Chapter 7), Filippo Lorenzon focuses on the problems presented by multimodal transport and their impact on international trade law. He points out (p 163) that international trade law 'is usually responsive to the needs of its industry and steadily follows technological developments, economic and political change and market practices' but he says (p 179) that with containerisation the 'way in which international trade in manufactured goods has developed over the last decades has been incapable of triggering the development of a uniform legal regime'. With profound developments surely coming over the next 30 years, one wonders how our various legal regimes will fare.

In the next paper in Part 2 of the book 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (Chapter 8), Dr Melis Özdel examines the issue of incorporation clauses in bills of lading. The author raises the difficult question whether the rules of incorporation developed in the authorities are (p 194) 'simply a maritime expression of the [well known] contractual doctrine of notice'. Dr Ozdel concludes that the incorporation of charterparty clauses into bills of lading is an issue peculiar to maritime law, as long so held by English courts, and that the rules of incorporation (p 195) 'have much to commend them, for they provide specific solutions to maritime issues'. In the final paper in Part 2 of the book 'Certificate Final Clauses in International Trade: Some Recent Developments' (Chapter 9), Alexander Sandiforth examines in some detail the effect of certificate final clauses which he says (p 198) are 'designed to prevent the buyer from adducing evidence that ... goods were not as described by the certificate at the moment when risk ... passed from seller to buyer ie. loading/shipment'. He concludes (p 205) that a clause must be 'appropriately drafted to provide the finality sought'. This of course would be standard contract law learning.

Part 3 of the book deals with 'Developments in Marine Insurance, Jurisdiction and Enforcement'. The perplexing concept of inherent vice is considered by Johanna Hjalmarsson and Jennifer Lavelle in 'Thirty Years of Inherent Vice – From *Soya v White* to *The Cendor MOPU* and beyond' (Chapter 10). The conclusion of the authors is a challenging one. They say (at p 235) that the concept of inherent vice – always something difficult to distil – 'is something not terribly important any more' following the decision in *The Cendor MOPU*.⁸ They argue (ibid) that the limited scope now given by that case to the effects of inherent vice 'is entirely logical: in modern times of post containerisation, and in particular post refrigeration, many cargoes need in practice no longer be treated as perishable'. I would be inclined to disagree with them on this point. I do not regard *The Cendor MOPU*, particularly in the judgement of Lord Saville (at [45]), as diminishing the doctrine of inherent vice and more generally I see a continuing modern day need for that doctrine: there are still many non-perishable cargoes eg. fragile cargoes, where the doctrine still has obvious application. The second paper in Part 3 is by Prof Baatz – 'Thirty Years of Europeanisation of Conflict of Laws and Still at Sea?' (Chapter 11). This is a most informative and well-written paper on the many thorny issues in the area of choice of law, particularly in light of European regulation of this area.

In summary, *Maritime Law Evolving* is well worth acquiring. It gives a well researched, and authoritative, account of maritime law, past and future, in the topics it deals with. It is well set out, easy to read, with an excellent index. It is a very good read as I say for those interested in the subject – particularly in its future aspects.

⁷ *United Nations Convention on International Multimodal Transport of Goods*, 1980, UN Doc TD/MT/CONF/16.

⁸ [2011] UKSC 5; [2011] 1 Lloyd's Rep 560.